

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

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

PROTESTANT STERICYCLE OF
WASHINGTON, INC.'S PETITION FOR
REVIEW OF INITIAL ORDER GRANTING
APPLICATION

PROTESTANT STERICYCLE OF WASHINGTON, INC.'S PETITION
FOR REVIEW OF INITIAL ORDER GRANTING APPLICATION

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
206 464-3939

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. FACTS AND PROCEDURAL BACKGROUND	2
III. ARGUMENTS AND AUTHORITIES	11
A. <u>The Initial Order Is Inconsistent with the Regulatory Scheme of Chapter 81.77 RCW and Violates the Specific Requirements of RCW 81.77.040</u>	11
1. <u>The Initial Order disregards the statutory presumption in favor of exclusive service territories for solid waste collection companies</u>	11
2. <u>The Initial Order disregards the statutory prohibition against a grant of overlapping solid waste collection authority absent a factual showing that the services of incumbent service providers are flawed or deficient</u>	17
B. <u>There is No Evidentiary Support in the Record for the Initial Order’s Findings or Conclusions</u>	26
1. <u>Generator testimony did not identify any specialized need not currently being met by Stericycle and other certificate holders</u>	26
2. <u>The Initial Order’s reliance on “changed circumstances” is unsupported by evidence in the record</u>	31
C. <u>The Commission’s Long-Standing Interpretation of Chapter 81.77 RCW and RCW 81.77.040 Has Been Repeatedly and Recently Reaffirmed</u>	33
D. <u>The Initial Order’s Reliance on an Alleged Commission Policy Favoring Competition is Without Support in the Commission’s Cases</u>	35
E. <u>The Initial Order Inappropriately Cites Lower Prices Offered by Waste Management as a Basis for Granting the Application</u>	41
IV. CONCLUSION	46

1 **TABLE OF AUTHORITIES**

2 **Page**

3 **CASES**

4 *Green River Comty. Coll. v. Higher Educ. Pers. Bd.*, 95 Wash.2d 108, 622 P.2d
5 826 (1980) 37
6 *Superior Refuse Removal, Inc. v. Wash. Util. and Transp. Comm'n*, 1997 Wash.
7 App. LEXIS 787 at 4 (Wash. Ct. App. May 22, 1997) 15, 21

7 **STATUTES**

8 Laws of 2005, Ch. 121, §6 15, 37
9 RCW 81 17, 43
10 RCW 81.04.110 50
11 RCW 81.28.230 47
12 RCW 81.68 17, 43, 47
13 RCW 81.68.040 16
14 RCW 81.77 passim
15 RCW 81.77.020 12
16 RCW 81.77.030 12, 46
17 RCW 81.77.040 passim
18 RCW 81.84.010 41
19 RCW 81.84.020 16
20 RCW 81.84.020(1) 41
21 WAC 480-07-305 50
22 WAC 480-07-370 50
23 WAC 480-07-460(2)(b) 7
24 WAC 480-07-910 50
25 WAC 480-70-386 50

1 **OTHER AUTHORITIES**

2 *In re Am. Envtl. Mgmt. Corp.*, Order M.V.G. No. 1452, App. No. GA-874 (Nov.
30, 1990)..... passim

3

4 *In re Dutchman Marine, LLC and Seattle Harbor Tours Ltd. P'ship*, Docket
Nos. TS-001774 & TS-002055, First Supplemental Order - Initial Order
Granting Applications with Conditions, ¶23 (Sept. 19, 2001) 40, 42, 43

5

6 *In re Dutchman Marine, LLC and Seattle Harbor Tours Ltd. P'ship*, Docket
Nos. TS-001774 & TS-002055, Second Supplemental Order - Commission
Decision and Order Affirming Initial Order Granting Applications with
7 Conditions (Oct. 19, 2001) 40, 41

8 *In re Lawson Disposal, Inc.*, Order M.V.G. No. 1264, App. No. GA-824 at 5
(Jan. 20, 1987) 22

9

10 *In re Med. Res. Recycling Sys., Inc.*, Order M.V.G. No. 1707, App. No. GA-
76820 at 2 (May 25, 1994) 20, 21, 23, 32

11 *In re Med. Res. Recycling Sys.*, Order M.V.G. No. 1633, App. No. GA-76819 at
12 2 (May 28, 1993) 14

13 *In re Petition of Comm'n Staff for a Declaratory Ruling*, Docket No. TG-
970532, Declaratory Order at 10 n.1 (Aug. 14, 1998) 14, 36

14 *In re R.S.T. Disposal Co.*, Order M.V.G. No. 1402, App. Nos. GA-845 and GA-
15 851at 15-16 (July 28, 1989)..... passim

16 *In re Ryder Distrib. Res., Inc. and Stericycle of Wash., Inc.*, Order M.V.G.
No. 1761, App. Nos. GA-75154 and GA-77359 (Aug. 11, 1995) 23, 25, 35, 46

17 *In re Ryder Distrib. Res., Inc.*, Order M.V.G. No. 1596, App. No. GA-75154
18 (Jan. 25, 1993) passim

19 *In re SafeCo Safe Transp., Inc.*, Order M.V.G. No. 143916, App. No. P-73623 at
10 (Oct. 9, 1991)..... 49

20 *In re SnoKing Garbage Co./R.S.T. Disposal Serv., Inc.*, Order M.V.G. No. 1185,
App. No. GA-788 at 6 (Nov. 6, 1984)..... 47

21

22 *In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1526, App. No. GA-
849 at 38-40 (Nov. 20, 1991) 22

23 *In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1639, App. No. GA-
24 896 (June 30, 1993) 15, 21, 48

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

26 *In re Sure-Way Incineration, Inc.*, Order M.V.G. No. 1475, App. No. GA-868

1 (Feb. 14, 1991) 23, 24

2 *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1663, App. No. GA-75968 at
3 8 (Nov. 19, 1993)..... 14, 23, 27, 47

4 *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1674, App. No., GA-75968 at
5 4-5 (Dec. 20, 1993)..... passim

6 *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553,
7 Final Order on Cross-Motions for Dismissal and Summary Determination
8 (July 13, 2011)..... 44, 45, 49

9 Washington Utilities and Transportation Commission, *Appropriateness of Rate*
10 *and Service Regulation of Commercial Ferries Operating on Lake Chelan:*
11 *Report to the Legislature Pursuant to ESB 5894*, p. 11 (Jan. 14, 2010) 17, 43, 47

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1 1. Stericycle of Washington, Inc. (“Stericycle”), through its attorneys Garvey
2 Schubert Barer, Stephen B. Johnson and Jared Van Kirk, respectfully petitions the Washington
3 State Utilities and Transportation Commission (“Commission”) to review and reverse Judge
4 Gregory J. Kopta’s Initial Order granting Waste Management of Washington, Inc.’s (“Waste
5 Management”) application for extension of its certificate authority to allow Waste Management
6 to provide biomedical waste collection services statewide.

7 **I. INTRODUCTION**

8 2. The Initial Order is inconsistent with the regulatory scheme of chapter 81.77
9 RCW, with the specific provisions of RCW 81.77.040, and with the Commission’s prior cases
10 interpreting those statutory provisions. Chapter 81.77 RCW follows the monopoly model of
11 utility regulation under which service providers are granted exclusive service territories subject
12 to comprehensive regulation by the Commission of their rates and services. The Commission
13 has consistently recognized that chapter 81.77 RCW and RCW 81.77.040 express a legislative
14 presumption in favor of exclusive service territories. Accordingly, to approve an application
15 for solid waste collection authority that duplicates or overlaps authority previously granted to
16 another carrier, RCW 81.77.040 requires a finding that existing certificated solid waste
17 collection companies will not provide satisfactory service. Under the statute and well-settled
18 Commission precedent, this finding must be based on evidence provided by the applicant that
19 the services of the incumbent service provider(s) are flawed or deficient in some manner.

20 3. Contrary to this requirement and over 20 years of consistent Commission
21 precedent interpreting the requirements of chapter 81.77 RCW and RCW 81.77.040, including
22 most recently Order 05 in this very proceeding, the Initial Order holds for the first time that
23 testimony by a few biomedical waste generators of their preference for competition is sufficient
24
25
26

1 to overcome the statutory presumption in favor of exclusive service territories entirely without
2 regard to any deficiency in the services of Stericycle and the WRRRA Protestants.¹

3 4. The Initial Order's disregard for the statutory presumption in favor of exclusive
4 service territories and for the corollary requirement that applicants for overlapping solid waste
5 authority must present compelling evidence of deficiencies in the services of existing carriers
6 shows disrespect for settled law and the parties, like Stericycle, who have relied on it. The
7 Initial Order is inconsistent with the regulatory scheme of chapter 81.77 RCW, violates the
8 specific requirements of RCW 81.77.040, and is contrary to the Commission's well-settled
9 interpretation of the governing statutes. The rationalizations advanced in support of the Initial
10 Order's conclusions are unsupported by evidence in the record and are themselves inconsistent
11 with Commission precedent. Accordingly, the Commission should review and overturn the
12 Initial Order and deny Waste Management's application for overlapping solid waste collection
13 authority.

14 II. FACTS AND PROCEDURAL BACKGROUND

15 5. Stericycle is the holder of Certificate G-244, under which Stericycle is
16 authorized to provide and currently provides biomedical waste collection and transportation
17 services to biomedical waste generators throughout Washington. Waste Management is the
18 holder of Certificate G-237, which authorizes Waste Management to provide general solid
19 waste collection and transportation services in limited territories within several Washington
20 counties. For approximately 15 years prior to 2011, Waste Management did not offer
21 biomedical waste collection services to generators within the G-237 territory. However, in
22 2011 Waste Management began providing biomedical waste collection services to customers
23 within its certificated territory under its G-237 general solid waste authority. On December 30,
24 2011 Waste Management filed the application for new certificate authority that is at issue in

25 ¹ In this brief the protestants represented by the Washington Refuse and Recycling Association will be collectively
26 referred to as the "WRRRA Protestants."

1 this proceeding. Waste Management seeks new authority to provide solid waste collection
2 services limited to biomedical waste to generators in the remaining areas of Washington that
3 Waste Management is not currently authorized to serve under G-237.

4 6. It is undisputed that Stericycle provides biomedical waste collection services
5 under certificate G-244 to biomedical waste generators throughout the territory that is the
6 subject of Waste Management's application. It is also undisputed that the WRRRA Protestants
7 provide biomedical waste services in portions of the application territory.

8 7. Pursuant to RCW 81.77.040 Stericycle and the WRRRA Protestants protested
9 Waste Management's application for new certificate authority. Among other grounds,
10 Stericycle protested that it already provides biomedical waste collection services in the territory
11 covered by Waste Management's application and that it provides and will continue to provide
12 those services to the satisfaction of the Commission. Under RCW 81.77.040, the Commission
13 must reject Waste Management's application to provide new biomedical waste collection
14 services in territory already served by Stericycle (and, in part, by the WRRRA Protestants) unless
15 Waste Management proves that Stericycle (and the WRRRA Protestants) will not provide service
16 to the satisfaction of the Commission.

17 8. Waste Management's application and the protests thereof were assigned to
18 Administrative Law Judge Kopta. From the very beginning Judge Kopta understood that RCW
19 81.77.040's restriction on granting new, overlapping certificate authority in territory already
20 served by another certificated service provider might be determinative in this application
21 proceeding. Accordingly, Judge Kopta's first order, Prehearing Conference Order 01, April 16,
22 2012, required that the parties

23 brief the legal issue of the interpretation of the provision in RCW 81.77.040 that
24 the Commission may issue a certificate for a service territory served by another
25 certificate holder "only if the existing solid waste collection company or
26 companies serving the territory will not provide service to the satisfaction of the
commission." Specifically, parties must address whether the statute authorizes
the Commission to grant a certificate only if the applicant demonstrates that the
service it proposes to provide is different than, or superior to, the services the

1 incumbent provider offers or that the incumbent provider is otherwise unwilling
2 or unable to provide the service the applicant proposes to offer.

3 9. Briefing in response to this directive was filed by Waste Management,
4 Stericycle, the WRRRA Protestants, and the Commission Staff. This briefing squarely addressed
5 the issues that are the principal subjects of this Petition for Review – whether chapter 81.77
6 RCW establishes a statutory presumption that solid waste collection services, including
7 biomedical waste collection services, are to be provided by regulated service providers with
8 exclusive service territories and whether the preference of some generators for competition, i.e.
9 for an additional service provider, is (without more) sufficient to overcome the statutory
10 presumption and to demonstrate that existing service providers will not provide service to the
11 satisfaction of the Commission.²

12 10. In its briefing to Judge Kopta, Waste Management contended that Commission
13 precedents establish a presumption in favor of competition among multiple service providers
14 and that “service without meaningful competition is not, irrespective of incumbent service
15 quality, service to the satisfaction of the commission.”³ Thus, Waste Management contended
16 that even if Stericycle provides quality biomedical waste collection services that fully meet the
17 needs of biomedical waste generators in the application territory, “biomedical waste service by
18 only one statewide hauler is not satisfactory.”⁴

19 11. Stericycle and the WRRRA Protestants contended that chapter 81.77 RCW
20 establishes a presumption in favor of exclusive service territories and that the Commission’s
21 prior cases confirm its “consistent view that mere desire for a backup carrier in the event of

22 ² See Commission Staff’s Initial Brief on Preliminary Legal Issue, ¶¶11-13; Waste Management’s Opening Brief
23 on Preliminary Legal Issue, ¶¶24, 26; Protestant Stericycle of Washington, Inc.’s Memorandum Concerning the
24 Showing an Applicant for Overlapping Authority is Required to Make to Establish that Existing Certificate
25 Holders Will Not Provide Service to the Satisfaction of the Commission, ¶¶3-16; Commission Staff’s Response
26 Brief on Preliminary Legal Issue, ¶¶2-3; Waste Management’s Response Brief on Preliminary Legal Issue, ¶¶2-6;
Protestant Stericycle of Washington, Inc.’s Reply Memorandum Concerning the Preliminary Legal issue Re:
Satisfactory Service, ¶¶2-17.

³ Waste Management’s Opening Brief on Preliminary Legal Issue, ¶24 (emphasis added).

⁴ *Id.*, ¶26.

1 possible discontinuance of, or deterioration in, existing service, or mere preference for
2 competition, does not demonstrate a need for an additional carrier.⁵ Thus, generator
3 preference for competition or an alternative service provider is not sufficient to demonstrate
4 that existing service providers will not provide service to the satisfaction of the Commission
5 under RCW 81.77.040.

6 12. The Commission Staff agreed with the protestants that the absence of
7 competition alone cannot demonstrate that existing service is unsatisfactory and, accordingly, is
8 insufficient to support a grant of overlapping authority. “According to Waste Management, the
9 Commission’s prior biomedical waste orders stand for the proposition that ‘biomedical waste
10 service by only one statewide hauler is not satisfactory,’ as a matter of law, under RCW
11 81.77.040. The Commission has never interpreted RCW 81.77.040 that broadly.”⁶ As the
12 Commission Staff explained, the Commission “has consistently required a *factual* showing that
13 the incumbent provider is not meeting the specialized needs of customers before the
14 Commission will grant a certificate for biomedical waste collection authority in an area already
15 served by another provider.”⁷

16 13. In his Order 05, Interim Order on Prehearing Issues, Judge Kopta addressed the
17 interpretation of the provision of RCW 81.77.040 limiting the Commission’s authority to grant
18 overlapping authority “only if the existing solid waste collection company or companies
19 serving the territory will not provide service to the satisfaction of the commission.” Judge
20 Kopta’s Order 05 rejected Waste Management’s contentions that there is a presumption in
21 favor of competition in the provision of solid waste services and that a desire for competition
22 alone would justify a grant of overlapping authority under the statutory standard.

23 ⁵ Protestant Stericycle of Washington, Inc.’s Memorandum Concerning the Showing an Applicant for Overlapping
24 Authority is Required to Make to Establish that Existing Certificate Holders Will Not Provide Service to the
25 Satisfaction of the Commission, ¶¶4, 11 (*quoting In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1674, App.
26 No., GA-75968 at 4-5 (Dec. 20, 1993) (emphasis added).

⁶ Commission Staff’s Response Brief on Preliminary Legal Issue, ¶2 (citation omitted).

⁷ *Id.*, ¶3 (emphasis in original).

1 Contrary to the position[] . . . Waste Management [has] taken, Commission
2 precedent does not support a presumption or predisposition for . . . competition
3 for the provision of biomedical waste collection and disposal services. Rather,
4 the Commission weighs the evidence presented to determine whether entry of an
5 additional provider in a particular service territory would serve unmet customer
6 needs⁸

7 Waste Management nevertheless quotes language in past decisions that suggests
8 that the Commission favors competition in the market for collection of
9 biomedical waste. None of the Commission's decisions, however, can
10 reasonably be interpreted to hold that a desire for competitive alternatives,
11 without more, is sufficient to find that incumbent providers will not provide
12 service to the satisfaction of the Commission. . . .

13 14. In Order 05, Judge Kopta held that Waste Management's application for
14 certificate authority in a territory already served by other providers could only be granted on
15 the basis of generator testimony that the biomedical waste collection services provided by
16 Stericycle and the WRRRA Protestants did not meet the specialized needs of biomedical waste
17 generators within the application territory.

18 The Commission may approve Waste Management's application, therefore, only
19 if the Company demonstrates that . . . the biomedical waste collection service
20 currently provided in the territory Waste Management proposes to serve does
21 not satisfy the specialized needs of customers in that area¹⁰

22 Based on the foregoing analysis of the statute and Commission precedent, Judge Kopta's Order
23 05 concluded with the following Order:

24 Waste Management must demonstrate that the biomedical waste collection and
25 disposal service currently provided in the territory the Company proposes to
26 serve does not satisfy the specialized needs of customers in that area as the
customers determine those needs.¹¹

15 15. Guided by Judge Kopta's Order 05 on this central legal issue, Stericycle
16 completed discovery, filed prefiled generator testimony, and prepared to conduct a hearing on
17 whether Stericycle's biomedical waste services meet the specialized needs of biomedical waste
18 generators in the territory covered by Waste Management's application. A hearing was
19
20
21
22
23

24 ⁸ Order 05, ¶9.

25 ⁹ *Id.*, ¶10.

26 ¹⁰ *Id.*, ¶11 (emphasis added).

¹¹ *Id.*, ¶15.

1 conducted December 3-6, 2012, at which the testimony of 10 biomedical waste generators or
2 representatives of associations of biomedical waste generators was presented. None of the
3 generators who testified identified “specialized needs” that the incumbent service providers had
4 failed to meet or identified any feature of Waste Management’s proposed services not already
5 matched by equivalent or better services offered by Stericycle and the WRRRA Protestants. In
6 fact, six of the 10 generator witnesses affirmatively denied any complaint about the services
7 provided by Stericycle.^{12, 13}

8 16. Although several Waste Management witnesses identified isolated billing or
9 customer service issues, Judge Kopta held that “[b]illing errors and disputes over service dates
10 are not unique to biomedical waste collection and thus do not reflect any specialized customer
11 need. The generators’ complaints . . . do not reflect a pattern of poor service or systemic
12 inadequacies that would support a finding that Stericycle will not provide service to the
13 satisfaction of the Commission.”¹⁴

14 17. In short, Stericycle provides biomedical waste services to over 7,700 biomedical
15 waste customers in Washington.¹⁵ Of these 7,700, during the nearly year-long preparation of

16
17 ¹² Specifically, Ray Moore, PeaceHealth System, stated that Stericycle had been a “good partner” with
18 PeaceHealth and that he had “no complaints” about Stericycle’s services (Hearing Transcript 394:2-11(citations to
19 the Hearing Transcript are hereinafter designated by page and line number references)); Danny Warner, Warner
20 Dentistry and Washington State Dental Association, stated that he had “no problem” with Stericycle’s services “at
21 all” (412:12-413:5); Terry Johnson, Lake Chelan Community Hospital, affirmed that he was “not testifying that
22 any aspect of Stericycle’s current service are not satisfactory” (237:16-19); Emily Newcomer, University of
23 Washington - Seattle Campus, stated that she had “no complaints” with Stericycle’s biomedical waste collection
24 services and that the Seattle Campus continues to use Stericycle’s services notwithstanding the availability of
25 Waste Management’s services at that location (543:15-24, 545:24-546:3-11); Jeff Mero, Association of
26 Washington Public Hospital Districts, testified that Stericycle is “a reliable and cost-effective provider of
biomedical waste management and collection services” (JM-1T, 2:2-3); and Taya Briley, Washington Hospital
Services, testified that “WHS continues to endorse Stericycle as a reliable and cost-effective provider of
biomedical waste management and collection services” (TB-1T, 2:3-4).

¹³ In this brief, record evidence will be cited in two formats. Citations to testimony recorded in the hearing
transcript will be cited by page and line number of the hearing transcript, in the format “(PPP:ll-ll).” Citations to
prefiled written testimony or other exhibits admitted into evidence will be to the exhibit designation required by
WAC 480-07-460(2)(b) and to the paragraph number or page number of that exhibit, in the format “AB-#T, ¶#”
for prefiled testimony and “YZ-#, p.#” for exhibits.

¹⁴ Initial Order 07, ¶9.

¹⁵ MAW-9, p.5 (Stericycle 2011 Annual Report, indicating 7,713 customers).

1 its application case for hearing, Waste Management found exactly none in the area covered by
2 its application that alleged Stericycle's extensive service offerings do not meet their specialized
3 needs for biomedical waste collection and disposal. The testimony of six of 10 of the testifying
4 generator witnesses, including four witnesses offered by Waste Management, affirmatively
5 demonstrates that Stericycle provides satisfactory biomedical waste collection and disposal
6 services throughout the application territory.¹⁶

7 18. Although the record includes no evidence that "the biomedical waste collection
8 and disposal service currently provided in the territory [Waste Management] proposes to serve
9 does not satisfy the specialized needs of customers in that area," as Judge Kopta's Order 05
10 required, there was testimony by biomedical waste generators that they would prefer to have
11 competitive options for biomedical waste collection services. In prefiled testimony most of the
12 eight generator witnesses proffered by Waste Management – eight out of Washington's nearly
13 8,000 biomedical waste generators – expressed a desire for a competitive alternative to
14 Stericycle's biomedical waste services.¹⁷

15 19. The hearing testimony makes clear, however, that these generators supported
16 competition in only the most generic sense, not the services of Waste Management specifically,
17 not because of any identified deficiency in existing services, and not because of any features of
18 Waste Management's proposed services that were seen as more responsive to their specialized
19 needs than the services provided by Stericycle and the WRRRA Protestants. For example,

20 ¹⁶ *Supra*, note 12.

21 ¹⁷ See TJ-1T, p.3, JL-1T, p.3, RL-1T, pp.3-4, RM-1T, p.4, EN-1T, p.4, CP-1T, pp.3-4, JS-1T, p.3, DW-1T, pp.2-3.
22 However, not all generator witnesses agreed that competition was required to ensure either adequate services or
23 fair prices. Jeff Mero of the Association of Washington Public Hospital Districts and Taya Briley of Washington
24 Hospital Services, each representing numerous generators in Washington, both testified that "Stericycle has
25 provided reliable biomedical waste management and collection services to Washington healthcare facilities since
26 the early 1990s at stable prices" and that their organizations are "not aware of any service option or service feature
proposed by Waste Management that is not already offered (or offered in an equivalent or better form) by
Stericycle." JM-1T, p.4, TB-1T, p.5. They both testified that Stericycle has aggressively controlled its costs and
offered remarkable price stability to their association's members. JM-1T, p.3-4, TB-1T, pp.4-5. Mr. Mero also
testified that "[t]he primary interest of AWPHD member hospitals is in reliable service" and not competition or
lower rates. JM-1T, p.5. The Initial Order does not consider any of this testimony.

1 Rodger Lycan of Pathology Associates Medical Laboratories (PAML) testified that he merely
2 wants competition “in the general sense.”¹⁸ Indeed, Mr. Lycan, Julie Sell of Olympic Medical
3 Center, Jean Longhenry of Wendel Family Dental Centre, Carla Patshkowski of the Providence
4 Medical Group, Ray Moore of PeaceHealth, and Terry Johnson of Lake Chelan Community
5 Hospital all testified that their support for competition (or a back-up service) was entirely
6 generic and not specific to Waste Management’s proposed services.¹⁹

7 20. Even this testimony is weak and unsupported by any expertise, analysis or
8 experience. Several generators admitted they have no expertise with which to evaluate whether
9 competition would be beneficial, did not assess competition in the regulated biomedical waste
10 market, or even failed to consider the possibility that competition might actually lead to cost
11 cutting and lower quality services before giving their testimony.²⁰ Dr. Warner forthrightly
12 admitted that his testimony about the alleged benefits of competition is a “generic assumption”
13 and “advocacy.”²¹ And Mr. Lycan simply admitted that his testimony in favor of competition
14 is his “personal opinion,” which “is worthless in this regard,” and that he “doesn’t really know”
15 what the result of competition “in the general sense” would be.²² Thus, the generator witnesses
16 testified solely on the basis of personal opinion to a desire for what they believe are the general

17 _____
¹⁸ (443:21-23).

18 ¹⁹ (215:6-12) (Ms. Sell confirmed that the “alternative doesn’t have to be Waste Management”); (238:12-17,
19 244:23-25) (Mr. Johnson stated that he “[does] not have a preference” about which alternate company provides the
20 competition); (323:21-25) (Ms. Longhenry admitted that an alternative option could be “[a]ny company that could
21 collect.”); (393:19-394:1) (Mr. Moore confirmed that competition could be from any provider that can provide the
22 services needed); (443:14-23) (Mr. Lycan admitted that any company that could deal with biomedical waste
23 effectively could provide the “general” competition he desires); (481:4-13) (Ms. Patshkowski admitted that
24 competition could “be from anyone”).

25 ²⁰ (324:1-4, 324:25-325:14) (Ms. Longhenry admitted that she has no expertise, performed no analysis of
26 competition, and did not consider the possibility that competition could lead to lower levels of service); (442:8-18,
443:3-7, 443:21-23) (Mr. Lycan admits that he performed no analysis and is only offering his personal opinion);
(409:8-18, 410:3-15) (Dr. Warner admitted that he performed no study of competition but instead made a generic
assumption that it would be beneficial); (559:13-17) (Ms. Newcomer admitted that she has not studied competition
or the possibility that it will reduce the quality of services).

²¹ (409:8-18) (“Q: So [your testimony concerning competition] is in the vein of advocacy for the Association? A:
Yes.”). Dr. Warner also testified that the board of the Washington State Dental Association did not review or
approve of his testimony in favor of competition. (408:10-15).

²² (443:3-13).

1 benefits of competition, not to any alleged benefit specific to biomedical waste collection and
2 disposal services or specific to the services Waste Management proposes to offer.

3 21. Following post-hearing briefing, on February 14, 2013, Judge Kopta issued the
4 Initial Order, proposing to grant Waste Management's application. Judge Kopta did not
5 conclude that Stericycle's biomedical waste collection and transportation services failed to
6 meet the specialized needs of biomedical waste generators. However, rather than concluding
7 under his own Order 05 that Waste Management had failed to prove that Stericycle would not
8 provide service to the satisfaction of the Commission and denying Waste Management's
9 application under RCW 81.77.040, Judge Kopta purported to find a new way to grant the
10 application.

11 22. As discussed more fully below, Judge Kopta's Initial Order reversed without
12 warning and without reasoned explanation his prior holdings in Order 05 (a) that generator
13 desire for a competitive alternative is insufficient to demonstrate that an existing service
14 provider will not provide service to the satisfaction of the Commission and (b) that Waste
15 Management must demonstrate that the biomedical waste collection services offered by
16 Stericycle and the other protestants did not satisfy the specialized needs of biomedical waste
17 generators in the application territory.

18 23. Judge Kopta "acknowledge[d] that in decisions from the early 1990's, the
19 Commission stated its 'view that mere desire for a backup carrier in the event of possible
20 discontinuance of, or deterioration in, existing service, or mere preference for competition, does
21 not demonstrate a need for an additional carrier,'" but decided instead to "revisit" and overturn
22 that precedent.²³ Ultimately, Judge Kopta concluded that he would "not rely on [the
23 Commission's prior decisions that a desire for competition is insufficient to satisfy RCW

24
25 ²³ Initial Order 07, ¶10 (*quoting In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1674) (footnote 8 of Order 07
26 actually cites to the final order in a different proceeding, but based on the quotation and context this appears to be
an erroneous citation).

1 81.77.040 to make the requisite determination in this case.”²⁴ Based on the testimony of a few
2 generator witnesses expressing a desire for generic competition, Judge Kopta disregarded his
3 Order 05, the requirements of chapter 81.77 RCW, and prior Commission precedent and
4 granted the application.

5 24. Although Judge Kopta “acknowledged” long-standing Commission precedent
6 before deciding to disregard it, he did not acknowledge in the Initial Order that he was also
7 “revisiting” his own Order 05 in which he had only months earlier reaffirmed the
8 Commission’s long-standing interpretation of RCW 81.77.040 and the requirement that, to be
9 successful, an applicant for overlapping biomedical waste authority must prove that an existing
10 service provider is not meeting the specialized needs of biomedical waste generators. Judge
11 Kopta also failed to acknowledge in the Initial Order that he was “revisiting” RCW 81.77.040,
12 chapter 81.77 RCW, and the statutory presumption that solid waste collection services are to be
13 provided by regulated service providers granted exclusive service territories – i.e., without
14 competition absent a factual showing that the services of the incumbent carrier are flawed or
15 deficient.

16 III. ARGUMENTS AND AUTHORITIES

17 A. The Initial Order Is Inconsistent with the Regulatory Scheme of Chapter 81.77 18 RCW and Violates the Specific Requirements of RCW 81.77.040.

19 1. The Initial Order disregards the statutory presumption in favor of exclusive 20 service territories for solid waste collection companies.

21 25. Chapter 81.77 RCW establishes a comprehensive regulatory scheme for the
22 collection and transportation of solid waste for disposal based on a rate-regulated monopoly
23 service model. Chapter 81.77 RCW grants the Commission authority to regulate entry into the
24 business of solid waste collection, the rates charged for solid waste collection services, and the
25 services and operations of solid waste collection companies. RCW 81.77.020 prohibits

26 ²⁴ *Id.*, ¶15.

1 engaging in the business of operating as a solid waste collection company except in accordance
2 with RCW 81.77.²⁵ RCW 81.77.030 requires the Commission to “supervise and regulate every
3 solid waste collection company in this state” in matters affecting the relationship between such
4 companies and the public, including:

- 5 (1) By fixing and altering its rates, charges, classifications, rules and
6 regulations;
- 7 (2) By regulating the accounts, service, and safety of operations;
- 8 (3) By requiring the filing of annual and other reports and data; [and]
- 9 (4) By supervising and regulating such persons or companies in all
10 other matters affecting the relationship between them and the public which they
11 serve;

12 26. RCW 81.77.040 is the source of the Commission’s authority to authorize solid
13 waste collection services by issuing certificates of public convenience and necessity. This
14 provision prohibits any person from operating as a solid waste collection company unless the
15 Commission first issues a certificate “declaring that the public convenience and necessity
16 require such operation.”

17 27. In general, RCW 81.77.040 provides the Commission with broad authority and
18 discretion to issue certificates of public convenience and necessity. It identifies factors that the
19 Commission must consider, but allows the Commission to consider any other factors it deems
20 relevant. In general, RCW 81.77.040 allows the Commission to issue certificates in its
21 discretion and to attach any term or condition to a certificate that it deems in the public interest.

22 28. However, RCW 81.77.040 strictly limits this otherwise broad authority in the
23 case of applications to provide solid waste collection services in a territory where another
24 company already holds authority from the Commission to provide such services.

25 When an applicant requests a certificate to operate in a territory already served
26 by a certificate holder under this chapter, the commission may, after notice and
an opportunity for a hearing, issue the certificate only if the existing solid waste
collection company or companies serving the territory will not provide service

²⁵ An exception is provided for solid waste collection conducted by cities or towns or under a contract with a city or town. This exception is inapplicable to the present case.

1 to the satisfaction of the commission or if the existing solid waste collection
2 company does not object.²⁶

3 29. Thus, RCW 81.77.040 limits the Commission's generally broad authority when
4 an applicant seeks authority to provide "overlapping" solid waste collection services and the
5 existing solid waste collection company objects to the application. By statute, the Commission
6 cannot issue a certificate for overlapping solid waste collection authority unless the existing
7 solid waste collection company will not provide satisfactory service.

8 30. It has long been recognized that chapter 81.77 RCW establishes a legislative
9 presumption in favor of exclusive service territories.

10 The law regulating the transportation of solid waste for collection and disposal
11 in Washington, Chapter 81.77 RCW, follows the pattern of utility regulation, in
12 that it treats solid waste collection as a natural monopoly with efficiencies and
13 public benefit gained through exclusive service in a territory. The law provides
14 for service in territories in which a carrier may be the sole provider, but must in
15 return offer nondiscriminatory service at regulated rates²⁷

16 "The legislature has determined that a monopoly-based system for solid waste collection is
17 consistent with the public interest."²⁸ The Commission reiterated this understanding of the
18 governing statute in a declaratory order concerning biomedical waste collection, affirming that
19 chapter 81.77 RCW "expresses a preference for monopoly service in the collection of solid
20 waste, allowing the Commission to grant new authority in already-served territory only if it
21 finds that the existing certificate holder will not provide satisfactory service."²⁹

22 31. The Legislature's preference for exclusive service territories is implemented by
23 the requirement of RCW 81.77.040 that a certificate of public convenience and necessity may
24 be granted by the Commission for service in a territory already served by another certificate
25 holder "only if the existing solid waste collection company or companies will not provide
26

²⁶ RCW 81.77.040 (emphasis added).

²⁷ *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1663, App. No. GA-75968 at 8 (Nov. 19, 1993) (emphasis added).

²⁸ *In re Med. Res. Recycling Sys.*, Order M.V.G. No. 1633, App. No. GA-76819 at 2 (May 28, 1993).

²⁹ *In re Petition of Comm'n Staff for a Declaratory Ruling*, Docket No. TG-970532, Declaratory Order at 10 n.1 (Aug. 14, 1998).

1 service to the satisfaction of the commission.” Thus, an applicant for overlapping authority
2 must prove that an existing certificated carrier will not provide satisfactory service.

3 The proposed order noted that the Legislature in enacting RCW 81.77 was
4 reluctant to permit overlapping authorities in the collection and disposal of
5 garbage and refuse. The result, according to the proposed order, is statutory
6 language requiring an applicant to make a strong showing that the existing
7 carrier will not serve the territory in question to the satisfaction of the
8 Commission. Absent such a showing, the Commission may not grant a
9 competitor’s application. The Commission agrees with the order’s statement of
10 the law.³⁰

11 Indeed, Washington courts and the Commission have consistently recognized that “[t]he
12 statutory standard of service to the satisfaction of the Commission ‘declares the legislature’s
13 strong preference for regulated monopoly service in the collection of solid waste.’”³¹

14 32. The requirements of RCW 81.77.040 have been in place since 1961. In 2005,
15 the Legislature amended RCW 81.77.040 in a manner that re-confirmed its intent to protect
16 existing certificate holders from duplicative grants of authority, absent a showing that the
17 services of existing carriers are deficient. The 2005 amendment added the language shown
18 underlined below in the relevant text:

19 When an applicant requests a certificate to operate in a territory already served
20 by a certificate holder under this chapter, the commission may, after notice and
21 an opportunity for a hearing, issue the certificate only if the existing solid waste
22 collection company or companies serving the territory will not provide service
23 to the satisfaction of the commission or if the existing solid waste collection
24 company does not object.³²

25 The added language emphasizes that the purpose of this provision is to protect existing
26 certificate holders from competition and to limit the authority of the Commission to grant
duplicative or overlapping authority. Thus, only “if the existing solid waste collection
company does not object” may the Commission grant overlapping authority without a hearing.
The reaffirmation of the hearing requirement also makes clear that the Commission must make

³⁰ *In re R.S.T. Disposal Co.*, Order M.V.G. No. 1402, App. Nos. GA-845 and GA-851 at 15-16 (July 28, 1989).

³¹ *Superior Refuse Removal, Inc. v. Wash. Util. and Transp. Comm’n*, 1997 Wash. App. LEXIS 787 at 4 (Wash. Ct. App. May 22, 1997) (quoting *In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1639, App. No. GA-896 (June 30, 1993)).

³² Laws of 2005, Ch. 121, §6.

1 an evidence-based determination on a case-by-case basis that the services offered by the
2 incumbent carrier are flawed or deficient in some particular way before it may grant
3 overlapping authority.

4 33. This statutory scheme follows a consistent pattern of Washington legislation
5 governing other transportation services. In parallel regulatory schemes, the Washington
6 Legislature has similarly expressed a preference for exclusive service territories by protecting
7 incumbent service providers from competition absent a showing that existing services are
8 deficient. Under the essentially identical statute governing auto transportation, “[t]he
9 commission may, after notice and an opportunity for a hearing, when the applicant requests a
10 certificate to operate in a territory already served by a certificate holder under this chapter, only
11 when the existing auto transportation company or companies serving such territory will not
12 provide the same to the satisfaction of the commission . . . issue the certificate as prayed for.”³³
13 Similarly, under the statute governing private ferry services, “the Commission may not grant a
14 certificate to operate in an area already served by an existing certificate holder, unless the
15 existing certificate holder has failed or refused to furnish reasonable and adequate service
16”³⁴

17 34. In a 2010 report to the Legislature, the Commission acknowledged that these
18 requirements provide “considerable protection from competition as long as [existing certificate
19 holders] continue to provide satisfactory service and comply with regulations.”³⁵ The
20 Commission described the Legislature’s rationale for this protection in the commercial ferry
21 statute as follows:
22

23 ³³ RCW 81.68.040.

24 ³⁴ RCW 81.84.020.

25 ³⁵ Washington Utilities and Transportation Commission, *Appropriateness of Rate and Service Regulation of*
26 *Commercial Ferries Operating on Lake Chelan: Report to the Legislature Pursuant to ESB 5894*, p. 11 (Jan. 14,
2010). Available at:
<http://www.utc.wa.gov/regulatedIndustries/transportation/commercialFerries/Pages/default.aspx>.

1 The combination of statutory protection from competition, on the one hand, and
2 stringent regulation of rates and terms of service, on the other, has historically
3 been adopted for industries believed to have characteristics of a 'natural
4 monopoly.' Such industries typically have very high capital costs, benefit from
5 economies of scale, and provide an indispensable service to the public. With
6 respect to these industries, the legislature has made a judgment that the public's
7 interest in reliable and affordable service is best served by a single,
8 economically regulated provider whose owners can make the sizable
9 investments needed to initiate and maintain service without the threat of having
10 customers drawn away by a competing provider.³⁶

11 35. Moreover, the Commission explicitly acknowledged in its 2010 report to the
12 Legislature that the same regulatory scheme governs solid waste collection and reflects the
13 Legislature's intent that existing solid waste collection service providers are to be similarly
14 protected from competition.

15 Other industries regulated under this [monopoly] model in Title 81 RCW are
16 solid waste (garbage) collection companies under RCW 81.77, and auto
17 transportation (fixed terminus bus) companies under RCW 81.68. The rate and
18 service regulations that apply to these industries are intended to provide a
19 surrogate for the pricing discipline that would be exerted by a competitive
20 marketplace.³⁷

21 36. Thus, the Commission has very recently acknowledged that chapter 81.77 RCW
22 and RCW 81.77.040 reflect the Legislature's determination that solid waste collection services
23 are to be provided by regulated service providers within exclusive service territories and that
24 existing service providers are to be protected from competition absent a factual showing that
25 their services are deficient.

26 37. Contrary to the requirements of chapter 81.77 RCW and RCW 81.77.040, the
Initial Order proposes to disregard the statutory presumption in favor of exclusive service
territories in solid waste collection. The Initial Order holds for the first time that generator
desire for competition or an alternative service provider is sufficient, standing alone, to find
that existing service providers will not provide service to the satisfaction of the Commission
under RCW 81.77.040. By allowing generator preference for competition (or the perceived

³⁶ *Id.* (emphasis added).

³⁷ *Id.* (emphasis added).

1 benefits of competition) to override the statutory presumption in favor of exclusive service
2 territories entirely without regard to the sufficiency of the services of existing certificate
3 holders, the Initial Order would entirely re-write the statutory scheme, effectively eliminating
4 the statutory presumption in favor of exclusive service territories.

5 38. Only the Legislature possesses the authority to so fundamentally alter the
6 statutory scheme governing solid waste collection. The Initial Order would turn decades of
7 Commission precedent on its head, essentially re-writing chapter 81.77 RCW and replacing the
8 statutory presumption in favor of exclusive service territories with a presumption in favor of
9 competition. The Initial Order is thus inconsistent with chapter 81.77 RCW, violates RCW
10 81.77.040, and must be reversed.

11 2. The Initial Order disregards the statutory prohibition against a grant of
12 overlapping solid waste collection authority absent a factual showing that the
13 services of incumbent service providers are flawed or deficient.

14 39. The plain language of RCW 81.77.040 requires that an applicant for overlapping
15 solid waste authority prove that the services of a certificate holder are flawed or deficient
16 before the Commission may approve its application – not simply that there is a desire for a
17 competitive alternative regardless of the quality of existing service.

18 40. As noted above, in RCW 81.77.040 the Legislature departed from the broad
19 authority generally granted to the Commission to approve applications for new solid waste
20 collection services in the specific case of applications for authority in a territory already served
21 by existing certificate holders. The Legislature chose to curtail the Commission’s authority in
22 such cases by requiring a finding that the “existing solid waste collection company” will not
23 provide satisfactory “service.” The plain language this provision of RCW 81.77.040 requires,
24 therefore, that the necessary finding must pertain to the quality of the services of the existing
25 solid waste collection company.

26 41. The Initial Order conflicts with the plain language of RCW 81.77.040 and leads
to an absurd interpretation of RCW 81.77.040. The Initial Order holds that the desire of a

1 handful of generators for competition (and the perceived benefits of price competition) is
2 sufficient to satisfy the statutory requirement. But this rationale would allow the Commission
3 to authorize overlapping solid waste service without any finding related to the adequacy of the
4 services provided by existing certificate holders. Indeed, the Initial Order does not make any
5 findings about Stericycle's services except to find that there is no evidence of systemic service
6 failures.³⁸ Instead, under the logic of the Initial Order, the only proof that would be required to
7 permit the Commission to grant overlapping authority is proof that some miniscule number of
8 generators desire the services of an additional solid waste collection company.

9 42. Such "proof" can never be sufficient to meet the requirements of RCW
10 81.77.040 precisely because the statute requires an "unsatisfactory service" finding related to
11 the services provided by the existing solid waste collection company. If the Legislature had
12 wanted to create a test for authorizing overlapping service that turned on a desire for
13 competition, price competition, or an alternative service provider, it could have done so, but it
14 did not. The Commission cannot alter the statutory scheme enacted by the Legislature. The
15 Initial Order is in conflict with RCW 81.77.040 and, therefore, must be reversed.³⁹

16 43. The Commission has consistently acknowledged that chapter 81.77 RCW and
17 RCW 81.77.040 prohibit a grant of overlapping solid waste authority absent evidence that the
18 services of existing service providers are flawed or deficient. In precedent brushed aside by the
19

20 ³⁸ Initial Order 07, ¶9.

21 ³⁹ The Initial Order's disregard for the statutory restriction on the Commission's authority to grant overlapping
22 certificates of public convenience and necessity is apparent. Under the plain language of RCW 81.77.040, the
23 Commission's authority to grant overlapping certificates is limited as to all applications to provide solid waste
24 collection services in a territory served by one or more existing service providers. However, under the logic of the
25 Initial Order, the Commission's authority to grant an application to provide services in a territory served by a
26 single service provider would not be subject to this limitation. This is because a lack of competition is inherent in
any territory with only a single service provider. If the Legislature intended RCW 81.77.040 to limit the
Commission's discretion to grant applications for overlapping authority only when there are multiple service
providers serving a particular territory, it could have said so, but it did not. Instead, the Legislature imposed those
limits even in cases where there is only a single existing solid waste collection company serving the application
territory; i.e., even in circumstances where there is no competition. The Commission does not have the authority
to apply a rule of decision that circumvents a statutory limitation on the Commission's authority.

1 Initial Order, the Commission has long recognized that chapter 81.77 RCW and RCW
2 81.77.040 limit its authority to authorize overlapping solid waste collection services:

3 Biohazardous waste is solid waste and its transportation is governed by chapter
4 81.77 RCW and by RCW 81.77.040. That section bars the Commission from
5 granting authority in territory served by an existing carrier unless the
6 Commission finds that the existing carrier will not provide service to the
7 satisfaction of the Commission.⁴⁰

8 The Commission has held that the statute requires an applicant for overlapping authority “to
9 make a strong showing that the existing carrier will not serve the territory in question to the
10 satisfaction of the Commission.”⁴¹

11 44. Because this statutory requirement limits the Commission’s otherwise broad
12 discretion to grant certificates of public convenience and necessity, the question whether the
13 services of existing carriers are satisfactory is a threshold issue that an applicant must surmount
14 before the Commission may consider the applicant’s fitness, sentiment in the community, the
15 public interest and the broader issues encompassed by the concept of public convenience and
16 necessity.⁴²

17 45. Consistent with the statutory focus on the services of the existing service
18 provider, in addressing this threshold issue the Commission has held that the facts relevant to
19 its determination are limited to those concerning the existing carrier’s services. The applicant’s
20 proposed services and the putative advantages of those services are not part of the threshold
21 “satisfactory service” determination.

22 At this stage . . . the Commission is not in the position of choosing between the
23 better of two applicants. The Commission is determining whether existing
24 service is unsatisfactory to a degree that competition is justified despite the
25 statutory preference for exclusive service territories.⁴³

26 ⁴⁰ *In re Med. Res. Recycling Sys., Inc.*, Order M.V.G. No. 1707, App. No. GA-76820 at 2 (May 25, 1994).

⁴¹ *In re R.S.T. Disposal Co.*, Order M.V.G. No. 1402 at 15-16 (emphasis added).

⁴² *In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1639 at 3. *See also Superior Refuse Removal*, 1997
Wash. App. LEXIS 787 at 6 (“The Commission considers its satisfaction with the existing service before it
examines the public’s need and the applicant’s fitness. . . . Indeed, it is only logical to address the question of
satisfactory service first. The answer to that question may foreclose granting the applicant a certificate, regardless
of its fitness to serve.”); *In re Med. Res. Recycling Sys., Inc.*, Order M.V.G. No. 1707 at 2.

⁴³ *In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1639 at 12.

1 46. In determining the issue of satisfactory service in the context of general solid
2 waste collection, the Commission's precedent has followed the direction of RCW 81.77.040,
3 evaluating the services provided by the existing service provider and not the alleged benefits of
4 an alternative service provider or any preference of the generator community for competition.
5 Specifically, the Commission considers the factors identified in *In re R.S.T. Disposal Co.*,
6 including

7 the nature, the seriousness and the pervasiveness of complaints about service;
8 the carrier's response to customer complaints and its demonstrated ability to
9 resolve them to the Commission's satisfaction; and the carrier's history of
10 compliance with regulation, with special attention to the carrier's
11 cooperativeness on matters central to the Commission's regulation in the public
12 interest.⁴⁴

13 The Commission has consistently required a strong showing of serious, pervasive, and
14 persistent service failures affecting a significant number or proportion of the customers in an
15 application territory in order to establish that an incumbent general solid waste collection
16 company will not provide satisfactory service.⁴⁵

17 47. With respect to applications for overlapping biomedical waste collection
18 services, the Commission has also consistently recognized the requirements of RCW
19 81.77.040, requiring a factual showing that the services provided by existing certificated
20 carriers are insufficient to meet the specialized needs of biomedical waste generators.

21 48. The Commission dealt with a flurry of biomedical waste application cases in the
22 late 1980s and the early 1990s. For the first time, the applicants in these cases proposed to
23 offer a specialized biomedical waste collection service that separated infectious biomedical

24 ⁴⁴ *In re R.S.T. Disposal Co.*, Order M.V.G. No. 1402 at 15-16.

25 ⁴⁵ *See, e.g., In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1526, App. No. GA-849 at 38-40 (Nov. 20,
26 1991) (finding that service complaints were not "pervasive" and that the evidence did not "demonstrate that large
numbers of customers, or a substantial proportion of the customers, are experiencing consistently serious problems
with the quality of physical service provided by the existing carrier."); *In re Lawson Disposal, Inc.*, Order M.V.G.
No. 1264, App. No. GA-824 at 5 (Jan. 20, 1987) (finding that service problems reflect unsatisfactory service
where "[t]he complaints are similar, they are consistent over time, and they represent a significant proportion of
the customer base."); *see also In re R.S.T. Disposal Co.*, Order M.V.G. No. 1402 at 28 (requiring a "strong
showing" that the existing carrier will not provide satisfactory service in the application territory).

1 waste from the general solid waste stream for purposes of handling, transportation, treatment
2 and disposal.⁴⁶ In interpreting the concept of satisfactory service in these cases, the
3 Commission required an applicant for overlapping biomedical waste collection authority to
4 prove that the services of the existing service provider were not meeting the specialized needs
5 of biomedical waste generators.

6 49. The Commission's decision in *Sure-Way Incineration* marks this shift in the
7 Commission's "satisfactory service" analysis from a focus on the service failures of existing
8 solid waste carriers to a focus in the biomedical waste context on whether existing biomedical
9 carriers' services are meeting the specialized needs of biomedical waste generators. The
10 Commission held that the proper standard for judging whether the services of existing
11 biomedical waste service providers are satisfactory is "whether the protestants were holding
12 themselves out to provide the service and whether the type of service provided reasonably
13 serves the [biomedical waste] market."⁴⁷

14 50. Although this decision marked a change in the Commission's factual inquiry
15 into the adequacy of the existing service provider's services, it did not deviate from the
16 statutory requirement that existing service providers be protected from competition absent a
17 factual showing that their services are in some respect deficient.

18 51. In *American Environmental Management Corp.*, decided the same day as *Sure-*
19 *Way*, the Commission remained focused on the services offered by incumbent service
20 providers. The Commission specifically acknowledged "the legislature's reluctance to permit
21

22 _____
23 ⁴⁶ See *In re Sure-Way Incineration, Inc.*, Order M.V.G. No. 1451, App. No. GA-868 (Nov. 30, 1990); *In re Sure-*
24 *Way Incineration, Inc.*, Order M.V.G. No. 1475, App. No. GA-868 (Feb. 14, 1991); *In re Am. Env'tl. Mgmt. Corp.*,
25 Order M.V.G. No. 1452, App. No. GA-874 (Nov. 30, 1990); *In re Sureway Med. Serv., Inc.*, Order M.V.G. No.
26 1663 at 8; *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1674 at 4-5; *In re Ryder Distrib. Res., Inc. and*
Stericycle of Wash., Inc., Order M.V.G. No. 1761, App. Nos. GA-75154 and GA-77359 (Aug. 11, 1995)
(consolidated); *In re Ryder Distrib. Res., Inc.*, Order M.V.G. No. 1596, App. No. GA-75154 (Jan. 25, 1993); *In re*
Med. Res. Recycling Sys., Inc., Order M.V.G. No. 1707 at 2.

⁴⁷ *In re Sure-Way Incineration, Inc.*, Order M.V.G. No. 1451 at 15.

1 overlapping authorities in the garbage and refuse industry”⁴⁸ but found that the evidence had
2 established that existing carriers services were not meeting the specialized needs of biomedical
3 waste generators.

4 There was a demonstrated need for a specialized, containerized infectious waste
5 collection service, which was not being met by the holders of existing
6 permanent authority during the evaluation period. Accordingly, the service that
7 was being performed by the existing solid waste collection companies is not
8 being duplicated by this grant of [authority for] a new, specialized infectious
9 waste service.⁴⁹

10 52. Thus, the Commission required that an applicant for overlapping biomedical
11 waste authority make a factual showing that the incumbent carrier’s services did not meet the
12 specialized needs of biomedical waste generators. Consistent with RCW 81.77.040, this is a
13 factual inquiry into the incumbent service provider’s services and the needs of generators for
14 specialized service. The Commission emphasized in the *American Environmental* case that it
15 was respecting the statutory preference for exclusive service territories, emphasizing that its
16 grant of specialized biomedical waste collection authority did not merely “duplicate” the
17 services of existing carriers.

18 53. In subsequent biomedical waste application cases the Commission has
19 consistently required the applicant to make a factual showing that existing services do not meet
20 the specialized needs of biomedical waste generators and that the services proposed by the
21 applicant do not merely duplicate existing services. In *In re Ryder Distribution Resources,
22 Inc.*, the Commission held that generator testimony of a need for the applicant’s unique
23 treatment and disposal services was sufficient to establish that existing service by other carriers
24 was not satisfactory.

25 If one carrier’s method of disposal is not satisfactory [to generators], and
26 another is reasonably needed, the Commission will consider that need carefully.
Stericycle is providing a service that in total helps the generators to assure
themselves that they do not incur federal, state, or civil liability. The existing
carriers do not provide an equivalent service. . . . The satisfactory nature of

⁴⁸ *In re Am. Envntl. Mgmt. Corp.*, Order M.V.G. No. 1452 at 9.

⁴⁹ *Id.* (emphasis added).

1 service by providers of specialized solid waste collection services is measured
2 according to the specialized needs of customers. It may include the technology
3 of disposal, the nature of protection afforded collected waste, and protections
4 against statutory and civil liability.⁵⁰

5 This reasoning was reaffirmed in the Commission's final decision on the *Ryder* case:

6 The Commission concludes that the waste generators' testimony establishes a
7 need for the collection, transportation and disposal services offered by SWI and
8 Stericycle. The service offered is tailored to meet the needs described by the
9 generators as important to the medical community.

10 Because existing carriers do not offer a collection, transportation and disposal
11 service which meets those needs, the existing carriers will not provide service to
12 the satisfaction of the Commission.⁵¹

13 54. In both *Sure-Way Incineration* and *American Environmental*, the Commission
14 emphasized that the services to be provided by the applicants did not merely "duplicate" the
15 services already provided by existing carriers.⁵² In the subsequent *Ryder* case, the Commission
16 similarly made clear that the services of existing carriers were not "equivalent" to those
17 proposed by the applicant.⁵³ The Commission has never granted overlapping biomedical waste
18 collection authority without a factual showing that the specialized needs of biomedical waste
19 generators were not being met by the services offered by existing certificate holders.

20 55. In briefing in this proceeding, the Commission Staff agreed that a grant of
21 overlapping authority must be supported by a fact-based determination that existing services
22 are not adequately serving the specialized needs of biomedical waste generators. "RCW
23 81.77.040 authorizes the Commission to grant a certificate for biomedical waste collection
24 authority in an area already served by other providers if the applicant demonstrates, through
25
26

⁵⁰ *In re Ryder Distrib. Res., Inc.*, Order M.V.G. No. 1596 at 11 (first emphasis added).

⁵¹ *In re Ryder Distrib. Res., Inc. and Stericycle of Wash., Inc.*, Order M.V.G. No. 1761 at 12.

⁵² *In re Am. Env'tl. Mgmt. Corp.*, Order M.V.G. No. 1452 at 9 ("[T]he service that was being performed by the existing solid waste collection companies is not being duplicated by this grant of [authority for] a new, specialized infectious waste service."). The Commission emphasized in both *Sure-Way Incineration* and *American Environmental* that the specialized services needed by generators were not being provided by existing carriers "in any way, shape, or form." *Id.* at 8.

⁵³ *In re Ryder Distrib. Res., Inc.*, Order M.V.G. No. 1596 at 11 ("Stericycle is providing a service that in total helps the generators to assure themselves that they do not incur federal, state, or civil liability. The existing carriers do not provide an equivalent service.").

1 [generator] testimony, that incumbent providers are not meeting the specialized needs of
2 customers.”⁵⁴ “[T]he Commission has consistently required a *factual* showing that an
3 incumbent provider is not meeting the specialized needs of customers before the Commission
4 will grant a certificate for biomedical waste collection authority in an area already served by
5 another provider.”⁵⁵

6 56. It has been “the Commission’s consistent view that mere desire for a backup
7 carrier in the event of possible discontinuance of, or deterioration in, existing service, or mere
8 preference for competition, does not demonstrate a need for an additional carrier.”⁵⁶ This rule
9 reflects the requirements of RCW 81.77.040. If generator desire for competition were
10 sufficient to demonstrate unsatisfactory service without regard to any deficiency in the services
11 of existing certificate holders, the legislative preference for exclusive service territories would
12 be entirely negated.

13 57. In compliance with chapter 81.77 RCW and RCW 81.77.040, the Commission
14 has for decades required that applicants for overlapping solid waste and biomedical waste
15 collection authority must make a factual showing that the incumbent service provider’s services
16 are flawed or deficient, either because of persistent service failures (in the general solid waste
17 context) or because the services of existing carriers do not meet the specialized needs of the
18 healthcare industry (in the biomedical waste context). The Commission’s longstanding rule
19 that a desire for competition or an alternative service provider, standing alone, is insufficient to
20 demonstrate unsatisfactory service follows necessarily from the statutory presumption in favor
21 of exclusive service territories.

22
23 ⁵⁴ Commission Staff’s Initial Brief on Preliminary Legal Issue, p. 5.

24 ⁵⁵ Commission Staff’s Response Brief on Preliminary Legal Issue, p. 2 (emphasis in original; rejecting Waste
25 Management’s contention that the absence of competition alone would support a finding by the Commission that
26 existing service was “unsatisfactory”).

⁵⁶ *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1674 at 4-5; *see also In re Sureway Med. Serv., Inc.*, Order
M.V.G. No. 1663 at 8 (“The Commission recognizes that competition in the collection and disposal of
biohazardous waste may not necessarily benefit the public.”).

1 58. In Order 05 in this proceeding, issued September 5, 2012, Judge Kopta correctly
2 rejected Waste Management’s argument that the absence of competition, standing alone, could
3 support a finding that existing service was not satisfactory. Order 05 held that Waste
4 Management’s application could only be granted on the basis of generator testimony that the
5 existing biomedical waste collection services provided by Stericycle and the WRRRA
6 Protestants did not meet the specialized needs of biomedical waste generators within the
7 application territory.

8 The Commission may approve Waste Management’s application, therefore, only
9 if the Company demonstrates that . . . the biomedical waste collection service
10 currently provided in the territory Waste Management proposes to serve does
11 not satisfy the specialized needs of customers in that area⁵⁷

12 Waste Management must demonstrate that the biomedical waste collection and
13 disposal service currently provided in the territory the Company proposes to
14 serve does not satisfy the specialized needs of customers in that area as the
15 customers determine those needs.⁵⁸

16 This is an accurate statement of the law. Unfortunately, Judge Kopta’s Initial Order entirely
17 disregarded his own reasoning and analysis in Order 05.

18 59. The Initial Order purports to find that generator preference for competition or an
19 alternative service provider is sufficient to authorize a competing service provider. In short, if
20 generators want a competitive alternative where none exists, or simply an additional service
21 provider, the Initial Order holds that this desire alone will be sufficient to overcome the
22 statutory preference for exclusive service territories. This stands the “satisfactory service”
23 requirement of RCW 81.77.040 and the Commission’s precedents on their heads. Instead of
24 the statutory presumption in favor of exclusive service territories, the Initial Order would create
25 the opposite presumption in favor of competition – the lack of competition alone would allow
26 the Commission to approve an application for overlapping authority. This is the very argument
that Waste Management made and that Judge Kopta correctly rejected in Order 05.⁵⁹

⁵⁷ Order 05, ¶11.

⁵⁸ *Id.*, ¶15.

⁵⁹ *Id.*, ¶10 (“Contrary to the position[] . . . Waste Management [has] taken, Commission precedent does not

1 60. The Initial Order purports to explain this new rule by stating that the
2 Commission is merely “revisiting” the Commission’s prior “view that mere desire for a backup
3 carrier in the event of possible discontinuance of, or deterioration in, existing service, or mere
4 preference for competition, does not demonstrate a need for an additional carrier.”⁶⁰ But the
5 Initial Order misrepresents the source of this precedent. The intent to create exclusive
6 territories and to protect existing certificate holders from competition absent a factual showing
7 of deficient service is legislative, not merely Commission policy. The specific Commission
8 precedent “revisited” and overturned by Judge Kopta reflects Commission recognition of an
9 express statutory limitation on the Commission’s authority to authorize competitive solid waste
10 collection services. The Commission’s governing statute is not something that Judge Kopta or
11 even the Commission has authority to “revisit.” The Initial Order is in conflict with that statute
12 and must be reversed.

13 **B. There is No Evidentiary Support in the Record for the Initial Order’s Findings or**
14 **Conclusions.**

- 15 1. Generator testimony did not identify any specialized need not currently being
16 met by Stericycle and other certificate holders.

17 61. The Initial Order does not identify any flaw or deficiency in the services of
18 Stericycle or the WRRRA Protestants and does not find that the protestants’ services do not meet
19 the specialized needs of biomedical waste generators. Indeed, no generator testified that
20 Stericycle’s services or the services of the WRRRA Protestants do not meet their specialized
21 service needs. No generator testified that their preference for competition had any relationship
22 to any specialized requirement associated with biomedical waste collection.⁶¹ Nevertheless, the

23 support a presumption or predisposition for . . . competition for the provision of biomedical waste collection or
24 disposal service.”).

25 ⁶⁰ Initial Order 07, ¶10.

26 ⁶¹ The Initial Order itself acknowledges that generator preference for competition does not reflect a “specialized
need” of biomedical waste generators, stating specifically that “No professional training is necessary to recognize
the benefits of competition” Initial Order 07, ¶14. Thus, generator desire for competition cannot be said to
be within the special expertise of healthcare professionals to which the Commission gave deference in prior
biomedical waste application cases. As stated by Judge Kopta in another context, a preference for competition is

1 Initial Order proposes to grant Waste Management's application. Thus, the Initial Order
2 proposes that the Commission disregard the well-established rule, reaffirmed most recently by
3 Judge Kopta in Order 05, that an applicant for overlapping biomedical waste authority must
4 prove that the services of the incumbent service providers are not meeting the specialized needs
5 of biomedical waste generators.

6 62. The Initial Order states that eight of the ten generator witnesses "testified to the
7 need for more options among service providers."⁶² This minimal factual finding is the sole
8 factual basis for the Initial Order's conclusion that the generator public desires a competitive
9 alternative and, under the erroneous legal standard announced in the Initial Order, that
10 Stericycle and the WRRRA Protestants will not provide service to the satisfaction of the
11 Commission.

12 63. The Commission requires that an applicant for overlapping authority must make
13 a "strong showing" that the services of existing providers are unsatisfactory.⁶³ Both
14 quantitatively and qualitatively the generator testimony expressing a desire for competition
15 fails to meet this standard. Quantitatively, only seven witnesses representing generators in the
16 application territory (out of some 8,000 Washington biomedical waste generators) offered any
17 testimony on the issue of competition and all simply expressed a generic preference for
18 competition.⁶⁴ No generator identified a service need that was not being met by Stericycle or

19 "not unique to biomedical waste collection and thus do[es] not reflect any specialized customer need." *Id.*, ¶9.

20 ⁶² Initial Order 07, ¶12.

21 ⁶³ *In re R.S.T. Disposal Co.*, Order M.V.G. No. 1402 at 15-16 (stating that RCW 81.77.040 requires "an applicant
22 to make a strong showing that the existing carrier will not serve the territory in question to the satisfaction of the
23 Commission.").

24 ⁶⁴ In stating that "eight" generator witnesses provided such testimony the Initial Order improperly credits the
25 testimony of Emily Newcomer, who manages solid waste and recycling operations for the University of
26 Washington's Seattle campus only. (542:11-18). It is undisputed that the Seattle campus is not in the application
territory and that Ms. Newcomer could not speak to the needs of the University of Washington's other campus in
Tacoma. Ms. Newcomer has no responsibility for waste services at the University of Washington's Tacoma
campus. (542:20-22). She has never spoken to and does not even know the employee who determines the Tacoma
campus' waste service needs. (542:23-543:5). Ms. Newcomer admits that she has no idea whether the Tacoma
campus manager feels there is any need for different biomedical waste service. (543:9-12). Ms. Newcomer's
testimony cannot establish a desire for a competitive alternative in the territory Waste Management proposes to

1 other existing certificate holders. In fact, six of the 10 generator witnesses (including four
2 witnesses offered by Waste Management) affirmatively denied any complaint about the
3 services provided by Stericycle.⁶⁵

4 64. Qualitatively, the testimony of these generator witnesses makes clear that they
5 only supported generic competition, not the services of Waste Management specifically, and
6 not because of any particular features of Waste Management's proposed services or any failure
7 of existing service providers to fully meet their needs. For example, Rodger Lycan of
8 Pathology Associates Medical Laboratories (PAML) testified that he merely wants competition
9 "in the general sense."⁶⁶ Indeed, Mr. Lycan, Julie Sell of Olympic Medical Center, Jean
10 Longhenry of Wendel Family Dental Centre, Carla Patshkowski of the Providence Medical
11 Group, Ray Moore of Peace Health, and Terry Johnson of Lake Chelan Community Hospital
12 all testified that their desire for competition (or a back-up service) is generic because the
13 competing services they sought did not have to be Waste Management's service.⁶⁷ The
14 generators could not have been clearer that they do not prefer competition because of any
15 deficiency in existing services or because Waste Management's proposed services would meet
16 a specialized need or would otherwise be superior to existing services but, rather, because they
17 simply want the perceived benefits of a competitive marketplace instead of the regulated
18 marketplace the Legislature created under chapter 81.77 RCW.

19 65. Moreover, the generator witnesses merely speculated about the perceived
20 benefits of competition in a rate-regulated market without any basis in professional knowledge

21
22 _____
23 serve. Ms. Newcomer's testimony also established that the University of Washington's Seattle Campus does not
24 need a competitive alternative to Stericycle. Ms. Newcomer acknowledges that the Seattle campus already has the
25 option of using Waste Management for all its biomedical waste services but, in practice, still uses Stericycle to
26 perform biomedical waste collection from Seattle campus labs. (543:15:24, 545:24-546:3). Ms. Newcomer
testified that she has "no complaints" about Stericycle's biomedical waste service and that she is not testifying that
Stericycle does not safely treat and dispose of the University's biomedical waste. (546:4-11).

⁶⁵ See *supra*, note 12.

⁶⁶ (443:21-23).

⁶⁷ (215:6-12, 238:12-17, 244:23-25, 323:21-25, 393:19-394:1, 443:14-23, 481:4-13).

1 or experience. For example, the generator witnesses uniformly admitted that they have no
2 expertise, have not assessed the effects of competition in a regulated medical waste market,
3 and/or failed to consider the possibility that competition might actually lead to lower quality
4 services.⁶⁸ Dr. Warner even admitted that his testimony about the alleged benefits of
5 competition is a “generic assumption” and “advocacy” and Mr. Lycan simply admitted that his
6 testimony in favor of competition is his “personal opinion” and that he “doesn’t really know”
7 what the effects of competition would be.⁶⁹ These qualifications in the witness testimony
8 underscore the weakness of the generator support for competition in the regulated world of
9 solid waste collection under chapter 81.77 RCW.

10 66. This testimony cannot establish a need for specialized services not provided by
11 existing carriers because the generators’ uninformed belief in the benefits of competition is not
12 testimony of “professional[s] in the body of knowledge at issue” “about the requirements of the
13 service they need.”⁷⁰ The Commission gives such generator testimony weight because
14 biomedical waste generators, as healthcare providers, “are in a unique position to evaluate the
15 risks and benefits of collection and disposal service from their own professional training and
16 experience.”⁷¹ A preference for generic competition is just a preference for general market
17 forces that its assumed will lead to “better” or “cheaper” services; it is not a preference for
18 anything unique to biomedical waste collection. The generator witnesses admitted that their
19 preference for competition is not based on any professional training and experience but, rather
20 is an “assumption,” “personal opinion,” or “advocacy.” This testimony in support of generic
21 competition and the hypothetical benefits such competition would purportedly provide does not
22 reflect a “specialized need” unique to biomedical waste generators or any matter within the
23

24 ⁶⁸ (324:1-4, 324:25-325:14) (Ms. Longhenry), (442:8-18, 443:3-7, 444:21-23) (Mr. Lycan), (409:8-18, 410:3-15)
(Dr. Warner), (559:13-17) (Ms. Newcomer).

25 ⁶⁹ (409:8-18, 443:3-13).

26 ⁷⁰ *In re Med. Res. Recycling Sys., Inc.*, Order M.V.G. No. 1707 at 4.

⁷¹ *In re Ryder Distrib. Res., Inc.*, Order M.V.G. No. 1596 at 11 (emphasis added).

1 special competence of generators as healthcare professionals. By no stretch of the imagination
2 can generator support for generic competition be characterized as identifying a “specialized”
3 need of biomedical waste generators that Stericycle or the WRRRA Protestants have failed to
4 meet.

5 67. Although the generator witnesses generally testified to a preference for
6 competition, none of them identified deficiencies in Stericycle’s services that they believed
7 competition would cure. As noted above, six of the 10 generator witnesses (including four
8 presented by Waste Management) affirmatively denied any complaint about the services
9 provided by Stericycle. In fact, the undisputed evidence of record demonstrates that, during the
10 13 years in which Stericycle has operated without a statewide competitor, it has continuously
11 improved its services and has not raised its prices despite general inflation. Mike Philpott of
12 Stericycle offered un rebutted testimony that in these 13 years Stericycle has continuously
13 innovated to meet customer needs, for example by introducing reusable sharps containers and
14 in-facility sharps waste management that did not previously exist in Washington.⁷² Mr.
15 Philpott also testified that in this time Stericycle introduced a range of different reusable
16 biomedical waste containers, an OSHA compliance program, and a secure, on-line database of
17 customer shipping manifests even when it faced no statewide competition.⁷³ Finally, during 13
18 years without statewide competition Stericycle has lowered the real costs of its services to
19 Washington generators, declining to raise its prices even though general inflation has increased
20 the prices of goods and services by 68%.⁷⁴ Stericycle’s service and price stability without
21 statewide competitive pressure demonstrate that the generators’ unsupported opinions about the
22 assumed benefits of competition are simply incorrect.

23
24
25 ⁷² MP-15T, ¶¶7-8.

⁷³ MP-15T, ¶¶9-11.

26 ⁷⁴ MP-15T, ¶15.

1 68. The Initial Order does not address any of the foregoing evidence rebutting the
2 generator witnesses' generic and unsupported assumption that they would somehow benefit
3 from competition. By any measure, the testimony in support of competition does not constitute
4 the "strong showing" required by RCW 81.77.040 that the services of Stericycle and the other
5 existing certificate holders are unsatisfactory.

6 2. The Initial Order's reliance on "changed circumstances" is unsupported by
7 evidence in the record.

8 69. The Initial Order attempts to defend the radical departure it proposes to make
9 from the law applicable to grants of overlapping authority by suggesting that "[m]uch has
10 changed in the last 20 years" and that "the Commission's prior decisions that a desire for
11 competition is insufficient to satisfy RCW 81.77.040 do not reflect the realities of the current
12 marketplace."⁷⁵ These are mere assertions, however, entirely without evidentiary support in the
13 record.

14 70. The Initial Order cites no evidence in the record of any change in conditions
15 affecting biomedical waste generators and no such change is apparent that would warrant a
16 change in the Commission's interpretation of RCW 81.77.040. No generator testified about
17 any "change" in conditions or testified that any such "change" is relevant to the service needs
18 of biomedical waste generators. Not a single generator witness expressing a desire for
19 competition cited any changed conditions as the basis for that desire. There is no evidence in
20 the record of any changed conditions or "realities of the marketplace" (a phrase that the Initial
21 Order does not explain) that would justify a legal standard promoting competition that did not
22 exist either 20 years ago or six months ago when this issue was addressed in Order 05. Judge
23 Kopta simply manufactured these claims about "changed circumstances" out of whole cloth to
24 justify the result he wished to reach.⁷⁶

25 ⁷⁵ Initial Order 07, ¶11, 15.

26 ⁷⁶ Actual changed market conditions are exemplified by the changes in the early 1990s when biomedical waste generators began demanding that infectious medical waste be separated from general solid waste and treated

1 71. The only so-called changes that the Initial Order cites are actually vague and
2 unsupported observations about other industries, not about changes in conditions affecting the
3 markets for solid waste or biomedical waste services. The Initial Order states without any
4 citation to evidence in the record or other source that competition in the formerly regulated
5 market for local telecommunications services has “resulted in consumer benefits.”⁷⁷ The Initial
6 Order does not define these alleged benefits, cite any evidence in the record to support this
7 statement, or explain why the telecommunications industry should or could be a model for solid
8 waste collection. Importantly, the Initial Order contains no discussion of why these
9 unidentified consumer benefits allegedly resulting from competition in local
10 telecommunications have any bearing on whether the statewide solid waste and biomedical
11 waste markets should be opened to competition in a manner that is not contemplated by chapter
12 81.77 RCW. There is no evidence in the record to support the assumption that the experience
13 of the telecommunications industry has any bearing on the proper disposition of Waste
14 Management’s application.

15 72. The Initial Order’s mention of local telecommunications deregulation only
16 highlights the underlying motivation of the Initial Order to deregulate entry into the solid waste
17 and biomedical waste markets, contrary to the requirements of chapter 81.77 RCW. Local

18 _____
19 through a non-incinerative disposal process. That market need triggered a deep reconfiguring of biomedical waste
20 collection, transportation, treatment and disposal. Even under these changed conditions, however, the
21 Commission did not simply accept that the generators had a newfound desire for competition or an alternative to
22 current service providers. Stericycle and other biomedical waste applicants of that era were required to prove that
23 existing services did not meet the specialized needs of biomedical waste generators. *See, e.g., In re Ryder Distrib.*
24 *Res., Inc. and Stericycle of Wash., Inc.*, Order M.V.G. No. 1761 at 12 (citing generator testimony stating need for
25 single carrier transportation and disposal, Stericycle’s non-incineration disposal method, customer training, and
26 puncture-proof containers); *In re Ryder Distrib. Res., Inc.*, Order M.V.G. No. 1596 at 23-25 (citing generator
testimony stating need for Stericycle’s non-incineration method of disposal, waste tracking, and integrated
collection and disposal services); *In re Am. Env’tl. Mgmt. Corp.*, Order M.V.G. No. 1452 at 8 (describing the then-
unmet need for segregation and specialized packaging of infectious waste and finding that existing solid waste
providers were not “specially equipped and trained to meet the demonstrated need for specialized, infectious waste
collection service” which has “distinct and different operational requirements.”). The Commission’s existing
standards are already sufficiently flexible to account for changed circumstances that necessitate new or different
specialized biomedical waste services, if the need for such services is established by evidence in the record.

⁷⁷ Initial Order 07, ¶11.

1 telephone deregulation was in response to the federal Telecommunications Act of 1996, which
2 required states to allow a measure of competition in local markets. In contrast, the Initial Order
3 does not identify any federal or state statute that authorizes deregulation of solid waste
4 collection services without the factual showing, required by RCW 81.77.040, that the services
5 of existing certificate holders are unsatisfactory. The example of local telecommunications
6 deregulation simply underscores that a change of the magnitude proposed by the Initial Order
7 must be accomplished through legislative action, not by administrative fiat in a single
8 application case.

9 **C. The Commission's Long-Standing Interpretation of Chapter 81.77 RCW and**
10 **RCW 81.77.040 Has Been Repeatedly and Recently Reaffirmed.**

11 73. It is simply false to imply, as the Initial Order does, that the Commission has not
12 "revisited" the rule that desire for competition is insufficient to demonstrate unsatisfactory
13 service for 20 years.

14 74. The Commission reiterated its interpretation of the governing statute in a 1998
15 declaratory order concerning biomedical waste collection, affirming that chapter 81.77 RCW
16 "expresses a preference for monopoly service in the collection of solid waste, allowing the
17 Commission to grant new authority in already-served territory only if it finds that the existing
18 certificate holder will not provide satisfactory service."⁷⁸ Chapter 81.77 RCW's statutory
19 presumption in favor of monopoly service within exclusive service territories and the protection
20 of incumbent service providers from competition was reaffirmed by the Commission in 2010 in
21 the report to the Legislature discussed above.⁷⁹ Similarly, the Commission's "Consumer
22 Guide" to solid waste collection, currently posted on the Commission's website, explains
23 chapter 81.77 RCW as follows:
24

25 ⁷⁸ *In re Petition of Comm'n Staff for a Declaratory Ruling*, Docket No. TG-970532, Declaratory Order at 10, n.1.

26 ⁷⁹ *See supra*, notes 35-37, and associated text.

1 In Washington, solid waste . . . collection is a regulated “monopoly” industry. . .
2 . . The state Legislature, by law, created exclusive solid waste territories so that
all customers would receive basic solid waste services.⁸⁰

3 The Commission’s past, present and continuing understanding of the monopoly service model
4 underlying chapter 81.77 RCW, and the legislative intent to protect existing service providers
5 from competition absent a showing that their services are deficient, clearly is not something
6 that can be disregarded as a stale remnant of a bygone day.

7 75. In 2005, moreover, the Washington Legislature amended RCW 81.77.040 but
8 did nothing to alter the substantive terms of that provision. Although this amendment adjusted
9 the statutory limitation on the Commission’s authority to grant overlapping authority, it did
10 nothing to change the protections provided to existing certificate holders.⁸¹ Thus, the
11 Legislature has itself recently “revisited” the “satisfactory service” requirement of RCW
12 81.77.040 without making any change that would affect the Commission’s well-established
13 interpretation of that provision. The Legislature’s amendment of RCW 81.77.040 without
14 altering its substantive terms confirms that the Commission’s prior decisions have properly
15 interpreted the statute.⁸² Judge Kopta’s proposal in the Initial Order to gut the statutory
16 protections afforded by RCW 81.77.040 to existing certificate holders is a change that can only
17 be made by the Washington Legislature.

18
19
20 ⁸⁰ Available at <http://www.utc.wa.gov/consumers/Documents/2009-6-ResidentialGarbageAndRecycling-ConsumerGuide.pdf>.

21 ⁸¹ The 2005 amendment added the language shown underlined below in the current text, as follows:

22 When an applicant requests a certificate to operate in a territory already served by a
23 certificate holder under this chapter, the commission may, after notice and an
opportunity for a hearing, 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 or if the existing solid waste collection company does not object.

24 Laws of 2005, Ch. 121, §6.

25 ⁸² See, e.g., *Green River Comty. Coll. v. Higher Educ. Pers. Bd.*, 95 Wash.2d 108, 118, 622 P.2d 826 (1980) (“[A]
26 contemporaneous construction by the department charged with administering an ambiguous statute is even more
persuasive if the Legislature not only fails to repudiate the construction, but also amends the statute in some other
particular without disturbing the administrative interpretation.”).

1 76. Judge Kopta further fails to acknowledge that the “satisfactory service” issue
2 was extensively “revisited” just six months ago by Judge Kopta himself in response to briefing
3 he ordered on the issue in anticipation of the hearing in this case. As discussed above, the
4 parties extensively briefed whether generator preference for competition could support a
5 finding that existing service is unsatisfactory. On September 5, 2012, after months of
6 deliberation (far longer than the time taken by Judge Kopta for deliberation on the Initial Order
7 after completion of post-hearing briefing), Judge Kopta rejected Waste Management’s
8 contention that service without meaningful competition could not be service to the satisfaction
9 of the Commission, holding that “the Commission may approve Waste Management’s
10 application . . . only if the Company demonstrates that . . . the biomedical waste collection
11 service currently provided in the territory Waste Management proposes to serve does not
12 satisfy the specialized needs of customers in that area as the customers determine those
13 needs.”⁸³ Thus, in Order 05 Judge Kopta himself reviewed and reaffirmed the law that less
14 than six months later he disingenuously implies has been stale for 20 years. Order 05
15 confirmed that a desire for competition is not sufficient to prove that the services of existing
16 carriers are unsatisfactory.

17 77. In short, the law applicable to this application case has been “revisited” recently,
18 including by the Legislature itself, and reaffirmed. The only thing that has changed since then
19 is that Waste Management failed to make a factual showing that Stericycle’s services fail to
20 meet the needs of biomedical waste generators in the application territory, apparently
21 necessitating a second “revisiting” to save Waste Management’s application. No party was
22 given notice of Judge Kopta’s decision to re-revisit the law applicable to this case under Order
23 05 or given an opportunity to be heard on the matter prior to issuance of the Initial Order.

24
25
26 ⁸³ Order 05, ¶¶4, 10, 11 (emphasis added).

1 **D. The Initial Order's Reliance on an Alleged Commission Policy Favoring**
2 **Competition is Without Support in the Commission's Cases.**

3 78. The Initial Order attempts to support its radical departure from the "satisfactory
4 service" test of RCW 81.77.040 and the long line of Commission decisions applying that
5 provision by inventing a Commission policy favoring competition.⁸⁴ The alleged policy is an
6 invention to justify the grant of Waste Management's application, nothing more. As discussed
7 in detail above, the Commission has in fact consistently recognized the policy of the
8 Washington Legislature, expressed in chapter 81.77 RCW and RCW 81.77.040, in favor of
9 monopoly services by regulated service providers within exclusive service territories.

10 79. As discussed above, Judge Kopta's Oder 05 emphatically rejected Waste
11 Management's claim that the absence of competition, standing alone, could support a finding
12 that the services of existing certificate holders are unsatisfactory. In direct contradiction of his
13 conclusions in the Initial Order, Judge Kopta held in Order 05 that "Commission precedent
14 does not support a presumption or predisposition for . . . competition for the provision of
15 biomedical waste collection and disposal services."⁸⁵ Judge Kopta's holding in Order 05 is
16 consistent with the Commission Staff's position that the Commission "has consistently required
17 a *factual* showing that the incumbent service provider is not meeting the specialized needs of
18 customers before the Commission will grant a certificate for biomedical waste collection
19 authority in an area already served by another provider."⁸⁶ The Initial Order provides no
20 explanation for Judge Kopta's change of position.

21 80. The Initial Order cites the final order in a commercial ferry case in support of
22 the alleged Commission policy favoring competition.⁸⁷ The Initial Order quotes from the final

23 ⁸⁴ Initial Order 07, ¶¶11, 15.

24 ⁸⁵ Order 05, ¶9.

25 ⁸⁶ Commission Staff's Response Brief on Preliminary Legal Issue, ¶3. *See also, id.* at ¶2, rejecting Waste
26 Management's argument that service by a single carrier is unsatisfactory as a matter of law.

⁸⁷ Initial Order 07, ¶11 (*citing In re Dutchman Marine, LLC and Seattle Harbor Tours Ltd. P'ship*, Docket Nos.
TS-001774 & TS-002055, Second Supplemental Order - Commission Decision and Order Affirming Initial Order
Granting Applications with Conditions (Oct. 19, 2001)).

1 order in that case out of context and fundamentally misrepresents its relevant holdings. The
2 Initial Order cites the ferry case for the proposition that in the commercial ferry context, and by
3 implication in the context of solid waste collection, the Commission “is not in the business of
4 granting exclusive service territories” and “may grant overlapping authority absent a showing
5 that competition would be ‘ruinous.’”⁸⁸ This characterization of the orders in the ferry case is
6 grossly misleading. In fact, the orders in the ferry case confirm the limitations on the
7 Commission’s authority to approve overlapping service absent a showing that the services of
8 existing certificate holders are deficient.

9 81. In the commercial ferry case, the Commission was considering competing
10 applications to provide ferry service on several routes where no other ferry company had active
11 certificate authority or services.⁸⁹ Thus, the case the Initial Order relies on is inapposite
12 because it did not address an application where an existing service provider is currently
13 providing services pursuant to a certificate granted by the Commission.

14 82. Second, the Commission’s orders in the ferry case explicitly state that after
15 service is established on a route, the Commission will be barred from approving a competing
16 ferry service on the same route absent a showing that the “existing certificate holder has failed
17 or refused to provide reasonable and adequate service,” which is the statutory limitation
18 applicable to grants of overlapping authority in commercial ferry context.⁹⁰ This is consistent
19 with the requirement that an applicant for overlapping solid waste or biomedical waste
20

21 ⁸⁸ Initial Order 07, ¶11.

22 ⁸⁹ See *In re Dutchman Marine, LLC and Seattle Harbor Tours Ltd. P’ship*, Docket Nos. TS-001774 & TS-002055,
23 First Supplemental Order - Initial Order Granting Applications with Conditions, ¶23 (Sept. 19, 2001) (*adopted by*
24 *the Commission in In re Dutchman Marine, LLC and Seattle Harbor Tours Ltd. P’ship*, Docket Nos. TS-001774 &
25 TS-002055, Second Supplemental Order - Commission Decision and Order Affirming Initial Order Granting
26 Applications with Conditions, ¶6). The initial order in the ferry case also makes clear that a certificate previously
issued for ferry service on some of the relevant routes had terminated because services were not initiated within
the time periods prescribed by RCW 81.84.010. *Id.*, ¶¶17-23.

⁹⁰ *Id.*, ¶¶63, 70; *In re Dutchman Marine, LLC and Seattle Harbor Tours Ltd. P’ship*, Docket Nos. TS-001774 &
TS-002055, Second Supplemental Order - Commission Decision and Order Affirming Initial Order Granting
Applications with Conditions, Appendix A, ¶70; RCW 81.84.020(1).

1 collection authority must make a factual showing that the services of existing of certificate
2 holders are flawed or deficient. The case cited by the Initial Order actually demonstrates that
3 the Initial Order should be rejected because it proposes to authorize duplicative services
4 without such a factual showing, contrary to the requirements of both the commercial ferry and
5 the solid waste statutes.

6 83. Judge Kopta apparently misunderstood two statements from the commercial
7 ferry case that are quoted out of context in the Initial Order. First, after the Commission stated
8 in that case that it is not in the business of granting exclusive territories, it went on to explain
9 that “[t]he grant of authority to one applicant does not preclude the simultaneous grant of
10 authority for competing service over the same or a similar route, or a subsequent grant of such
11 authority, on proper grounds.”⁹¹ Thus, what the Commission said was no more than that it can
12 grant similar authority to competing companies when there is no existing ferry service or “on
13 proper grounds,” which the Commission went on to explain was the statutory showing by an
14 applicant for overlapping ferry service that the existing service is not reasonable or adequate.⁹²
15 Existing services are still protected from competition and a desire for competition is not a basis
16 for authorizing a competing service. In fact, although overlapping authority was granted in the
17 ferry case for certain routes, the Commission made clear that once one of the carriers actually
18 initiated service on one of those routes, the other carrier would be precluded from doing so
19 without seeking new authority from the Commission and making the required factual showing
20 that the incumbent carrier’s services are deficient.⁹³

21
22 _____
23 ⁹¹ *In re Dutchman Marine, LLC and Seattle Harbor Tours Ltd. P’ship*, Docket Nos. TS-001774 & TS-002055,
24 First Supplemental Order - Initial Order Granting Applications with Conditions, ¶63 (emphasis added).

25 ⁹² *Id.*

26 ⁹³ *Id.*, ¶70 (“Our grants of authority as to these overlapping routes are conditioned by requiring that to the extent
one operator or the other obtains such additional authority as is required to initiate service (e.g., docking rights,
land use permits) and actually initiates service, that route is thereafter not available to the other operator unless
additional authority is sought from the Commission and is supported by a showing that the existing operator has
failed or refused to furnish reasonable and adequate service.”).

1 84. Second, the commercial ferry case discussed “ruinous competition” but, again,
2 not remotely in the context implied by the Initial Order. The initial order adopted by the
3 Commission actually states that exclusivity of established routes, unless and until the statutory
4 standard for overlapping service is met, “will prevent ruinous competition”⁹⁴ Thus, the
5 final order discusses “ruinous” competition as a potential harm that supports exclusive service
6 territories, not as the sole condition that would limit the Commission’s otherwise plenary
7 authority to authorize duplicative services, as the Initial Order suggests. The initial order in the
8 ferry case also discussed “ruinous competition” as a potential harm that must be considered
9 before approving overlapping authority, but addressed that issue separately from its discussion
10 of the statutory showing required to demonstrate that existing ferry service is not reasonable or
11 adequate.⁹⁵

12 85. Finally, to the extent that commercial ferry service is a model for this case, the
13 Commission has recently made clear that the statutory “reasonable and adequate service”
14 standard applicable to commercial ferry services provides “considerable protection from
15 competition as long as they continue to provide satisfactory service and comply with
16 regulations.”⁹⁶ The Commission has acknowledged that the solid waste statute provides
17 existing certificate holders under that statute similar protection from competition because
18 the legislature has made a judgment that the public’s interest in reliable and
19 affordable service is best served by a single, economically regulated provider
20 whose owners can make the sizable investments needed to initiate and maintain
21 service without the threat of having customers drawn away by a competing
22 provider. Other industries regulated under this model in Title 81 RCW are solid
23 waste (garbage) collection companies under RCW 81.77, and auto transportation
24 (fixed terminus bus) companies under RCW 81.68. The rate and service
25 regulations that apply to these industries are intended to provide a surrogate for
26 the pricing discipline that would be exerted by a competitive marketplace.⁹⁷

⁹⁴ *Id.*

⁹⁵ *Id.*, ¶64.

⁹⁶ Washington Utilities and Transportation Commission, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan: Report to the Legislature Pursuant to ESB 5894*, p. 11 (Jan. 14, 2010).

⁹⁷ *Id.* (emphasis added).

1 86. The only other source cited for the purported Commission policy in favor of
2 competition is a single sentence in a final order resolving motions for summary determination
3 in *Stericycle v. Waste Management*, a 2011 proceeding concerning Waste Management’s
4 authority to provide biomedical waste services under its existing G-244 certificate authority. In
5 that decision, the Commission stated that “Commission policy has historically encouraged
6 competition in the provision of biomedical waste services.”⁹⁸

7 87. For a number of critical reasons this statement does not reflect the
8 Commission’s policy with respect to the RCW 81.77.040 satisfactory service inquiry and does
9 not support authorizing new overlapping services based on generator desire for competition.
10 First, as demonstrated above, the quoted statement from *Stericycle v. Waste Management* itself
11 is not supported by a fair reading of prior Commission cases, which have consistently
12 recognized the statutory policy in favor of exclusive service territories and the protection of
13 existing carriers from competition absent as showing that their services are deficient.⁹⁹

14 88. The statement in the final order in *Stericycle v. Waste Management* relies on a
15 1990 Commission decision in which the Commission reflected in dicta that it was not confident
16 that any single carrier then authorized to provide service could meet the needs of biomedical
17 waste generators.¹⁰⁰ This statement does not refer to the statewide services of Stericycle, which
18 were subsequently approved by the Commission. There is no evidence in this proceeding that
19 Stericycle’s services do not meet the needs of biomedical waste generators. Moreover, this
20 dicta is nothing more than a statement supporting competition if an existing provider is unable
21 to meet the needs of biomedical waste generators – that is, it merely confirms that overlapping
22

23 ⁹⁸ Initial Order 07, ¶11 (*quoting Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Final
24 Order on Cross-Motions for Dismissal and Summary Determination (July 13, 2011)). In fact, in footnote 10 the
Initial Order cited a different case as the source of this statement. This appears to be an erroneous citation.

25 ⁹⁹ *See supra*, §III(A)(1).

26 ¹⁰⁰ *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Final Order on Cross-Motions for
Dismissal and Summary Determination, ¶37 (*quoting In re Sure-Way Incineration, Inc.*, Order M.V.G. No. 1451
at 16-17).

1 authority may be granted if, but only if, existing services will not meet the specialized needs of
2 biomedical waste generators. Neither the quoted statement from *Stericycle v. Waste*
3 *Management* nor the earlier Commission dicta on which that statement is based supports the
4 Initial Order's attempt to circumvent the statutory requirement that overlapping authority may
5 only be granted if the services provided by existing certificate holders are deficient.

6 89. The *Stericycle v. Waste Management* final order also notes that overlapping
7 biomedical waste authority has been granted in the past. But in every case where the
8 Commission has approved such authority, as discussed extensively above, the applicant has
9 demonstrated that the existing services did not meet the specialized needs of biomedical waste
10 generators, something that Waste Management has failed to prove in this proceeding.¹⁰¹ Thus,
11 it is simply not true that the Commission has historically had a policy that would allow the
12 Commission to grant overlapping authority on the basis of generator preference for
13 competition, without regard to the satisfactory service determination required by RCW
14 81.77.040, as the Initial Order wrongly implies.

15 **E. The Initial Order Inappropriately Cites Lower Prices Offered by Waste**
16 **Management as a Basis for Granting the Application.**

17 90. The Initial Order relies on evidence that Waste Management introduced
18 marginally lower prices on certain "product options" as "reflect[ing] the benefits of a
19 competitive market" and, thus, as a reason to approve Waste Management's application for
20 overlapping authority.¹⁰² However, the Initial Order's reliance on price competition to justify
21 approving overlapping services is fundamentally inconsistent with the statutory scheme of

22 ¹⁰¹ See, e.g., *In re Ryder Distrib. Res., Inc. and Stericycle of Wash., Inc.*, Order M.V.G. No. 1761 at 12 (citing
23 generator testimony stating need for single carrier transportation and disposal, Stericycle's non-incineration
24 disposal method, customer training, and puncture-proof containers); *In re Ryder Distrib. Res., Inc.*, Order M.V.G.
25 No. 1596 at 23-25 (citing generator testimony stating need for Stericycle's non-incineration method of disposal,
26 waste tracking, and integrated collection and disposal services); *In re Am. Env'tl. Mgmt. Corp.*, Order M.V.G. No.
1452 at 8 (describing the then-unmet need for segregation and specialized packaging of infectious waste and
finding that existing solid waste providers were not "specially equipped and trained to meet the demonstrated need
for specialized, infectious waste collection service" which has "distinct and different operational requirements.").

¹⁰² Initial Order 07, ¶13.

1 chapter 81.77 RCW. Moreover, Judge Kopta’s reliance on Waste Management’s pricing is
2 improper under at least three lines of Commission precedent that the Initial Order does not
3 challenge or even acknowledge.

4 91. First, prices and rates are simply not part of the satisfactory service
5 determination required by RCW 81.77.040 and well-established Commission precedent
6 implementing that provision. RCW 81.77.030 requires the Commission to “supervise and
7 regulate every solid waste collection company in this state . . . by fixing and altering its rates,
8 charges, classifications, rules and regulations.” Thus, the rates of all solid waste collection
9 companies are set by the Commission under its plenary authority to “fix” and “alter” those
10 rates. It is well-established that chapter 81.77 RCW imposes rate regulation as part of the
11 comprehensive statutory scheme in which certificate holders are protected from competition
12 through a grant of exclusive service territories.¹⁰³ Moreover, the Commission has explicitly
13 acknowledged that

14 The rate and service regulations that apply to [solid waste (garbage) collection
15 companies under RCW 81.77, and auto transportation (fixed terminus bus)
16 companies under RCW 81.68] are intended to provide a surrogate for the pricing
17 discipline that would be exerted by a competitive marketplace.¹⁰⁴

18 Thus, chapter 81.77 RCW imposes direct regulation of carrier rates by the Commission as an
19 alternative to price competition. The Initial Order is fundamentally incompatible with this
20 statutory scheme when it casually relies on the alleged benefits of price competition to justify
21 approving Waste Management’s application for overlapping authority.

22 92. The Commission has expressly held that the “level of rates is not a proper
23 inquiry in determining whether authority should be granted”¹⁰⁵ Rates are not a proper

24 ¹⁰³ *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1663 at 8 (“[Chapter 81.77 RCW] provides for service in
25 territories in which a carrier may be the sole provider, but must in return offer nondiscriminatory service at
26 regulated rates” (emphasis added)).

¹⁰⁴ Washington Utilities and Transportation Commission, *Appropriateness of Rate and Service Regulation of
Commercial Ferries Operating on Lake Chelan: Report to the Legislature Pursuant to ESB 5894*, p. 11 (Jan. 14,
2010) (emphasis added).

¹⁰⁵ *In re SnoKing Garbage Co./R.S.T. Disposal Serv., Inc.*, Order M.V.G. No. 1185, App. No. GA-788 at 6 (Nov.

1 “evaluative element” under RCW 81.77.040 because “the Commission has historically not
2 considered rates proposed by applicants because rates can be changed at any time.”¹⁰⁶ Judge
3 Kopta ignores this precedent and makes the minor rate differences proposed by Waste
4 Management a key element in the rationale supporting his Initial Order. The statute simply
5 does not contemplate a rate-based analysis of the satisfactory service issue.

6 93. Second, the Commission has been clear that the satisfactory service
7 determination under RCW 81.77.040 is a threshold issue that an applicant must surmount
8 before the Commission may consider the possible benefits of the applicant’s proposed services
9 and is limited to evaluating the existing carrier’s services.¹⁰⁷ The applicant’s proposed services
10 and the alleged benefits of those services are not part of the “satisfactory service”
11 determination.¹⁰⁸ By relying on evidence that Waste Management proposes to offer some
12 services at lower prices than Stericycle, Judge Kopta has improperly departed from the
13 requirements of RCW 81.77.040’s satisfactory service inquiry.

14 94. Third, the evidence of lower prices cited in the Initial Order comes entirely from
15 testimony and exhibits of Waste Management’s own witness, not the testimony of any
16 biomedical waste generator.¹⁰⁹ No generator testified that its general desire for a more
17 competitive market was driven by the minor rate differences identified by Waste
18 Management’s witness. On the contrary a witness representing numerous rural hospitals
19 testified that those generators’ primary concern is not price but reliable service, which he and
20 other generator witnesses testified Stericycle has consistently provided.¹¹⁰ Judge Kopta did not

21 6, 1984) (declining to consider the lower rates of an applicant for transfer of authority because the transfer
22 application “is not a proceeding under [RCW 81.28.230 to fix just and reasonable rates] and it does not determine
23 the propriety of any rate level.”).

24 ¹⁰⁶ *In re R.S.T. Disposal Co.*, Order M.V.G. No. 1402 at 37.

25 ¹⁰⁷ *See supra*, notes 42-43, and associated text.

26 ¹⁰⁸ *In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1639 at 12.

¹⁰⁹ Initial Order 07, ¶13, n.15 (citing prefiled testimony of Waste Management witness Jeff Norton).

¹¹⁰ JM-1T, pp. 3-5 (Stating, on behalf of the Association of Washington Public Hospital Districts, that “Stericycle
has provided reliable biomedical waste management and collection services to Washington healthcare facilities
since the early 1990s at stable prices” and that “[t]he primary interest of AWPHD member hospitals is in reliable

1 acknowledge this testimony. The Initial Order's reliance on testimony from a Waste
2 Management witness, is improper. The Commission has long been clear that the satisfactory
3 service determination must be based on the testimony of generators in the application territory
4 – the testimony of an applicant's personnel is not relevant.¹¹¹ Under this unchallenged
5 precedent, Waste Management's evidence that certain of its rates are lower than Stericycle's
6 cannot establish a generator need for a competitive alternative.

7 95. Without acknowledging any of the foregoing Commission precedent, Judge
8 Kopta argues that evidence of Waste Management's proposed prices is relevant to the
9 satisfactory service determination because “[t]he Commission will find companies' service
10 satisfactory only to the extent that the service provided furthers the Commission's ultimate goal
11 of ensuring that consumers have access to that service at fair, just, and reasonable rates, terms,
12 and conditions.”¹¹² This is clearly not true for at least three reasons. First, as previously
13 discussed, the Commission has long held that the satisfactory service issue depends entirely on
14 whether the services of existing certificate holders meet the specialized needs of biomedical
15 waste generators.¹¹³ Pricing considerations do not reflect such “specialized needs.” Second,
16 the Commission has statutory control over the rates of solid waste collection companies and
17 thus directly ensures that all such rates, including Stericycle's, are “fair, just, and reasonable.”
18 The Commission does not rely on the “discipline” of a competitive market to ensure that carrier
19 rates are fair, just and reasonable. Third, the Commission does not regulate (or even consider)
20 rates in deciding applications for certificate authority; the Commission has separate, specialized
21 regulatory mechanisms, rules and standards for the evaluation of the carrier rates and charges,

22 _____
service.”).

23 ¹¹¹ *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1674 at 5, n.3 (“The Commission requires that need be
24 shown through the testimony of persons who require the service.”); *see also In re SafeCo Safe Transp., Inc.*, Order
25 M.V.G. No. 143916, App. No. P-73623 at 10 (Oct. 9, 1991) (In a motor carrier application case raising the issue of
26 public need, disregarding the testimony of an applicant's employee and holding that “[a]n applicant may not
present testimony about the needs of others for its own services.”).

¹¹² Initial Order 07, ¶14.

¹¹³ *See supra*, §III(A)(2).

1 including mechanisms by which interested parties, including consumers, may instigate such
2 rate proceedings.¹¹⁴ All carrier rates are filed with and reviewed by the Commission, which
3 may reject any rate deemed unreasonable. Commission review of carrier rate filings and rate
4 proceedings initiated for the specific purpose of evaluating carrier rates under well-established
5 rules and standards developed by the Commission for this purpose, are the mechanisms by
6 which the Commission ensures that solid waste collection rates are “fair, just, and reasonable.”

7 96. This application proceeding, of course, is not a rate proceeding and no generator
8 has asserted that Stericycle’s rates are not “fair, just, and reasonable.” There is no evidence in
9 the record demonstrating that Stericycle’s rates are not “fair, just, and reasonable.” Nowhere in
10 the Initial Order does Judge Kopta make any finding that Stericycle’s rates are not “fair, just,
11 and reasonable.” On the contrary, there is ample, undisputed evidence in the record that
12 Stericycle has provided statewide biomedical waste services at stable rates for over 20 years –
13 declining even to pass on the increased costs of general inflation to its Washington
14 customers.¹¹⁵ Given that the Commission controls provider rates under chapter 81.77 RCW to
15 ensure that such rates are just and reasonable, that Stericycle’s rates have been approved by the
16 Commission, and that Stericycle has maintained stable rates for over 20 years, the fact that
17 Waste Management now proposes to offer marginally lower rates for certain waste quantities
18 cannot support a finding that Stericycle’s services are not “fair, just, and reasonable,” let alone
19 unsatisfactory under RCW 81.77.040.¹¹⁶

20 ¹¹⁴ RCW 81.04.110 (authorizing complaints); WAC 480-07-910 (authorizing informal complaints by consumers);
21 WAC 480-07-305, 370 (authorizing applications for adjudicative proceeding to be initiated by formal complaint);
22 WAC 480-70-386 (providing that solid waste collection companies must respond to informal complaints from
23 consumers or those referred by the Commission, and providing that consumers have the right to make formal
24 complaints).

25 ¹¹⁵ During the 13 years that Stericycle has operated without statewide competition Stericycle has lowered the real
26 costs of its services to Washington generators by declining to raise its prices even though general inflation has
increased prices of goods and services by 68% in that period. MP-15T, ¶15.

¹¹⁶ Moreover, Judge Kopta has given no consideration to whether Waste Management’s proposed rates are “fair,
just and reasonable” or sufficiently remunerative to support Waste Management’s proposed services over time.
This is a particularly glaring omission given Waste Management’s bald assumption that its rates are currently far
from remunerative. *See* MAW-16T, ¶¶2, 3, 10 (stating that parent company has absorbed and will continue to

1 97. Judge Kopta has not determined whether Waste Management’s proposed rates
2 are fair and reasonable under the Commission’s rate standards and certainly has not held that
3 Stericycle’s rates are not fair and reasonable. Instead, without regard to the Commission’s rate-
4 setting procedures and standards, Judge Kopta relies entirely on the prospect that Waste
5 Management proposes to offer marginally lower prices for certain service. In essence,
6 therefore, the Initial Order holds that an existing service provider’s rates and services can be
7 deemed “unsatisfactory” under RCW 81.77.040 simply because a prospective service provider
8 seeking entre to the market is willing to charge a penny less for certain services. The Initial
9 Order’s reliance on such rate competition to justify a finding that existing services are
10 unsatisfactory entirely without regard to the Commission’s rate-setting standards is antithetical
11 to chapter 81.77 RCW and RCW 81.77.040.

12 **IV. CONCLUSION**

13 98. The regulatory scheme established by chapter 81.77 RCW and RCW 81.77.040
14 contemplates exclusive service territories in which service providers are protected from
15 competition absent a showing that their services are deficient. RCW 81.77.040 bars the
16 Commission from approving an application for overlapping solid waste collection authority
17 unless the applicant proves that existing solid waste collection companies will not provide
18 service to the satisfaction of the Commission. To permit the Commission to grant overlapping
19 authority, an applicant must make a strong factual showing that the services provided by the
20 incumbent service provider(s) are flawed or deficient. The Initial Order ignores these statutory
21 requirements and would hold, instead, that generator preference for competition, and in
22 particular price competition, is a sufficient basis on which to find that Stericycle and the
23 WRRRA Protestants will not provide service to the satisfaction of the Commission. In so doing,

24 _____
25 absorb substantial biomedical waste losses). Any grant of new authority to Waste Management must include a
26 condition that it prepare financial reports to the Commission separately reporting on its biomedical waste service
costs and revenues so that the Commission can readily determine whether its proposed rates will actually yield
sufficient profit to preclude cross-subsidization from its other businesses.


1 the Initial Order creates an unlawful presumption in favor of competition in solid waste
2 collection. The Initial Order requires merely a showing that a few generators desire
3 competition or an additional service provider entirely without regard to any deficiency in the
4 services of existing carriers. The Initial Order is inconsistent with chapter 81.77 RCW, violates
5 the specific requirements of RCW 81.77.040 and is contrary to the Commission's well-settled
6 interpretation of these governing statutes, and must, therefore, be reversed.

7 99. The Initial Order's rationalizations for unlawfully deviating from the
8 requirements of chapter 81.77 RCW are unsupported by evidence in the record and are
9 themselves contrary to well established Commission precedent. The Initial Order reverses
10 without warning an earlier order in this case, confirming the correct legal standard, and relies
11 on unsupported claims of changed circumstances, market realities and a non-existent
12 Commission policy favoring competition. Undisputed record evidence demonstrates that
13 Stericycle meets the needs of biomedical waste generators and, therefore, will provide
14 biomedical waste collection and transportation services to the satisfaction of the Commission.
15 Accordingly, the Commission should overturn the Initial Order and deny Waste Management's
16 application for overlapping solid waste collection authority.

17 DATED this 28th day of March, 2013.

18 Respectfully submitted,

19 GARVEY SCHUBERT BARER

20
21 By 
22 Stephen B. Johnson, WSBA #6196
23 Jared Van Kirk, WSBA #37029
24 Attorneys for Protestant Stericycle of
25 Washington, Inc.
26

CERTIFICATE OF SERVICE

I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of Washington that, on March 28, 2013, I caused to be served on the person(s) listed below in the manner shown a copy of PROTESTANT STERICYCLE OF WASHINGTON, INC.'S PETITION FOR REVIEW OF INITIAL ORDER GRANTING APPLICATION:

Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
PO Box 47250
Olympia, WA 98504-7250
(360) 664-1160
records@utc.wa.gov

- Via Legal Messenger
- Via Facsimile
- Via FedEx
- Via Email

Administrative Law Judge
Gregory Kopta
gkopta@utc.wa.gov

- Via Email

Jessica Goldman
Polly L. McNeill
Summit Law Group
315 – 5th Avenue South
Seattle, WA 98104
jessicag@summitlaw.com
pollym@summitlaw.com
kathym@summitlaw.com
deannas@summitlaw.com

- Via Legal Messenger
- Via Facsimile
- Via U.S. Mail, First Class, Postage Prepaid
- Via Email

James K. Sells
Attorney at Law
PMB 22, 3110 Judson Street
Gig Harbor, WA 98335
jamesells@comcast.net
cheryls@rsulaw.com
*Attorney for Protestant WRRRA,
Rubatino, Consolidated, Murrey's and
Pullman*

- Via Legal Messenger
- Via Facsimile
- Via U.S. Mail, First Class, Postage Prepaid
- Via Email

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

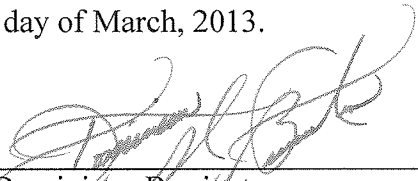
Steven W. Smith
Office of the Attorney General
Utilities and Transportation Division
1400 S. Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1225
(360) 586-5522 Fax
ssmith@utc.wa.gov

- Via Legal Messenger
- Via Facsimile
- Via U.S. Mail, First Class,
Postage Prepaid
- Via Email

David W. Wiley
Williams Kastner & Gibbs PLLC
601 Union Street, Ste. 4100
Seattle, WA 98101
(206) 233-2895
dwiley@williamskastner.com
*Attorney for Protestant WRRRA,
Rubatino, Consolidated, Murrey's and
Pullman*

- Via Legal Messenger
- Via Facsimile
- Via U.S. Mail, First Class,
Postage Prepaid
- Via Email

Dated at Seattle, Washington this 28th day of March, 2013.



Dominique Barrientes
dbarrientes@gsblaw.com