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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of:

Docket No. TG-120033

WASTE MANAGEMENT OF WASHINGTON,  
INC. D/B/A WM HEALTHCARE SOLUTIONS  
OF WASHINGTON

**WASTE MANAGEMENT'S ANSWER  
TO PETITION FOR ADMINISTRATIVE  
REVIEW OF INITIAL ORDER NO. 7  
ON BEHALF OF "THE WRA  
COMPANIES" AND THE WRA**

For an Extension of Certificate G-237 for a  
Certificate of Public Convenience and Necessity  
to Operate Motor Vehicles in Furnishing Solid  
Waste Collection Service

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## I. INTRODUCTION

1. Applicant Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington (“Waste Management”) requests that the Commission affirm the Initial Order Granting Application of Waste Management for extension of Waste Management’s authority to offer regulated biomedical waste services statewide and that the Commission deny the Petition for Administrative Review of Initial Order No. 7 on Behalf of “The WRRRA Companies” and the WRRRA (“WRRRA Petition”).<sup>1</sup> The concerns raised by the Washington Refuse and Recycling Association (“WRRRA”) and the individual WRRRA members (“WRRRA Companies”) (collectively, the “WRRRA Protestants”) regarding implications of the Initial Order on entry standards for traditional solid waste certificate rights are misplaced because it is a narrow decision granting an extension of authority for specialized biomedical waste collection services. And the objections in the WRRRA Petition regarding overlap with the individual WRRRA Companies’ certificate rights are unfounded because they are not supported by the evidence and are outweighed by the public’s need for responsive service.

## II. ARGUMENT

16 **A. Affirming the Initial Order Will Maintain the Statutory Purpose of RCW 81.77.040.**

17 2. An extension of biomedical waste collection authority is warranted if the applicant  
18 demonstrates that (1) biomedical waste collection service currently provided in the territory sought  
19 does not satisfy the specialized needs of customers in that area as the customers determine those  
20 needs and (2) public convenience and necessity requires an additional carrier.<sup>2</sup> The evidence  
21 presented in this case provides ample grounds for the Commission to grant Waste Management’s  
22 application for extension under both prongs of the statutory test.<sup>3</sup>  
23  
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26 <sup>1</sup> Waste Management concurrently has filed an Answer to Stericycle’s petition for administrative review and, to avoid  
duplication, Waste Management incorporates that Answer herein by this reference.

27 <sup>2</sup> RCW 81.77.040; Order 05 ¶ 11.

28 <sup>3</sup> The WRRRA Protestants do not challenge the Initial Order’s finding in favor of Waste Management’s fitness.

1           **1.     The Existing Certificate Holders Are Not Serving to the Satisfaction of the**  
2           **Commission.**

3           3.     The WRRRA Petition is fraught with histrionics about how the Initial Order “seems  
4 to ignore” the statutory requirement for a threshold determination of whether the existing WRRRA  
5 certificate holders are serving to the satisfaction of the Commission.<sup>4</sup> But the Initial Order does  
6 not change the essential elements of the statutory test. It allows the Commission to base its  
7 satisfaction on standards appropriate to Waste Management’s incremental extension into the  
8 statewide biomedical waste collection as the service sector currently exists, and it does so in  
9 accordance with the statutory framework. Determining whether the Commission is satisfied with  
10 existing service is still a threshold determination, it is still an evidentiary element of proof, and it is  
11 still subject to the Commission’s discretion. Different policy considerations, however, justify  
12 exercising discretion to interpret the legal standards in the specific context of Waste Management’s  
13 application to extend authority for providing biomedical waste collection statewide.

14                   **a.     The Initial Order Properly Addresses First Whether the Commission Is**  
15                   **Satisfied with Existing Services.**

16           4.     Oblivious to the actual sequence of analysis presented in the Initial Order, the  
17 WRRRA Protestants allege error for failing to address the Commission’s satisfaction as a  
18 preliminary inquiry. Nobody disagrees that this determination must be made before considering  
19 public convenience and necessity and before evaluating the applicant’s fitness. In fact, the Initial  
20 Order tackles this element before considering other factors. What the WRRRA Protestants really  
21 disagree with, of course, rests on the conclusion drawn from the evidence presented, not from the  
22 analytic sequence taken.

23           5.     The WRRRA Protestants conclude that the Initial Order must have bypassed the  
24 necessary threshold inquiry because, in their view, the Commission may not exercise its discretion  
25 without “any specific findings and/or reference to record evidence outlining service failures,  
26 inadequate adherence to law and rule (fitness), or even isolated communicated critiques of service  
27

28           <sup>4</sup> WRRRA Petition ¶ 8.

1 by existing customers....”<sup>5</sup> This argument ignores the fact that the Commission’s inquiry can be  
2 based on factors other than obvious operational or regulatory infirmities.

3 6. The threshold test is obviously and easily satisfied if there are actual refusals of  
4 service, if there are regulatory violations, or if the service proposed is “not available in any way  
5 shape or form.”<sup>6</sup> An applicant can easily meet the statutory requirement with proof of blatant  
6 deficiencies. In those instances, there is little call for the Commission to exercise very much  
7 discretion at all.

8 7. There are, however, more nuanced grounds for the Commission to find that existing  
9 medical waste certificate holders are not operating to its satisfaction. Contrary to the WRRR  
10 Protestants’ suggestion, the determination does not require a pejorative opinion.<sup>7</sup> It does not have  
11 to be based on criticisms of the existing certificate holders’ operations. It can be based instead on  
12 changing and enhanced expectations of generators and the Commission.

13 8. In this case, the Commission has exercised its broad discretion to determine  
14 whether it is satisfied with the current level of biomedical waste collection service being provided  
15 by existing certificate holders by reference to more subtle shipper needs that are not being met.<sup>8</sup> It  
16 has made the threshold determination not based on evidence of refusal to serve or regulatory  
17 violations or even consistent customer complaints. In consideration of the specific facts before it,  
18 the Commission has determined that without some modicum of controlled competition, existing  
19 conditions are not furthering the ultimate goal of ensuring that consumers have access to the  
20 biomedical waste collection services they require.

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23 <sup>5</sup> WRRR Petition ¶ 11.

24 <sup>6</sup> *In re Am. Env't. Mgmt. Corp.*, App No. GA-874, Order M.V.G. No. 1452 at 8 (Nov. 30, 1990).

25 <sup>7</sup> “The finding of failure of satisfactory service does not necessarily involve a moral judgment. A carrier may be found  
26 unsatisfactory despite providing excellent service to the public within the terms of its certificate if the service does not  
27 meet the reasonable requirements of shippers.” *In re Ryder Distribution Res., Inc.*, App. No. GA-75154, Order  
28 M.V.G. No. 1596 at 2 (Jan. 25, 1993).

<sup>8</sup> *In re Sureway Med. Servs., Inc.*, App. No. GA-75968, Order M.V.G. No. 1663 at 10-11 ( Nov. 19, 1993) (“In  
evaluating whether existing companies will provide service to the satisfaction of the Commission, the Commission  
will not limit its consideration to evidence of service failures of the sort that usually are significant in neighborhood  
garbage collection service, such as service refusals, missed pickups or garbage strewn about.”).

1           9.     The WRRRA Protestants disregard the nuances of analysis in the Initial Order  
2 because they disagree with the outcome. Instead they argue that the threshold question was  
3 ignored. However, the Initial Order correctly puts the Commission’s satisfaction with existing  
4 services first. The Initial Order properly measured existing services prior to considering public  
5 convenience and necessity, and before evaluating the applicant’s fitness.

6                   **b.     The Initial Order’s Dissatisfaction with Incumbent Service Is Based on**  
7                   **Factual Evidence.**

8           10.    Nor, contrary to the WRRRA Protestants’ argument, does the Initial Order ignore the  
9 need for factual evidence demonstrating that the existing service providers are not capable of  
10 satisfying the generators’ and the Commission’s expectations. All parties agree that the  
11 Commission has acknowledged a need for competition in the biomedical waste collection market.<sup>9</sup>  
12 In isolation, that precedent does not support a presumption or predisposition that would justify  
13 granting an application as a matter of law. Instead, an evidentiary hearing must be conducted to  
14 determine whether the generators’ and the Commission’s needs are being met, by weighing  
15 evidence of whether entry of an additional provider in a particular service territory would serve  
16 unmet customer needs consistent with the public interest.<sup>10</sup>

17           11.    Again, the WRRRA Protestants are correct in asserting that RCW 81.77.050 requires  
18 an evidentiary hearing and that facts must support the Commission’s finding. And again, it is the  
19 outcome and not the logic that is the actual object of the WRRRA Protestants’ consternation. The  
20 WRRRA Protestants complain that not “a single witness” nor “a single piece of evidence” nor “any  
21 cross-examination” was offered to criticize the services being offered by the WRRRA Companies.  
22 There was, however, ample evidence to support the Commission’s discretionary determination of  
23 the necessary preliminary finding on satisfactory service. It was based on the testimony of  
24 shippers who showed a very real and legitimate demand for an alternative statewide service  
25 provider. For example, Ray Moore, the Lead Contract Manager of Supply Chain for the

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27 <sup>9</sup> To avoid duplication, Waste Management addresses this point further in its Answer to Stericycle’s Petition for  
Administrative Review.

28 <sup>10</sup> Order 05 ¶ 9.



1 PeaceHealth hospitals. Like other testifying generators, PeaceHealth desires to contract with “one  
2 statewide service provider for the sake of efficiency and cost.”<sup>11</sup> Thus, despite the fact that three  
3 PeaceHealth hospitals are located in the WRRRA Protestants’ territories,<sup>12</sup> the WRRRA Protestants  
4 cannot provide a viable alternative to Stericycle’s statewide monopoly. Without that need being  
5 met, none of the certificate holders can serve to the satisfaction of the Commission. Waste  
6 Management’s burden of proof was met not by operation of law, but by factual evidence.

7 12. Thus, the Initial Order adheres to the analytic required under RCW 81.77.040. The  
8 determination of whether existing service providers are meeting customer needs in satisfaction of  
9 the Commission’s expectations was firstly considered, and the conclusion that all of the existing  
10 services were unsatisfactory in furthering the Commission’s regulatory objectives was based on  
11 factual evidence.

12 **2. The Commission Should Reaffirm that Entry Standards for Biomedical Waste**  
13 **Transportation Are Different Than the Ones for Traditional Solid Waste**  
14 **Collection.**

15 13. The WRRRA Protestants express concern that certain statements in the section of this  
16 narrowly-tailored order discussing whether existing biomedical waste service is being provided to  
17 the satisfaction of the Commission could be broadly applied to applications for traditional solid  
18 waste collection authority.<sup>13</sup> Waste Management does not interpret the Initial Order as swallowing  
19 the general rule and believes the decision by its own terms applies only to the very limited factual  
20 situation presented, that is, to Waste Management’s extension of biomedical waste authority. The  
21 introductory paragraph of this section of the Initial Order specifically measures satisfactory service  
22 “by providers of specialized solid waste collection...,”<sup>14</sup> and refers several times to “bio-  
23

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24 <sup>11</sup> Ex. RM-1T at 3.

25 <sup>12</sup> Hearing Tr. Vol. VI at 397:23-399:7 (Columbia Basin Hospital in Ephrata, in Protestant Consolidated Disposal  
26 Services, Inc.’s territory; Pullman Regional Hospital in Protestant Pullman Disposal Service’s territory; Samaritan  
Hospital in Moses Lake, in Protestant Consolidated’s territory).

27 <sup>13</sup> WRRRA Petition ¶¶ 12-19.

28 <sup>14</sup> Order 07 ¶ 6 (emphasis in original).

1 hazardous” and “biomedical” waste collection.<sup>15</sup> The holding is based “on this record and under  
2 the circumstances presented in this docket...”<sup>16</sup> The WRRRA Protestants are unduly fearful.

3 14. The only precedent interpreting RCW 81.77.040 that is cited in the section of the  
4 Initial Order considering satisfactory service consists of prior decisions in biomedical waste  
5 applications. Thus, when the Initial Order says, “[a]ccordingly, the Commission will not rely on  
6 those prior decisions to make the requisite demonstration in this case,” it is plainly referring to the  
7 *Sureway* case from 1993.<sup>17</sup> The “benefits of competition” analysis that weighed into the outcome  
8 of the Initial Order is specifically focused on only biomedical waste collection and although some  
9 statements taken in isolation might suggest a broad application, the Initial Order cannot fairly be  
10 read in this manner.

11 15. However, to the extent there is any ambiguity about whether competition is grounds  
12 for meeting the threshold requirement under RCW 81.77.040 for entry into the conventional solid  
13 waste collection market, Waste Management supports the position of the WRRRA Protestants.  
14 Waste Management, too, does not believe the same standards would or should apply. As the  
15 WRRRA Protestants acknowledge, the Initial Order perpetuates the Commission’s historic  
16 differentiation between biomedical waste collection entry standards and conventional solid waste  
17 service.<sup>18</sup> If the Commission determines in the context of administrative review to clarify that  
18 point, Waste Management certainly does not object to any such clarification.

19 **B. The Commission Properly Exercised Its Discretion to Utilize Controlled Competition**  
20 **as a Regulatory Tool.**

21 16. In the section discussing the relevance of competition to Waste Management’s  
22 extension of authority to perform biomedical waste collection services, the Initial Order alludes to  
23 other markets and sectors that illustrate the evolution of the Commission’s perspective allowing for  
24 greater consumer choice without sacrificing the protections of economic regulation.<sup>19</sup> The

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25 <sup>15</sup> *Id.* ¶ 15.

26 <sup>16</sup> *Id.* ¶ 16.

27 <sup>17</sup> *Id.* ¶ 15.

28 <sup>18</sup> WRRRA Petition ¶ 13.

<sup>19</sup> Order 07 ¶¶ 11-12.

1 Commission's views about the ability of controlled competition to supplement its regulatory  
2 oversight have advanced. On this point, the Initial Order is correct.

3 17. Although these references were illustrative only, the WRRRA Protestants spend a  
4 great deal of energy knocking down the relevance of trends in other industry sectors. The WRRRA  
5 Protestants are particularly bothered by the Initial Order's citation to the *Dutchman Marine*  
6 decision involving commercial ferry certificates.<sup>20</sup> Stericycle, too, argues about the applicability  
7 of the references, and in this section of its Answer, Waste Management presents its response to  
8 both sets of Protestants on this particular point.

9 18. The Protestants misinterpret the Initial Order and exaggerate the import of the  
10 illustrative examples. First, and perhaps most importantly, the Initial Order did not rest on  
11 precedent in the telecommunications or commercial ferry industries. The developments in those  
12 industries were referenced in dicta only as examples of controlled competition.

13 19. Furthermore, the Initial Order did not erroneously characterize the Commission's  
14 evolving view about the potential for controlled competition to supplement its administrative  
15 oversight in those other regulated industries. The references were accurate and legitimate allusions  
16 to the Commission's increasing willingness to supplement its authority with limited market forces.

17 20. Clearly, the Initial Order is not wrong when it notes that introduction of competition  
18 into former regulated telecommunications monopoly markets has resulted in consumer benefits.  
19 Without eliminating the need for agency oversight, the Commission's ability to rely on  
20 competition to supplement regulation has nonetheless reduced the need for active oversight and  
21 proactive enforcement in the telecommunications sector. But the Initial Order does not suggest  
22 that biomedical waste should be treated the same and it certainly does not hold that entry into the  
23 solid waste market – for traditional *or* specialized services – is or should be subject to the same  
24 standards as those applied to telecommunications. The Initial Order is merely illustrating changes  
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26 <sup>20</sup> *In re Dutchman Marine, LLC and Seattle Harbor Tours, Ltd. P'ship*, Docket Nos. TS-001774 & TS-002055, First  
27 Supplemental Order – Initial Order Granting Applications with Conditions (Sep. 19, 2001) and Second Supplemental  
28 Order – Commission Decision and Order Affirming Initial Order Granting Applications with Conditions (Oct. 19,  
2011).

1 that have occurred in regulatory policy as it relates to using controlled competition in other  
2 industries.

3 21. Similarly, the Initial Order cites to a commercial ferry case for the proposition that  
4 controlled competition can be one of the Commission's tools for ensuring that customer demands  
5 are met while regulatory goals are furthered. It does not, contrary to the alarmist interpretation  
6 taken by the WRRRA Protestants, establish "ruinous competition" as a new standard for  
7 determining the point at which existing service becomes unsatisfactory to the Commission – not  
8 for traditional solid waste entry, not for specialized biomedical waste entry, and not even for  
9 commercial ferry entry. The Initial Order was merely describing the regulatory bounds imposed  
10 on controlled competition in the cited *Dutchman Marine* commercial ferry case.

11 22. In the *Dutchman Marine* case, concurrent applications for commercial ferry service  
12 on Lake Washington were granted, but the Commission conditioned the overlapping approvals on  
13 allowing the authority of each applicant to be perfected by the carrier that first commenced service,  
14 saying: "The result was a grant of authority to both applicants. This result enhances diversity of  
15 suppliers, affords incentives to begin service, and allows comprehensive service to the public."<sup>21</sup>  
16 Thus, the Commission struck the balance between its supervision of regulated activities and the  
17 benefit of limited competition.

18 23. The fact that the conditions imposed by the Commission on the overlapping  
19 authorities granted were intended to ensure that only one of the commercial ferries would be

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21 <sup>21</sup> *In re Dutchman Marine, LLC and Seattle Harbor Tours Ltd, P'ship*, Docket No. TS-001774 & TS-002055, Second  
22 Supplemental Order – Commission Decision and Order Affirming Initial Order Granting Applications with Conditions  
23 at 1 (Oct. 19, 2011). The argument by the WRRRA Protestants regarding erroneous references to the initial order of  
24 *Dutchman Marine* is somewhat baffling. Admittedly, if an initial order becomes final by operation of law, then it has  
25 no precedential value. WAC 480-07-825(7). That does not appear to be what happened in the *Dutchman Marine* case.  
26 Under the WUTC rules, an initial order becomes final by agency action whenever "the Commissioners enter an order  
27 after the period available for petitions for administrative review and no such petition has been filed...." WAC 480-07-  
28 820(b)(iii). In the *Dutchman Marine* case, the Second Supplemental Order recites that no timely petition was filed and  
the Order was entered over the signature of all three Commissioners. The Commissioners "affirmed and adopted" the  
initial order, which is also contemplated by rule for a final order. WAC 480-07-825(9). As noted by the WRRRA  
Protestants, the Second Supplemental Order was not the Commission "Standard Notice of Finality," and did not  
include the standard statement that the "Commission does not endorse the order's reasoning and conclusions." WRRRA  
Petition n.15. Indeed, it includes a recitation that "This is a final order of the Commission." Waste Management can  
only assume that citation to the analysis in the *Dutchman Marine* initial order is proper. The allegations of error on  
this point are mistaken – albeit irrelevant because the *Dutchman Marine* case was cited in the Initial Order for  
illustrative purposes and not for precedential authority.

1 entitled to service once it was perfected is beside the point.<sup>22</sup> The Initial Order does not suggest  
2 that *Dutchman Marine* controls the outcome of this proceeding; it is only cited as illustrating the  
3 potential for using controlled competition as a tool of regulation. In *Dutchman Marine*, the  
4 Commission decided to grant both applications but let competition determine who got which route.  
5 In this case, the Initial Order holds that competition is necessary to provide shippers with service  
6 that is responsive to their needs. The Commission has discretion to use the “tool” of controlled  
7 competition as it sees fit. In *Dutchman Marine*, it was used to incentivize efforts to commence  
8 service, and allow comprehensive service to the public. In this case, controlled competition is  
9 being used to ensure that statewide biomedical waste shippers have the ability to secure service  
10 that meets their specialized needs.

11 24. In the same paragraph that refers to the evolution of competition in the  
12 telecommunications industry and the *Dutchman Marine* decision, the Initial Order concludes,  
13 “Even in the context of bio-hazardous waste collection, the Commission has observed that its  
14 ‘policy has historically encouraged competition.’”<sup>23</sup> The Commission has expressed its policy  
15 reasons for viewing a biomedical waste collection application through a different lens than  
16 traditional solid waste collection.<sup>24</sup> In the context of this specialized service, the Commission has  
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19 <sup>22</sup> Stericycle’s Petition for Review ¶ 83.

20 <sup>23</sup> Initial Order ¶ 11 (quoting *In re Sure-Way Incineration, Inc.*, App. No. GA-868, Order No. 1451 at 16-17 ( Nov. 30,  
21 1990) (“The Commission is not ready to say that grant of one application for statewide authority would preclude a  
22 grant of others, and will consider this element in future proceedings.”)). Stericycle would prefer the outcome in this  
23 case to rest on the Commission’s report to the legislature predicated by litigation involving ferry service on Lake  
24 Chelan rather than consider the Commission’s own, recent findings about the need for competition in biomedical  
25 waste collection services. Stericycle’s Petition ¶¶ 85-86 (“The only other source cited for the purposed Commission  
26 policy in favor of competition is a single sentence in a final order resolving motions for summary determination in  
27 *Stericycle v. Waste Management,....*”). It fails to mention that in that litigation that culminated in the ostensibly  
28 irrelevant and isolated statement, Stericycle itself urged the Commission to require that Waste Management perform  
statewide authority. *In re Pet’n of Stericycle of Wash., Inc.*, Docket TG-110287, Pet’n of Stericycle of Wash. ¶ 3 (Feb.  
10, 2011) (requesting that the Commission “condition[] approval of any tariff filed by Waste Management for  
biomedical waste collection and transportation services on the successful prosecution by Waste Management of an  
application for statewide biomedical waste collection authority”).

<sup>24</sup> *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Final Order on Cross-Mot. for  
Dismissal & Summ. Determination at 14-15 (July 13, 2011) (The Commission “recognized that its regulation of this  
specialized service is underpinned by different policies than the ones applicable to traditional solid waste collection  
....”).

1 consistently maintained that different standards apply.<sup>25</sup> There are good reasons for the  
2 Commission to consider using controlled competition to buttress its regulatory oversight of  
3 biomedical waste collection.

4 25. Conventional solid waste collection companies actively solicit regulatory oversight.  
5 The public convenience and necessity does not require competition to supplement the  
6 Commission's regulatory policies for traditional haulers. Conventional companies like the WRRR  
7 Companies and Waste Management file frequent general rate requests, participate in workshops,  
8 provide comments on proposed rules, respond to formal and informal investigations, adjudicate  
9 filings, and regularly appear before the Commission in Open Meetings. Moreover, these  
10 conventional solid waste service providers file detailed Class A Annual Reports with the  
11 Commission.<sup>26</sup>

12 26. In contrast, the single statewide biomedical waste collection company that exists  
13 today operates under the regulatory radar. Stericycle has never filed a general rate request. It has  
14 operated under its initial tariff rates since 1993, which remain unchanged today.<sup>27</sup> In 2011, it filed  
15 a tariff revision to match product options and rates offered by Waste Management, changing its  
16 base tariff rates for the first time in two decades.<sup>28</sup> Otherwise, it has appeared before the  
17 Commission only to defend its monopoly.<sup>29</sup> Its annual reports contain only limited financial  
18 information.<sup>30</sup> It ignores Commission rules requiring it to provide customers with a document  
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20 <sup>25</sup> To avoid duplication, Waste Management addresses this point further in its Answer to Stericycle's Petition for  
Administrative Review.

21 <sup>26</sup> See Ex. MAW-22.

22 <sup>27</sup> It has filed twice to add new rates, but has not otherwise changed its basic rates. See, e.g., Stericycle of Washington,  
Inc. Docket No. TG-011370 (December 1, 2001) (minimum charges) and Docket No. TG-081200 (August 11, 2008)  
23 (charges for incinerating pharmaceuticals).

24 <sup>28</sup> Order ¶13; Stericycle of Wash., Inc., Docket No. TG-111023 (June 13, 2011).

25 <sup>29</sup> WM Healthcare Solutions of WA – Tariff No. 2 (effective April 6, 2011), Docket TG-110552 (The Commission  
allowed Waste Management's tariff to go into effect by operation of law.); *Stericycle v. Waste Mgmt.*, Docket  
TG-110553, Order 02 (July 13, 2011) (The Commission rejected Stericycle's allegations that Waste Management had  
26 abandoned its biomedical waste authority under Certificate G 237, and its requests for the Commission to order Waste  
Management to get statewide authority from the Commission before allowing it to collect biomedical waste, and  
27 dismissed the complaint.); *Stericycle v. Waste Mgmt.*, Docket TG-121597 (Complaint by Stericycle filed October 1,  
2012, and now pending before the Commission.).

28 <sup>30</sup> See Ex. MAW-9.

1 describing the company's services.<sup>31</sup> It disregards the regulatory obligation of giving new  
2 customers a copy of the Commission's consumer brochure or notifying customers annually of the  
3 Commission's availability to address customer concerns.<sup>32</sup> Apparently, Stericycle does not even  
4 inform customers that its services are regulated by the WUTC.<sup>33</sup>

5 27. In regulating traditional solid waste collection companies, the Commission has no  
6 need for competition to supplement its oversight and further its goals of ensuring that consumers  
7 have access to collection services at fair, just and reasonable rates, terms and conditions. In the  
8 context of biomedical waste collection, however, the benefit of adding a modicum of controlled  
9 competition is obvious and justified.<sup>34</sup> When the first applications for biomedical waste collection  
10 certificates were considered, and in the time following those initial approvals, the ability of  
11 multiple service providers to answer the public's need for responsive service was assured. Since  
12 that time, however, Stericycle's later-acquired iron-fisted monopoly on statewide services and the  
13 limited, regional service of the WRRRA Protestants have not been responsive to the legitimate  
14 shipper needs. In and of itself, these service and regulatory deficiencies may not rise to the level  
15 of *per se* unsatisfactory service, but they evidence the need for controlled competition in the world  
16 of biomedical waste collection that is not warranted for traditional solid waste collection  
17 companies.

18 **C. The Public Need for Responsive Service Outweighs Any Negative Impacts of Waste**  
19 **Management's Expansion Given the Absence of Persuasive Evidence of Negative**  
20 **Impact on the WRRRA Protestants' Economic Viability.**

21 28. The WRRRA Petition alleges an objection to Finding of Fact No. 4, in which the  
22 Initial Order stated that Waste Management successfully "demonstrated that the public's need for  
23 a competitive alternative to the existing service providers outweighs those providers'

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24 <sup>31</sup> WAC 480-70-361(7); Hearing Tr. Vol. VI at 448:1-11 (Lycan); *id.* at 484:19-486:19-23 (Patschkowski).

25 <sup>32</sup> WAC 480-70-386(a); Hearing Tr. Vol. VI at 448:1-11 (Lycan); *id.* at 484:19-486:19-23 (Patschkowski).

26 <sup>33</sup> Hearing Tr. Vol. VI at 448:1-11 (Lycan); *id.* at 484:19-486:19-23 (Patschkowski).

27 <sup>34</sup> Charles S. Phillips, Jr. The Regulation of Public Utilities, Ch. 12 (it is sound regulatory policy to favor the  
28 introduction of an element of competition where its operative effect will tend to promote the public interest); *see also*  
Nelson Lee Smith, The Federal Power Commission and Pipeline Markets: How Much Competition?, 68 Columbia  
Law Review 664 (1968).

1 unsubstantiated claims of an adverse economic impact on their operations.”<sup>35</sup> There is, however,  
2 neither argument presented in the WRRRA Petition on this objection, nor reference to record  
3 evidence relied on to support the WRRRA Protestants’ objection. Nonetheless, to the extent the  
4 Commission deems the issue to have been presented by the mere assertion of the objection, the  
5 Initial Order should be upheld.

6 29. In considering whether the public convenience and necessity requires the  
7 additional operations sought by Waste Management, the Initial Order properly considered  
8 whether the public’s needs for responsive service outweigh any negative impacts of the entry of  
9 an additional provider on the economic viability of existing carriers.<sup>36</sup> The public need for  
10 granting Waste Management’s application was amply demonstrated by the shipper witnesses.  
11 Washington waste generators, including those with statewide facilities, currently have no  
12 meaningful competition available and it is therefore functionally impossible for the services of the  
13 incumbent certificate holders to satisfy the Commission.<sup>37</sup>

14 30. In alluding to the *Dutchman Marine* decision, the Initial Order does not create a  
15 new standard for determining the satisfaction of the Commission by reference to “ruinous  
16 competition.” However, under analysis of the public convenience and necessity, the Initial Order  
17 properly balances the negative impacts of the entry of an additional provider on the economic  
18 viability of existing carriers with the public’s need for responsive service.<sup>38</sup> The Initial Order  
19 does not require proof of “ruinous competition,” but it does demand **some** evidence that granting  
20 Waste Management’s expansion into the remaining territory will have a “significant impact on the  
21 economic viability of the existing companies.”<sup>39</sup> And, once again, the WRRRA Protestants obscure  
22 whatever arguments they have regarding the avowed objection to the finding made in the Initial  
23 Order with criticisms of the analytic approach. In this case, the Initial Order is proper, both in the

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24 <sup>35</sup> Order 07 ¶ 31; WRRRA Petition ¶ 4.

25 <sup>36</sup> Order 05 ¶ 10.

26 <sup>37</sup> *In re Ryder Distribution Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1596 at 12 ( Jan. 25, 1993) (The  
27 Commission concluded that “single carrier service is a reasonable shipper need ....”).

27 <sup>38</sup> Order 05 ¶ 11; Order 07 ¶¶ 17-22.

28 <sup>39</sup> Order 07 ¶18.



1 analysis taken and in the conclusion made: the WRRRA Companies failed to provide persuasive  
2 evidence that granting Waste Management’s application would affect the economic viability of  
3 their operations, negatively or positively.

4 31. The Commission considers the impact of competition on incumbent service  
5 providers purely as a proxy for gauging effective service to the public. Protecting the incumbents,  
6 in and of itself, is not a Commission goal. “Consistent with the state’s strong health and safety  
7 interest in assuring universal collection and securing service at fair rates, the Commission will  
8 consider whether a grant of competing authority would be detrimental to the public because it  
9 would jeopardize the viability of existing service.”<sup>40</sup> The Commission has rejected “a test for  
10 denial that is measured by adverse effect upon existing carriers’ financial returns.” Rather, “the  
11 proper test for public interest [is] whether the entry of an additional carrier, who has demonstrated  
12 public need for its services, will result in damage to carriers that causes a reduction to  
13 unacceptable levels of available reasonably priced service to consumers.”<sup>41</sup>

14 32. There is no material threat to the viability of any of the WRRRA Companies nor is  
15 there any evidence that granting Waste Management’s application will cause a reduction of  
16 reasonably priced service to consumers – and the WRRRA Protestants do not now argue otherwise.  
17 The balance must tip without contest in favor of the public’s need for competitive statewide  
18 service.

19 33. It is undisputed that each of the WRRRA Companies successfully competed with  
20 two contemporaneous statewide RMW service providers, Stericycle and BFI, during the time of  
21 controlled competition in the 1990s.<sup>42</sup>

22 34. Furthermore, the WRRRA Companies did not provide persuasive evidence that  
23 having to compete with a second statewide provider now will materially threaten their “economic  
24 viability” or that competition from Waste Management will cause them to have a base of small,

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26 <sup>40</sup> *In re Sureway Med. Servs., Inc.*, App. No. GA-75968, Order M.V.G. No. 1663 at 11 (Nov.19, 1993) (emphasis added).

27 <sup>41</sup> *In re Ryder Distribution Resources, Inc.*, App. No. GA-75154, Order M.V.G. No. 1761 at 14 (Aug. 11, 1995) (emphasis added).

28 <sup>42</sup> Ex. MAW-4T at 15-19; Hearing Tr. Vol. VIII at 812:18-813:2.

1 rural accounts.<sup>43</sup> No evidence was offered at the hearing nor is any argument presented in the  
2 WRRRA Petition as to why this would change in the face of competition from Waste Management.

3 35. For example, Rubatino Refuse Removal, Inc.’s president Edward Rubatino  
4 testified that he already lost the one major RMW generator in his area to Stericycle, leaving a  
5 balance of approximately 200 small customers, and that his RMW business already is  
6 unprofitable.<sup>44</sup> Murrey’s Disposal, in turn, has never lost one of its large customers to Stericycle  
7 and, in fact, is not aware of having lost any customers to Stericycle.<sup>45</sup> Yet, it is undisputed that  
8 Murrey’s Disposal is earning substantially more in net operating income than what it is entitled to  
9 earn under an acceptable operating ratio and could lose substantial business without creating any  
10 material risk to its economic viability.<sup>46</sup> Consolidated Disposal Services already has lost to  
11 Stericycle its customers with multi-site locations,<sup>47</sup> and it could lose 35% of its revenue and still  
12 be profitable.<sup>48</sup> Pullman Disposal Service, Inc. already has a “very consistent” customer base  
13 comprised of small RMW generators and no hospitals,<sup>49</sup> and has not lost any customers to  
14 Stericycle.<sup>50</sup> No evidence is offered as to why this would change with competition from Waste  
15 Management.

16 36. In short, the WRRRA Companies cannot offer a statewide alternative to Stericycle  
17 to satisfy the generators’ need – hence they cannot provide service to the satisfaction of the  
18 Commission – and they have not established that competition from Waste Management will  
19 create a material risk to their economic viability.

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22 <sup>43</sup> Order 05 ¶ 11.

23 <sup>44</sup> Hearing Tr. Vol. VIII at 813:3-7, 814:9-815:1, 816:24-817:5.

24 <sup>45</sup> *Id.* at 823:15-825:19. Murrey’s Disposal is a subsidiary of Waste Connections, Inc., *id.* at 823:7-10, a publicly  
25 traded corporation (<http://www.wasteconnections.com/company/about-us.aspx>) “with, literally, billions of dollars to  
26 spend.” WRRRA Protestants’ Post-Hearing Brf. at 5:9.

27 <sup>46</sup> Ex. MAW-4T at 16-17; Ex. MAW-14.

28 <sup>47</sup> Hearing Tr. Vol. VIII at 837:8-838:2.

<sup>48</sup> Hearing Tr. Vol. VIII at 840:3-13.

<sup>49</sup> Hearing Tr. Vol. VII at 708:4-14, 709:1-16.

<sup>50</sup> *Id.* at 709:20-21.

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### III. CONCLUSION

37. The Commission should affirm the Initial Order Granting Application of Waste Management and deny the WRRRA Petition. The Initial Order correctly applied the statutory test set forth in RCW 81.77.040 in approving Waste Management's statewide extension. The Commission properly exercised its discretion to determine its satisfaction with currently-existing service offerings in responding to the legitimate needs of shippers for specialized biomedical waste collection services. The Initial Order does not establish a new or alarming standard for traditional solid waste. Although not necessary, the Commission nonetheless may choose to make the clarification sought by the WRRRA Protestants in affirming the Initial Order. To the extent the WRRRA Protestants object to the Initial Order granting overlap with the individual WRRRA Companies' certificate rights, that objection should be wholly denied, because the WRRRA Petition failed to present any argument or provide evidence of negative impacts to the WRRRA Protestants' economic viability that would in any way outweigh the public's need for responsive service.

DATED this 8th day of April, 2013.

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**CERTIFICATE OF SERVICE**

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

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Gregory J. Kopta Administrative Law Judge Washington Utilities and Transportation Commission gkopta@utc.wa.gov	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email
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1 DATED at Seattle, Washington, this 8th day of April, 2013.

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