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April 8, 2013

Steven V. King, Acting Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P.O. Box 47250
Olympia, Washington 98504-7250

RE: *In re Application of Waste Management of Washington, Inc. d/b/a WM Healthcare
Solutions of Washington
Docket TG-120033*

Dear Mr. King:

Enclosed for filing in the above-referenced docket are the original and four copies of Commission Staff's Answer to Petitions for Review of Initial Order, and Certificate of Service.

Sincerely,

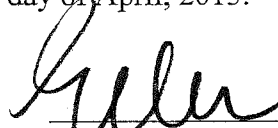
STEVEN W. SMITH
Assistant Attorney General

SWS:emd
Enclosures
cc: Parties (*via e-mail*)

Docket TG-120033
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached Commission Staff Answer to Petitions for Review upon the persons and entities listed on the Service List below *via e-mail*.

DATED at Olympia, Washington this 8th day of April, 2013.



ELIZABETH M. DeMARCO

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of

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

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

DOCKET TG-120033

COMMISSION STAFF'S ANSWER
TO PETITIONS FOR REVIEW OF
INITIAL ORDER

I. INTRODUCTION

1 The Staff of the Washington Utilities and Transportation Commission (“Staff”) files this answer in response to the Petitions for Administrative Review filed by Stericycle of Washington, Inc. (Stericycle) and the Washington Refuse and Recycling Association and its four member certificate holders who are parties in this matter (collectively the WRRRA).

II. ARGUMENT

2 The petitions for review do not challenge the fitness of the applicant Waste Management of Washington, Inc. (Waste Management) or address the public convenience or necessity element of RCW 81.77.040. The primary issue raised in the petitions relates to the initial order’s treatment of whether the existing certificate holders “provide service to the satisfaction of the commission.”¹ Staff’s answer addresses that issue.

¹ RCW 81.77.040.

A. Satisfaction of the Commission in the Context of Biomedical Waste Transportation

3 In the Prehearing Conference Order dated April 16, 2012, Administrative Law Judge Kopta directed the parties to brief the legal issue of the interpretation of that part of RCW 81.77.040 that states that the Commission may issue a certificate for a service territory “only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission.”² Staff presented no direct case in this proceeding, but in response to this directive did address this criterion.

4 In its Initial Brief on Preliminary Legal Issue, Staff reviewed the Commission’s orders on the issue of “satisfaction of the commission” in the specialized context of applications for authority to transport biomedical waste.³ And in response to Waste Management’s brief on the preliminary legal issue, Staff restated our reading of these prior orders.⁴ Staff did not take a position on whether, in this proceeding, Waste Management has shown that the incumbent certificate holders failed to “satisfy the specialized needs of customers ... as the customers determine those needs.”⁵

B. The Initial Order Granting Application

5 The Initial Order noted that the Commission decisions from the early 1990s, including those reviewed by Staff in its briefing, found that “mere preference for competition” does not alone demonstrate a need for an additional carrier. However, the ALJ found that this is an appropriate time to revisit this issue.⁶ ALJ Kopta concluded that those decisions from the 1990s “do not reflect the realities of the current marketplace” and

² Order 01, ¶6.

³ Commission Staff’s Initial Brief on Preliminary Legal Issue, ¶10-15.

⁴ Commission Staff’s Response Brief on Preliminary Legal Issue, ¶ 3-4.

⁵ Commission Staff Post-Hearing Brief, ¶26.

⁶ Order 07, ¶10.

therefor “the Commission will not rely on those prior decisions to make the requisite determination in this case.”⁷ The rationale for reconsidering that Commission precedent is explained in greater detail in paragraphs 11 through 15 of the Initial Order.

C. Agency Discretion to Depart from Precedent

6 The Commission has considerable discretion under the “satisfaction of the commission” requirement.⁸ Moreover, *stare decisis* plays a more limited role in the administrative agency context and, of course, administrative agencies can change their positions. State reviewing courts, however, will look to the agency to explain its reasons for a departure from prior conclusions.⁹

7 And on the federal level courts have upheld an agency’s departure from precedent where the agency, acting within its discretion, has acknowledged the departure, and adequately explained the basis for the new approach.¹⁰ One federal court stated the matter this way: “[Agency] inconsistency provides a basis for rejecting an agency’s interpretation only in ‘rare circumstances such as when an agency provides no explanation at all for a change in policy, or when its explanation is so unclear or contradictory that we are left in doubt as to the reason for the change in direction.’”¹¹

III. CONCLUSION

8 As noted, Staff did not take a position below on whether Waste Management has made the required showing under the “satisfaction of the commission” criterion. We do not

⁷ Order 07, ¶ 15.

⁸ *Pac. N.W. Transp. v. Utils. & Transp.*, 91 Wn. App. 589,597 (1998) (discussing identical statutory language in RCW 81.68.040).

⁹ *Vergeyle v. Employment Security*, 28 Wn. App. 399, 404, 623 P. 2d 736 (1981), review denied, 95 Wash. 2d 1021 (1981).

¹⁰ Richard J. Pierce, “Administrative Law Treatise”, Fifth Edition, § 11.5 (2013 Cumulative Supplement).

¹¹ *International Rehabilitative Sciences v. Sebelius*, 688 F. 3d 994, 1001(9th Cir. 2012).

intend to imply by the general discussion above, that staff is now taking a position on this issue.

DATED this 8th day of April, 2013.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General of Washington

A handwritten signature in cursive script that reads "Steven W. Smith". The signature is written in black ink and is positioned above a horizontal line.

STEVEN W. SMITH
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff