

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

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|------------------------------------|---|---------------------------|
| STERICYCLE OF WASHINGTON, INC., |) | DOCKET TG-110553 |
| |) | |
| Complainant, |) | |
| |) | STERICYCLE'S MOTION FOR |
| v. |) | SUMMARY DETERMINATION AND |
| |) | RESPONSE TO WASTE |
| WASTE MANAGEMENT OF |) | MANAGEMENT'S MOTION TO |
| WASHINGTON, INC., |) | DISMISS |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

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I. INTRODUCTION

1. Stericycle of Washington, Inc. (“Stericycle”)¹, through its attorneys Garvey Schubert Barer, Stephen B. Johnson and Jared Van Kirk, respectfully submits this Motion for Summary Determination and Response to Waste Management’s Motion to Dismiss. As discussed at the prehearing conference on April 29, 2011, this memorandum constitutes (1) Stericycle’s Motion for Summary Determination that Waste Management of Washington, Inc. (“Waste Management”) has abandoned any authority it may once have had to offer biomedical waste collection and transportation services under G-237, and (2) Stericycle’s response to Waste Management’s Motion to Dismiss Stericycle’s Complaint and Petition.

2. Stericycle’s Motion for Summary Determination is brought pursuant to WAC 480-07-380, RCW 34.05.437, and Civil Rule 56 and raises issues of law and the application of law that concern RCW 81.77.030 and RCW 81.77.040, together with other statutes and rules cited below.

3. Fifteen years after selling its assets and leaving the market for biomedical waste collection and transportation, Waste Management now seeks not only to revive its abandoned authority, but also to do so without the threshold regulatory review and oversight by the Commission that is normally required of new entrants into biomedical waste collection. This is allowable, according to Waste Management, because the

¹ Stericycle of Washington, Inc. (G-244) is located at 20320 80th Avenue S., Kent, WA 98032.

authority to provide biomedical waste collection services is just another form of solid waste authority conferred under its general solid waste certificate G-237, authority it can use or not, when and how it pleases.

4. Waste Management is incorrect. Washington Supreme Court precedent, Commission precedent, and the solid waste statute, Chapter 81.77 RCW, all provide that a common carrier that is unable or unwilling to exercise its authority to provide services otherwise within the scope of its authority loses the right under its certificate to provide such services. The policy reasons that support this conclusion are especially trenchant with respect to biomedical waste collection services, which the Commission has recognized must be evaluated under different standards than those applicable to general solid waste, and for which the Commission bears a particular responsibility to ensure that such services are provided in a manner that is protective of public health and responsive to the unique needs of biomedical waste generators.²

5. On the undisputed facts, Waste Management abandoned its authority to provide biomedical waste collection services when it ceased providing such services in 1996. Waste Management has for the past 15 years been both unable and unwilling to provide such services to generators within the territories covered by G-237. Because the

² The Commission is the only state agency that regulates biomedical waste collection in Washington. Counsel for Waste Management showed her unfamiliarity with the regulatory regime for biomedical waste when she suggested at the April 14, 2011 open meeting of the Commission that the Washington Department of Ecology ("Ecology") exercises regulatory authority in this area. While Ecology reviews permits granted by jurisdictional health departments for solid waste handling facilities, including biomedical waste processing facilities, Ecology plays no role in regulating biomedical waste collection or transportation. The Commission is the only state agency with authority to regulate the collection and transportation of infectious biomedical waste.

need to ensure public safety is paramount, the Commission must recognize this abandonment of authority by amending G-237 to restrict Waste Management from engaging in biomedical waste collection and transportation until Waste Management applies for new authority and submits to Commission scrutiny under RCW 81.77.040 with respect to its proposed biomedical waste collection services. Only in this way can the Commission meet its responsibilities to supervise and regulate biomedical waste collection in Washington in the public interest.

6. Waste Management's Motion to Dismiss asserts that Stericycle's abandonment claim should be dismissed. Stericycle's Motion for Summary Determination serves as its opposition to Waste Management's Motion to Dismiss on the abandonment issue. Waste Management's other arguments in support of its Motion to Dismiss are premature. If Stericycle succeeds on its Motion for Summary Determination on the abandonment issue, these issues (and others) will almost certainly be addressed in a subsequent application proceeding. If this proceeding continues beyond the abandonment issue, Stericycle will undoubtedly seek leave to amend its Complaint to add claims challenging Waste Management's rates, rules and practices with greater specificity, based on harm actually incurred since Waste Management's recent tariff filing. Moreover, Stericycle's claims and Waste Management's arguments present issues of fact that cannot be resolved in any event without a hearing. Accordingly, Waste Management's Motion to Dismiss must be denied.

II. PROCEDURAL BACKGROUND³

7. In late 2010, a Waste Management employee began advising some Washington biomedical waste generators that Waste Management intended to begin a new biomedical waste service at some point in the future. Declaration of Michael Philpott (hereinafter “Philpott Decl.”), ¶4. On January 6, 2011 the Commission approved the addition of “WM Healthcare Solutions of Washington” as a trade name under G-237, publicly disclosing for the first time that Waste Management intended to begin offering biomedical waste services at some point in the future. Exhibit A, Order Adding Trade Name, Docket No. TG-110023.

8. On February 10, 2011, Stericycle filed a Petition and Complaint with the Commission, challenging several aspects of the new biomedical waste service anticipated from Waste Management, including a claim that Waste Management had abandoned its authority under G-237 to provide such services. Exhibit B, Stericycle Petition, p. 5-6, ¶9, Docket No. TG-110287. In a Notice of Opportunity to Comment, the Commission indicated its position that Waste Management’s pre-marketing of a new service to be provided in the future and designation of a new trade name did not establish an actual case or controversy that could be adjudicated by the Commission. Exhibit C, Notice of Opportunity to Comment, Docket No. TG-110287. In response, Waste Management

³Stericycle’s Motion for Summary Determination relies on the exhibits and declarations filed with this Motion, together with all pleadings and filings under this Docket No. 110553. Exhibits in support of this Motion for Summary Determination and Response to Motion to Dismiss are attached and listed in a Table of Exhibits. All of these exhibits are documents from the Commission’s files or other public agency files of which the Commission may take judicial notice. In addition, Stericycle relies in support of its Motion on the Declarations of James Polark and Michael Philpott, filed herewith.

commented that “[b]ecause Waste Management has not filed a tariff rate for collecting biomedical waste, there is presently no case or controversy before the Commission.” Exhibit D, Comments of Waste Management, Docket No. TG-110287. On March 10, 2011 the Commission agreed with Waste Management and declined to initiate an adjudicative proceeding on Stericycle’s Petition. Exhibit E, Decision Not to Initiate Adjudicative Proceeding, Docket No. TG-110287. The Commission noted that, although Stericycle contended that Waste Management had abandoned its biomedical waste authority, the Commission had no jurisdiction to consider abandonment unless and until Waste Management either commenced service or sought authorization to commence service, neither of which had yet occurred. Id. The Commission indicated that Stericycle could oppose Waste Management’s authority to conduct the anticipated new service only when a proposed tariff was filed. Id.

9. One week later, On March 18, 2011 Waste Management filed a proposed tariff for biomedical waste services in the territories covered by G-237. Exhibit F, Waste Management Proposed Tariff No. 1, Docket No. TG-110506. On March 21, 2011, Stericycle filed a Complaint and Petition asserting for the second time that Waste Management had abandoned its biomedical waste authority under G-237 and asserting numerous substantive reasons why Commission review of the proposed service was required in the public interest. Stericycle Complaint and Petition, Docket No. TG-110553. This second Complaint was in direct response to the Commission’s decision that it lacked jurisdiction to consider Stericycle’s claims until Waste Management had sought approval

of a biomedical waste tariff. Waste Management's initial tariff filing was rejected by the Commission because it was filed on one day notice without evidence of customer support.

10. On March 30, 2011, Waste Management filed a new tariff on seven days notice -- after the filing of Stericycle's second Complaint. Exhibit G, Waste Management Proposed Tariff No. 2, Docket No. TG-110552.

III. FACTS

11. In May 1996 Waste Management filed Tariff MW-1, a new tariff under certificate G-237 for "collection of medical wastes in specialized containers" in portions of King and Snohomish counties.⁴ Exhibit I, Tariff MW-1, Docket No. TG-960654. Tariff MW-1 was approved on June 26, 1996. Exhibit J, WUTC Staff Memorandum Approving MW1, Docket No. TG-960654.

12. On July 2, 1996, Waste Management filed a proposed amendment to the service territory covered by MW-1, seeking to add biomedical waste services in parts of additional western Washington counties. See Exhibit K, Complaint and Order Suspending Tariff Filing, Docket No. TG-960863. The Commission suspended this filing pending an investigation and determination of whether biomedical waste services were within the scope of G-237's "rubbish" collection authority in those areas. Id. Waste Management subsequently withdrew the proposed amendment. Exhibit L, Request and Approval of Withdrawal of Filing, Docket No. TG-960863.

⁴ At the time of this filing, Waste Management was known as Washington Waste Hauling and Recycling, Inc. It changed its name to Waste Management of Washington, Inc. in 1999. Exhibit H, Certificate of Amendment of Certificate of Incorporation; Declaration of James Polark, ¶2.

13. On December 20, 1996, Waste Management and Stericycle, Inc., Stericycle's parent company, executed an Asset Purchase Agreement by which Waste Management's parent company and its subsidiaries, including Waste Management, sold the majority of their biomedical waste business nationwide to Stericycle, Inc., including all their Washington customer accounts, business and assets, for approximately \$11 million. Declaration of James Polark (hereinafter "Polark Decl."), ¶3, Exhibit 1 to Polark Decl. (Asset Purchase Agreement); see also Exhibit M, SEC Form 8-K. Schedule 1 to the Asset Purchase Agreement lists tangible assets previously used by Waste Management in Washington and sold to Stericycle. Polark Decl., ¶2, Exhibit 1 (excerpts of Schedule 1 to Asset Purchase Agreement). Schedule 2 to the Asset Purchase Agreement lists the Washington biomedical waste customer accounts sold to Stericycle, including customer accounts in Auburn, Bellevue, Bothel, Duval, Enumclaw, Kennewick, Kent, Kirkland, Prosser, Redmond, Renton, Richland, Seattle, Spokane, and Tukwila. Polark Decl., ¶2, Exhibit 1 (excerpts of Schedule 2 to Asset Purchase Agreement). Waste Management represented that "[a]ll of the Customer Accounts are presently receiving services from [Waste Management]." Polark Decl., Exhibit 1 (Asset Purchase Agreement, ¶6).

14. As part of the sale of its Washington biomedical waste customer accounts, business and assets, Waste Management entered into a five year non-compete agreement in which it agreed not to conduct biomedical waste collection within 75 miles of Renton, Redmond, and Kennewick, the Washington service locations identified in Schedule 3 to the Asset Purchase Agreement, an area covering the population centers of King, Pierce,

Snohomish, Benton and Franklin counties. Polark Decl., Exhibit 1 (Asset Purchase Agreement, ¶12; excerpts of Schedule 3 to Asset Purchase Agreement). The five year non-compete agreement also required Waste Management to discontinue owning or operating incinerators or autoclaves for the treatment of medical waste at or within 350 miles of its then-existing facilities in Colorado, Maryland, Arizona, and Texas, the operation of which was to be assumed by Stericycle under the agreement. Polark Decl., Exhibit 1 (Asset Purchase Agreement, ¶¶12-13).

15. Immediately following the sale of Waste Management's biomedical waste business and assets, Waste Management withdrew its filing under Docket No. TG-960863 to extend Tariff MW-1 to additional western Washington territory. Exhibit L, Request and Approval of Withdrawal of Filing, Docket No. TG-960863.

16. Following the sale of its Washington biomedical waste customer accounts, business and assets in 1996 and until its March 30, 2011 tariff filing became effective, Waste Management could not lawfully conduct and did not provide biomedical waste collection services in Washington under G-237. Philpott Decl., ¶3-4. In that time Waste Management did not offer to perform or hold itself out as available to perform biomedical waste collection services in the territories covered by G-237. See id., ¶4. Waste Management did not return to the biomedical waste collection business after the expiration of its 5-year non-competition agreement with Stericycle. In its Answer to Stericycle's Complaint in this proceeding, Waste Management admitted "that it has not had a tariff for biomedical waste collection for the past 15 years." WM Answer, ¶20.

17. In sum, Waste Management engaged in biomedical waste collection operations in Washington for a brief period in mid-1996 but later that year sold its Washington customer accounts, assets and business to Stericycle, withdrew its biomedical waste tariff and discontinued biomedical waste collection operations under G-237. Waste Management has not conducted biomedical waste collection operations in Washington since 1996, nor was Waste Management legally capable of providing such services, given the absence of a Commission-approved tariff for such services. Thus, from 1996 through the filing of Stericycle's original Petition and second Complaint in this matter, and until Waste Management's second tariff filing went into effect on or about April 6, 2011, Waste Management was both unable and unwilling to provide biomedical waste collection services in Washington.⁵

IV. ISSUES PRESENTED AND RELIEF REQUESTED

18. The following issues are before the Commission on Stericycle's Motion for Summary Determination:

(1) Does the Commission have authority to find that Waste Management has abandoned biomedical waste collection authority under G-237 and to amend G-237 to delete abandoned biomedical waste authority?

⁵ Waste Management has argued that, prior to its recent tariff filings, its solicitation of potential customers for a future service constituted "operation" as a biomedical waste collection company. WM Motion to Dismiss, pp.6, 11-12, ¶¶15, 31. While Stericycle previously expressed the view that the solicitation of customers brought Waste Management's activities within the purview of Commission oversight and was sufficient to satisfy the "case or controversy" requirement for the initiation of an adjudicative proceeding, clearly the solicitation of potential customers for an anticipated, future service did not constitute a current exercise of biomedical waste collection authority under G-237. Waste Management could not provide or offer to provide any biomedical waste collection services prior to April 6, 2011, the date on which its Tariff No. 2 went into effect under the Commission's rules.

(2) By being unable and unwilling to conduct biomedical waste operations for 15 years, including the year preceding the filing of Stericycle's Complaint in this proceeding, has Waste Management abandoned its biomedical waste collection authority under G-237?

(3) Should G-237 be amended to delete the biomedical waste collection authority that Waste Management abandoned in 1996?

(4) Should Waste Management's Motion to Dismiss be denied?

19. Stericycle respectfully requests that the Commission grant Stericycle's Motion for Summary Determination and issue an Order holding as follows:

(1) That the Commission has the authority to find that Waste Management has abandoned its biomedical waste collection authority under G-237 and to amend G-237 to delete the abandoned biomedical waste authority;

(2) That Waste Management has abandoned its biomedical waste collection authority under G-237;

(3) That G-237 will be amended to delete the abandoned biomedical waste collection authority; and

(4) That Waste Management's Motion to Dismiss will be denied.

V. ARGUMENT AND AUTHORITY

A. The Commission's Authority to Find that Waste Management Has Abandoned its Biomedical Waste Authority is Deeply Rooted in Law and Commission Practice.

20. Waste Management has abandoned its authority to conduct biomedical waste collection and transportation services under G-237. For over a half-century, the

Washington Supreme Court and the Commission have recognized that the authority granted to a common carrier in a permit will lapse and be extinguished if not exercised.⁶ It is equally well established that a common carrier can abandon a portion of its authority, geographic, commodity or service type, through non-exercise and that the Commission will narrow the scope of a permit to reflect such abandonment. The solid waste statute, RCW 81.77.030(6), specifically authorizes the Commission to amend a solid waste common carrier's G-certificate in the event of partial abandonment. The Commission has upheld its authority to recognize a partial abandonment of solid waste authority and to appropriately narrow a G-certificate where abandonment has been shown.

- i. The Commission's authority to amend G-237 to reflect Waste Management's abandonment of its biomedical waste authority is based on well established law and Commission precedent.

21. In 1958, the Washington Supreme Court held that a common carrier permit was a property interest that cannot be canceled or amended without notice and a hearing. Lee & Eastes, Inc. v. Public Service Comm'n, 52 Wn. 2d 701, 702 (1958). Nevertheless, the Court affirmed the Commission's authority to deny the transfer of a "dormant" permit, which the Commission defined to include a permit that was not "in active and regular use." Id.

22. The concept of "dormancy" resulting from a carrier's non-exercise of its authority, established in Lee & Eastes, has continued to guide the Commission in abandonment cases. A substantial body of precedent establishes the Commission's

⁶ This is the flip-side of a common carrier's duty to serve to the limits of its authority.

authority to cancel a common carrier permit that has been abandoned and, accordingly, bar the transfer of the abandoned permit. See, e.g., Order M. V. No. 14797, In re General Delivery Service, Inc., Hearing No. P-76507 (July 1994) (finding abandonment); Order M. V. No. 145830, WUTC v. Toledo Trucking, Inc., Hearing Nos. H-5005; P-75157 (December 1992) (canceling a common carrier permit found to be abandoned); c.f. Order M. V. No. 132877, In re Paffile Truck Lines, Inc., Hearing Nos. P-68392; P-68434 (December 1985) (recognizing the Commission's authority to restrict a permit in the case of abandonment but, on facts of that case, finding that the carrier did *not* abandon its permit).

23. The Supreme Court and the Commission have further held that a common carrier's permit can be curtailed through a *partial* abandonment of particular services authorized by a carrier's permit. In Herrett Trucking Company v. Public Service Comm'n, 61 Wn. 2d 234, 240 (1963), the Supreme Court held that a portion of the authority granted in a common carrier permit had lapsed as a result of non-exercise by the permit holder. The Court reviewed the Commission's approval of the transfer of a permit authorizing the transportation of building materials, heavy machinery, and bulk cement. The Commission held that the permit's authorization to transport heavy machinery and building materials had not lapsed or become "dormant" as a result of non-exercise. The Supreme Court reversed the Commission as to the portion of the permit authorizing transportation of building materials, finding that this portion of the permit had lapsed and could not be transferred. Thus, the Supreme Court in Herrett Trucking reached two important

conclusions: (1) that a *portion* of authority defined by commodity or service type could lapse or be abandoned through non-exercise and (2) that the Commission must bar transfer of the abandoned portion of a carrier's permit, narrowing the carrier's property interest.

24. Subsequent Commission decisions have consistently recognized the Commission's authority to restrict a common carrier permit due to partial abandonment of particular commodities or service types. See, e.g., Order M. V. No. 144753, In re R.C. Kercheval, Inc., Hearing No. P-74415 (March 1992) (finding abandonment of a portion of a permit authorizing the hauling of heavy machinery and building materials); c.f. Order M. V. No. 143760, In re Mercer Trucking Co., Inc., Hearing No. P-74033 (August 1991) (recognizing the Commission's authority to find a partial abandonment but finding, on facts of the case, that carrier did *not* abandon that portion of its authority authorizing transport of metallic ores).

25. In sum, there is no doubt that a common carrier such as Waste Management can abandon a portion of its certificated authority by failing to exercise its authority as to a particular commodity or a distinct service type. The law recognizing such abandonment is longstanding and reflected in both Supreme Court and Commission decisions. It is equally well established that the Commission may restrict the exercise of a common carrier's permit with respect to the abandoned authority, notwithstanding that the permit is a valuable property interest.⁷

⁷ With this precedent as background, Waste Management's contention that a certificate cannot be "fragmented" because it is a property right is without basis. WM Motion to Dismiss, p.9, ¶25. There is no

- ii. The Commission's authority to amend G-237 to reflect Waste Management's abandonment of biomedical waste authority is based on the express terms of RCW 81.77.030(6) and clear Commission precedent.

26. The Commission's well-established authority to address a common carrier's partial abandonment of its authority is equally applicable to solid waste collection companies operating under the authority of a G-certificate. The Commission's authority to narrow a solid waste company's certificate by amendment, excising abandoned commodities or service types, is explicit in the solid waste statute and in prior Commission decisions.

27. RCW 81.77.030(6) provides that the Commission may, on its own authority or in response to a complaint, alter or amend a certificate when it is shown that the certificate holder has "failed to operate as a solid waste collection company for a period of at least one year preceding the filing of the complaint" Consistent with its longstanding authority to find partial abandonment, the Commission has held that its statutory authority to "alter or amend" an existing certificate means that the statutory "failure to operate as a solid waste collection company" applies equally to abandonment of a portion of certificated authority. Order M. V. G. No. 1403, Mason County Garbage Co. v. Harold LeMay Enterprises, Cause No. TG-2163 (August 1989) (amending G-certificate to exclude residential solid waste collection services) (reversed in part on other grounds, Harold LeMay Enterprises v. UTC, 67 Wn. App 878 (1992)). If the Commission's authority under RCW 81.77.030(6) was limited to cases of total abandonment, the

question that a certificate implicates property rights, but there is also no question that those rights may be restricted or extinguished on the basis of abandonment, following notice and an opportunity to be heard.

authority to “alter or amend” a certificate in the context of abandonment would have no operative meaning.

28. Mason County Garbage Co. v. Harold LeMay Enterprises is directly on point. It is clear precedent for the Commission’s authority to amend G-237 on a finding that Waste Management has abandoned its authority to conduct biomedical waste collection services. In that case, two certificate holders with authority to provide general solid waste collection services in Mason County entered into an agreement that one of them, Mason County Garbage, would provide only residential can and container service and the other, Harold LeMay Enterprises, would provide only drop box service. That division of business persisted for a number of years until Mason County Garbage learned that Harold LeMay Enterprises had begun limited container service and soon intended to begin full residential service. Mason County Garbage filed a complaint with the Commission, contending under RCW 81.77.030 that because Harold LeMay Enterprises had not operated residential can and container services in the previous year it had abandoned that portion of its certificate. Mason County Garbage asked the Commission to amend LeMay’s certificate to delete the abandoned residential can and container service authority. An administrative law judge entered a proposed order finding that Harold LeMay Enterprises’ operation of just drop box services was sufficient to preserve *all* of its certificate authority; essentially taking the view (advocated here by Waste Management) that operating any type of certificated service was enough to preclude a finding of abandonment.

29. The Commission rejected the ALJ's proposed order. Instead, the Commission expressly found that "[w]hen a certificate holder fails to operate a portion of its authority during the test year, the certificate may be altered or amended to reflect that fact and a portion of the authority may be deleted." Id. In reaching this holding, the Commission specifically invoked its historical authority to find partial abandonment of common carrier services, as discussed above, citing Order M. V. No. 132877, In re Paffile Truck Lines, Inc., Hearing Nos. P-68392; P-68434 (December 1985). Additionally, the Commission cited the plain language of RCW 81.77.030(6), which authorizes alteration or amendment of a certificate upon a finding of abandonment. "The very existence of statutory authority to 'amend or alter' certificates contemplates less-than-total geographic or commodity abandonment." The Commission concluded that an "[a]mendment recognizing major service types is appropriate." Id. The LeMay case is controlling; the same result is required here.

- iii. Waste Management's arguments in support of its Motion to Dismiss directly contradict settled law and controlling Commission precedent.

30. Notwithstanding the terms of RCW 81.77.030(6) and the case authority cited above, Waste Management contends that "biomedical waste services may not be fragmented from a traditional solid waste certificate." WM Motion to Dismiss, p.5, ¶12. In effect, Waste Management asks the Commission to disregard over 50 years of Commission and Supreme Court precedent, the language of the solid waste statute, and specific Commission decisions holding that solid waste authority may be abandoned as to

specific commodities or service types. Waste Management has no authority for its position but simply asserts that a finding of abandonment can only be sustained if Waste Management “failed to performed [sic] any solid waste collection services in the preceding year.” Id. at 5, ¶14. But this is precisely the contention that was rejected by the Commission in Mason County Garbage Co. v. Harold LeMay Enterprises -- that exercise of any portion of certificated authority is enough to defeat a claim that other portions of a solid waste carrier’s authority have been abandoned. In effect, Waste Management asks the Commission to disregard its decision in Mason County Garbage Co. v. Harold LeMay Enterprises. Waste Management’s contention must be rejected as a matter of law.

31. Waste Management’s only argument addressing Mason County Garbage Co. v. Harold LeMay Enterprises is that the Court of Appeals supposedly “expressed skepticism on the question of whether a portion of a solid waste certificate can be abandoned.” Id. at 7, ¶19. This assertion is, however, incorrect. In Harold LeMay Enterprises v. UTC, 67 Wn. App. 878 (1992), the Court of Appeals simply assumed without deciding that the Commission had authority to amend a certificate upon a finding of partial abandonment, deciding only that the Commission’s factual findings did not support the Commission’s holding (discussed below). 67 Wn. App. 878, 883. This is not a statement that reflects the view of the Court of Appeals, one way or the other, on the Commission’s legal authority. However, as the Court of Appeals recognized, Washington’s courts are bound to give the Commission’s interpretation of the law substantial weight. Id. at 881. Waste Management’s argument that the appellate court’s

decision to accept the Commission's legal authority without discussion somehow limits its precedential value is without merit.⁸

32. Waste Management attempts to distort the meaning of RCW 81.77.030(6) by arguing that the statute “authorizes the *revocation* of a ‘certificate,’ not a single right granted by a certificate.” WM Motion to Dismiss, p.5, ¶14 (emphasis added). But this “argument” is entirely based on a self-serving, selective quotation of a portion of the relevant statute. The operative language is *not* that the statute authorizes *revocation* of an abandoned certificate, a consequence that may follow a *total* abandonment of authority, but rather the statutory language that authorizes the Commission to “alter or amend” a certificate to reflect a carrier's abandonment of its authority. As the Commission recognized in Mason County Garbage Co. v. Harold LeMay Enterprises, this language clearly indicates that a certificate may be altered or amended to delete a portion of authority that has been abandoned. Waste Management simply skips this language, skips the holding of the Commission in Mason County Garbage Co. v. Harold LeMay Enterprises, and fails to present any coherent argument that a partial abandonment of a authority to transport a particular commodity or offer a particular type of service cannot result in amendment of a certificate to delete the carrier's authority as to that commodity or service type.

⁸ Waste Management also completely fails to address the Commission and Supreme Court decisions holding that a portion of a common carrier's authority can be abandoned. Although those cases arose in the procedural context of requests to transfer authority, the principle that permit authority may be partially abandoned is in no way dependent on or limited to that procedural context.

B. The Importance of the Commission's Careful Exercise of its Authority to Ensure Biomedical Waste Services are Protective of Public Health, Meet Generator Needs and Serve the Public Interest Further Supports a Finding of Abandonment.

33. The Commission's legal authority to amend Waste Management's certificate G-237 to reflect its 15-year abandonment of biomedical waste collection services is well established by statute and by judicial and Commission precedent. Commission precedent specific to biomedical waste further supports this authority and underscores the importance of Commission supervision to ensure that biomedical waste collection services are provided in a manner that is protective of public health and otherwise in the interests of biomedical waste generators and the broader public. Specifically, the Commission's biomedical waste rules and decisions demonstrate the Commission's recognition (1) that biomedical waste collection services are subject to specialized regulatory requirements; and (2) that there is a need to ensure that biomedical waste collection services are protective of public health and adequately address the risk of liability to generators who must rely on biomedical waste collection and disposal services regulated by the Commission.

34. The Commission has long recognized that biomedical waste is a specialized service that presents unique considerations for generators, the public and the Commission. This has produced a body of law that treats biomedical waste collection under unique standards, rather than as an indistinguishable part of solid waste collection under a G-certificate.

35. Even though biomedical waste is classified as solid waste, and even though RCW 81.77 does not differentiate among specialized types of solid waste, the Commission has nevertheless “recognized the differences in market and in operation between community universal solid waste collection, on the one hand, and specialized operations such as collection of hazardous and biohazardous wastes on the other” and held that “biohazardous waste collection service is evaluated differently when looking at performance to the Commission’s satisfaction and at requirements of the public convenience and necessity.” Medical Resource Recycling Sys., Inc. Cause No. GA-76820, *3-4 (May 1994). Thus, in evaluating the public’s need for additional biomedical waste services the Commission is careful to determine that biomedical waste collection companies and their employees are “specially equipped” and “trained” in order to fulfill the “distinct and different operational requirements” of the industry. Order M. V. G. No. 1452, In re Am. Env. Mgmt., Hearing No. GA-874 (November 1990). Considerations relevant to evaluating the services of biomedical waste collection companies include “the technology of disposal, ability to coordinate disposal, the nature of protection afforded collected waste, and protections against potential statutory and civil liability.” Ryder Dist. Resources, Inc., Cause No. GA-75154, *22 (January 1993). Commission proceedings in biomedical waste collection cases have involved extensive demonstrations of operational capability unique to biomedical waste to establish that a new biomedical waste service provider will meet the needs of biomedical waste generators and the public. See, e.g., Am. Env. Mgmt., at *23-25 (finding extensive facts in support of new provider’s capability,

including the credentials of managers, the sufficiency of proposed containers, training offered to staff and customers, specifications of specialized transport vehicles and storage facilities, required protective gear, and the sufficiency of manuals on the handling of biomedical waste).

36. The need for this special scrutiny is self evident; “[t]he wastes in question include highly toxic substances that could spread dread diseases. The public health consequences of releases can be severe.” Id. “It is a matter of statewide concern that biomedical waste be handled in a manner that protects the health, safety, and welfare of the public, the environment, and the workers who handle the waste.” WAC 480-70-426.

37. Additionally, the Commission has recognized that the unique needs of biomedical waste generators require specialized services and facilities. Generators have “a heightened responsibility to determine the method of disposal, and its needs for collection and disposal are of a different character than its needs for universal waste collection.” Ryder Dist. Resources, at *21.

38. The Commission’s recognition of the special requirements applicable to biomedical waste collection services was developed through consideration of applications for new authority to provide biomedical waste collection services. The unique requirements of biomedical waste collection are, however, of no less importance in the rarer circumstance where a new biomedical waste collection service is proposed by an existing certificate holder with no recent or significant experience in biomedical waste collection. The same risks to public health and to biomedical waste generators are

implicated when the new entrant has a G-certificate but has never exercised that authority or has not done so for many years.

39. In its abandonment jurisprudence, the Commission has recognized that “new authorities should not be created without a demonstration that there is a public need for additional service. If ‘inactive’ authorities are transferred to persons who begin operations, *the effect is the same as the creation of a new authority and it should not be allowed in the absence of proof of need through an application for new authority.*” Paffile Truck Lines, Inc., Order M.V.G. No. 132877, Cause Nos. P-68392 & P-68434, at *5-6 (December 1985) (citation omitted) (emphasis added).

40. Following this precedent, the Commission should reserve to itself *at least* as much authority to reject biomedical collection services founded upon abandoned authority as it does with respect to general solid waste collection services. Mason County Garbage Co. v. Harold LeMay Enterprises was a case involving general solid waste collection services and the Commission recognized a partial abandonment of authority by amending a carrier’s G-certificate. Because of the inherent dangers of biomedical waste and the specialized needs of generators, the Commission must retain the authority to amend a certificate to delete abandoned biomedical waste authority and, thus, require a new application for authority before permitting the initiation of biomedical waste collection services by the holders of G-certificates that have either never exercised biomedical waste collection authority or discontinued providing biomedical waste collection services many years before.

41. The result of a decision to amend Waste Management's G-certificate here will serve precisely the interests that the Commission has recognized are most important in the regulation of biomedical waste collection. If Waste Management's certificate is amended to delete biomedical waste authority, the Commission will retain the ability to evaluate a proposed new biomedical waste service in the context of an application by the proponent to regain the abandoned authority. The Commission has previously recognized an application as the preferred posture in which to evaluate a proposed new service. See Paffile Truck Lines, at *5-6. The Commission will be able to meet its responsibility to ensure that prospective providers of biomedical waste collection services meet all the important benchmarks of public convenience and necessity, including financial and operational fitness, public need, the availability of satisfactory service from existing carriers and the public interest. Waste Management, like every other party seeking to offer a new biomedical waste collection service, can and should be required to demonstrate the need for its services and its fitness to provide them.

42. Waste Management argues that the Commission should *not* amend G-237 to delete its abandoned biomedical waste collection authority because the Commission has supposedly expressed a policy in favor of competition within the biomedical waste sector and that this policy should trump oversight of new service providers. See WM Motion to Dismiss, pp.6-7, ¶¶16-18. Waste Management asserts that recognizing its abandonment of authority is tantamount to "protecting Stericycle's monopoly." Id. at 7, ¶18. This argument is, however, fundamentally at odds with the public policy reflected by RCW

81.77.040. To the extent the Commission has recognized the value of competition in the biomedical waste sector, it has done so in the context of an application proceeding in which a new entrant's fitness and the need for its services has been fully demonstrated and vetted. See, e.g., Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., Hearing No. GA-868 (November 1990) (cited by WM Motion to Dismiss, p. 7, ¶17). The Commission has never expressed support for unsupervised or unregulated entry into any aspect of solid waste collection, much less biomedical waste collection, nor would such a policy position be consistent with the legislative policy expressed in chapter 81.77 RCW.

43. Moreover, the Commission's position on competition in biomedical waste collection arose out of Commission consideration of applications for new authority and its determinations in some of those application cases that a new entrant would meet the needs of generators whose needs were not then being met by existing carriers. So, the position of the Commission has been that competition may be allowed in biomedical waste if a prospective entrant can establish that there is a public need for its services, that its services are in the public interest and that it is fit, willing and able to safely provide them. This is precisely what Waste Management will be required to do if Stericycle's Complaint is upheld and this motion granted. The potential benefits of competition do not trump the Commission's responsibility to ensure that there is a public need for Waste Management's services, that existing carriers are not meeting that need to the satisfaction of the Commission, and that Waste Management is fit, willing and able to provide the proposed services in a manner that is protective of public health and otherwise in the public interest.

Indeed, the Commission has expressly stated that “mere preference for competition does not demonstrate a need for an additional carrier.” Sureway Medical Svcs., at *9.

C. Waste Management Has Abandoned Any Authority Under G-237 to Collect and Transport Biomedical Waste.

44. A certificate holder has abandoned a portion of its authority when, for at least the year preceding the complaint, “the certificate holder either is unavailable to serve customers or refuses to serve potential customers” in its territory. Harold LeMay Enterprises v. UTC, 67 Wn. App. 878, 883 (1992) (emphasis added).⁹ Such a finding must be based on objective evidence and not the subjective intent of the certificate holder. See, e.g., Order M. V. No. 14797, In re General Delivery Service, Inc., Hearing No. P-76507 (“The intention to abandon a permit is measured objectively -- by the actions of the permit holder in the circumstances in which it finds itself.”).

45. The appellate court reviewing the Commission’s decision in Mason County Garbage Co. v. Harold LeMay Enterprises adopted the quoted standard to differentiate what it considered to be an insufficient showing that a certificate holder had merely “not performed” or “not held itself out” as available to perform the relevant services. Harold LeMay Enterprises, 67 Wn. App. at 883. The court stated that it could not adopt a mere non-performance or failure to hold out standard “since we have been cited no authority for the argument that a certificate holder must hold itself out as providing a particular type of service.” Id.

⁹ The Court of Appeals also used the formulation “unwilling or unable” to describe its test for abandonment, apparently viewing the two formulations as identical. Id.

This may have been an unfortunate instance in which the appellate court was simply not provided with all relevant precedent. There is, in fact, a substantial body of Commission authority that permits an inference of inability or unwillingness from a carrier's failure to provide services or to hold itself out to the public as available to provide services. See, e.g., Order M. V. No. 144753, In re R.C. Kercheval, Inc., Hearing No. P-74415; Order M. V. No. 143760, In re Mercer Trucking Co., Inc., Hearing No. P-74033. These cases are consistent with the Harold LeMay Enterprises "unable or unwilling" standard but they go on to provide that, absent compelling evidence from the service provider of, for example, a circumstance beyond its control, failing to provide services or failing to hold oneself out as available to provide services will result in an appropriate inference of inability or unwillingness to serve and, hence, abandonment.

46. In re Mercer Trucking Co. is a good example of this principle applied in a case considering the abandonment of a portion of permit authority. The Commission held that "[a]s a safeguard against the transfer of authorities that have been intentionally abandoned, the Commission requires a permit holder to demonstrate that it was ready, able and willing, and held itself out to the public to handle the traffic in question during an appropriate test period. When there is a cessation of holding out for service, an intent to abandon the property right may be inferred." Order M. V. No. 143760, In re Mercer Trucking Co., Inc., Hearing No. P-74033. The Commission determined that Mercer Trucking had not held itself out as available to transport mined ores, a portion of its permitted authority, but in that case declined to draw an inference of abandonment only

because Mercer Trucking's conduct had been caused by forces beyond its control, namely the lack of any available business for transportation of the relevant ores. Id. The Commission concluded that it "cannot expect a carrier to engage in useless activities solely to keep its authority alive." Id. By implication, however, the Commission can and should expect carriers to engage in normal "holding out" activities if they wish to avoid a conclusion that they have abandoned their authority.

47. In In re R.C. Kercheval the Commission applied this principle again in a partial abandonment case. Order M. V. No. 144753, In re R.C. Kercheval, Inc., Hearing No. P-74415 ("the Commission requires a permit holder to demonstrate that it was ready, able and willing, and held itself out to the public to handle the traffic in question When a carrier has ceased activity or holding out during a period when service would normally be expected, an intent to abandon the permit will be inferred . . . unless the cessation was caused by circumstances over which the carrier had no control."). The Commission found that the carrier had not performed or held itself out as available to perform the relevant services and, in the absence of evidence of a lack of available business or other circumstances beyond its control, held that the authority had been abandoned. Id.

48. For these reasons, although Waste Management's inability or unwillingness to provide biomedical waste services is required to demonstrate abandonment, precedent indicates that this standard can be met by an inference from Waste Management's failure to provide or offer service that is not rebutted by a showing from Waste Management that

it was prevented from providing or offering biomedical waste services due to circumstances beyond its control. As discussed above, there are particularly good reasons to draw such an inference with respect to biomedical waste collection authority. The Commission has determined that special substantive standards apply with respect to biomedical waste and has consistently sought to ensure that new biomedical waste services will be protective of public safety and meet the specialized needs of generators. Where, as here, a prospective new entrant in the biomedical waste sector proposes to initiate an admittedly new service without Commission scrutiny after leaving the business and failing to provide or offer such services for 15 years, a finding of abandonment is both justified and required.

49. Waste Management has abandoned its biomedical waste authority under *any* standard, whether through inference from its failure to provide those services and hold itself out as providing those services, or directly through the undisputed fact that Waste Management was both unable and unwilling to provide biomedical waste services for the past 15 years.

50. The test year for evaluating abandonment is the year preceding the filing of a complaint. Stericycle filed its initial petition with the Commission on February 10, 2010 asserting, among other claims, that Waste Management had abandoned its biomedical waste authority. Exhibit B, Stericycle Petition, p.5-6, ¶9, Docket No. TG-110287. The Commission acknowledged this contention in its decision declining to initiate an adjudicative proceeding on jurisdictional grounds. Exhibit E, Decision not to Initiate

Adjudicative Proceeding, Docket No. TG-110287. The test year is therefore, February 10, 2010 through February 10, 2011.¹⁰ The test year preceding Stericycle's Complaint was, in fact, the culmination of a 15 year period in which Waste Management was unavailable -- both unable and unwilling -- to provide biomedical waste collection services, did not provide those services, and did not hold itself out to provide those services.

51. It is undisputed that Waste Management ceased providing biomedical waste services in Washington in December 1996 when it sold its Washington customer accounts, assets and business to Stericycle, Inc. See Philpott Decl., ¶3; Polark Decl., ¶4, Exhibit 1 (Asset Purchase Agreement and excerpts of Schedules 1-3 thereto); Exhibit M, SEC Form 8-K. It is also undisputed that Waste Management did not offer or provide such services and was legally unable to provide such services for the subsequent 15 years -- until at least April 6, 2011 -- and throughout the test year. See Philpott Decl., ¶¶3-4.

52. Waste Management's cessation of biomedical waste collection services and continuing decision not to provide those services was voluntary and clear evidence that Waste Management was, in fact, unable and unwilling to provide such services. In December 1996 Waste Management voluntarily relinquished its biomedical waste business for a substantial purchase price in cash and notes from Stericycle. Polark Decl., ¶4,

¹⁰ Waste Management may contend that the test year is March 21, 2010 through March 21, 2011, based on the filing date of Stericycle's second Complaint, filed on the first business day after Waste Management filed its first, ultimately rejected, biomedical waste tariff. This interpretation does not meet the purposes of the test year because conduct after a certificate holder is put on notice of an abandonment claim should not be considered when deciding abandonment. See Am. Env. Mgmt. Corp., at *16 ("The kind of service provided by an existing certificate holder after a person files a competing application cannot be used to defeat an application."). As a practical matter, however, it makes no difference because Waste Management did not provide or offer services, and continued to be unavailable and unable to do so until at least April 6, 2011 -- seven days after filing its tariff and 15 days after the filing of Stericycle's second Complaint.

Exhibit 1 (Asset Purchase Agreement and excerpts of Schedules 1-3 thereto). That agreement included the sale of all Waste Management's Washington customer accounts, assets and business to Stericycle. *Id.* Thus, Waste Management not only gave up operating its biomedical waste services, it affirmatively transferred its customers to Stericycle, all of which were then receiving services from Waste Management. Polark Decl., ¶4, Exhibit 1 (Asset Purchase Agreement, ¶6, excerpts of Schedule 2 to Asset Purchase Agreement). No forces beyond Waste Management's control forced Waste Management's exit from the biomedical waste collection business.

53. Part of the Asset Purchase Agreement was a non-compete provision in which Waste Management agreed not to provide competitive biomedical waste services for five years. This, too, was a voluntary choice that Waste Management made in exchange for value. Polark Decl., Exhibit 1 (Asset Purchase Agreement, ¶12; excerpts of Schedule 3 to Asset Purchase Agreement). Waste Management never attempted to operate or offer biomedical waste services in areas of Washington that were not precluded by the non-competition agreement and where there was available business. Further, even when the non-compete period expired in 2001, it is undisputed that Waste Management failed to reinstitute biomedical waste collection services in any part of Washington. Of course, Stericycle's ongoing business demonstrated the existence of paying customers throughout the state. Waste Management's choice not to provide biomedical waste collection services, despite the ongoing demand for such services, continued from 1996 through the test year.

54. The undisputed facts establish that Waste Management was unavailable to provide biomedical waste collection services. C.f. Order M. V. No. 143760, In re Mercer Trucking Co., Inc., Hearing No. P-74033 (finding that carrier did *not* abandon a portion of its authority, the transport of metallic ores, only where the carrier had ceased such operations due to circumstances beyond its control, namely the lack of available business transporting such materials); Order M. V. No. 144753, In re R.C. Kercheval, Inc., Hearing No. P-74415 (inferring intent to abandon where carrier failed to offer or provide services by choice). The undisputed facts demonstrate that such services were unavailable from Waste Management. Despite the expiration of the contractual bar to competition, Waste Management did not attempt to provide such services for 10 more years, through and including the test year.

55. Further, it is undisputed that Waste Management canceled its only biomedical waste tariff following the sale of its Washington customer accounts and assets and did not obtain an approved tariff until after Stericycle's Complaint in this proceeding was filed almost 15 years later. In its answer to Stericycle's Complaint, Waste Management admits for the record "that it has not had a tariff for biomedical waste collection for the past 15 years." WM Answer, ¶20; see also Philpott Decl., ¶3. It is self-evident that a certificate holder who does not have an approved tariff to provide biomedical waste services is objectively unavailable and legally unable to provide those services. WAC 480-70-236 ("No company may provide solid waste collection service until it files, and the commission approves, a tariff."). And, once again, Waste Management made no

effort, including in the test year, to obtain an approved tariff, even after the contractual restriction on competition in certain territories expired. Indeed, in paragraphs 6 and 8 of its March 4, 2011 Comments in response to the Commission's Notice of Opportunity to Comment in TG-110287, Waste Management admitted that during the prior 15 years it had been unavailable to provide biomedical waste services, asserting that as of March 4 it intends to "take steps necessary to collect and transport biomedical waste in Washington at some point in time" in the future and that it "has not yet filed a tariff rate for collection of biomedical waste." Exhibit D, Comments of Waste Management, Docket No. TG-110287.

56. Finally, as part of the 1996 sale of its biomedical waste collection business, Waste Management sold all specialized assets used in providing biomedical waste collection services and discontinued operation of its biomedical waste processing facilities. Polark Decl., ¶4, Exhibit 1 (Asset Purchase Agreement; excerpts of Schedule 1 to Asset Purchase Agreement). Polark Decl., Exhibit 1 (excerpts of Schedule 1 to Asset Purchase Agreement). The sale of specialized biomedical waste transportation equipment indicates that in addition to giving up its biomedical waste customers and operations, Waste Management gave up the specialized biomedical waste capability that would have allowed it to conduct operations in the future. The Commission considers the sale of specialized assets strong evidence of inability to provide services and abandonment. See, e.g., Order M. V. No. 143760, In re Mercer Trucking Co., Inc., Hearing No. P-74033 (noting that the carrier "did not have equipment available to transport mine ores and ore concentrates during [the] test period . . ."); Am. Env. Mgmt. Corp., at *16 (allowing additional

biomedical waste service where a non-performing certificate holder lacked the specialized equipment and resources needed to provide the service even if it had received a request for services).

57. Waste Management does not dispute any of these facts. See WM Motion to Dismiss. Waste Management's *only* argument that it has not abandoned its biomedical waste authority is that it began soliciting potential customers for future biomedical waste collection services in the test year. Id. at 6, 11-12, ¶¶15, 31. Waste Management tries to leverage the fact that Stericycle argued that these acts of solicitation were events establishing a justiciable case or controversy to support Waste Management's position, even though Waste Management argued, and the Commission agreed, that this prospective solicitation for future services did not create a case or controversy. The Commission concluded that Stericycle's arguments then, and Waste Management's arguments now, were not correct: "Waste Management activities alleged in the Stericycle Petition [solicitation for potential future services] do *not* rise to the level of 'operating for the hauling of solid waste for compensation.'" Exhibit E, Decision Not to Initiate Adjudicative Proceeding, Docket No. TG-110287. Indeed, the Commission concluded that a dispute based on such activities was a "purely academic issue" because "Waste Management has not entered, or sought Commission authority to enter, into the business of collecting and transporting biomedical waste for disposal in Washington." Id. (emphasis added). A purely academic issue based on non-existent services by a company that was

not operating for the hauling of biomedical waste and which had not yet sought or obtained authority for future services cannot be activity that defeats a finding of abandonment.

D. The Commission Must Amend G-237 to Remove Biomedical Waste Authority.

58. After finding that Waste Management has abandoned its biomedical waste authority, RCW 81.77.030(6) authorizes the Commission to suspend, revoke, alter or amend certificate G-237. In Mason County Garbage Co. v. Harold LeMay Enterprises the Commission recognized the element of discretion implied by the statute's use of the word "may." Order M. V. G. No. 1403, Mason County Garbage Co. v. Harold LeMay Enterprises, Cause No. TG-2163. The Commission stated that its consideration of remedies would be guided by the facts of the case and public policy considerations. Id. The Commission made clear, however, that abandonment will require a restrictive amendment unless the certificate holder demonstrates "compelling public policy considerations" that militate against amendment. Id. The Commission's presumption in favor of a narrowing amendment to delete abandoned authority from a certificate and the high burden on the certificate holder to establish compelling reasons to rebut that presumption is clear from the Commission's LeMay decision. The Commission did not evaluate any facts of the case or public policy arguments pro or con. Rather, the Commission simply held that "there do not seem to be any compelling public policy considerations which would prevent a restrictive amendment of the type requested." Id. (emphasis added).

59. The Commission's common carrier abandonment precedent further supports application of the presumption in favor of restriction, rebuttable by the certificate holder only by showing compelling reasons. In Order M. V. No. 145830, WUTC v. Toledo Trucking, Inc., Hearing Nos. H-5005; P-75157, the Commission noted that cancellation of a common carrier's permit in response to a complete abandonment is also discretionary. In exercising this discretion, the Commission found "no merit in the petition's arguments against cancellation," and explained how none of the facts in that case supported deviation from the presumption of cancellation. Id. Thus, the Commission has established that its discretion to suspend, revoke, alter or amend a certificate due to abandonment is exercised by presuming the appropriateness of cancellation or amendment, depending on the scope of abandonment, and requiring the certificate holder to meet the high burden of establishing compelling reasons of public policy to defeat amendment or cancellation.

60. In this case there are no compelling reasons not to amend G-237 to delete authority for the biomedical waste collection authority that Waste Management abandoned in 1996. Waste Management, by its own admission, has not maintained a tariff for biomedical waste services nor provided such services for 15 years. There is certainly no emergency now, after an absence of 15 years, that requires the Commission to disregard Waste Management's abandonment of its biomedical waste collection authority. Whatever need there may be for Waste Management's services can be established in an application proceeding. Waste Management seeks to initiate biomedical waste collection services on the basis of its abandoned authority in an undisclosed manner, following undisclosed

policies and procedures, after undisclosed training of its employees, with undisclosed equipment, using undisclosed processing and disposal facilities, to undisclosed customers. The Commission is the only state agency with authority to ensure public safety and to protect the public interest in the performance of biomedical waste collection services. Given the unique public safety concerns related to the handling of biomedical wastes, no reason proffered by Waste Management for allowing it to initiate biomedical waste collection on the basis of authority it abandoned 15 years ago can possibly be more compelling than the Commission's duty to ensure that the proposed service is protective of public safety and health, responds to a public need and serves the public interest.

61. Waste Management's only argument that the Commission should exercise its discretion against amendment of G-237 seems to be that allowing Waste Management to offer biomedical waste collection services would promote competition. See WM Motion to Dismiss, pp.6-7, ¶¶16-18. That argument has been addressed above at ¶¶ 42-43, and that discussion is equally relevant here. In short, Waste Management is asserting that competition is the paramount public policy interest of the Commission when, in fact, it is distinctly subordinate to the duty to ensure that a prospective biomedical waste service provider establishes a need for its services and that it is fit, willing and able to provide them in a manner protective of the public health and otherwise consistent with the public interest.

E. Waste Management's Motion to Dismiss Stericycle's Other Claims Should be Denied.

62. The foregoing discussion in support of Stericycle's Motion for Summary Determination stands as Stericycle's response to Waste Management's Motion to Dismiss the abandonment claim. Waste Management has, however, also moved to dismiss some of the additional claims in Stericycle's Complaint. This portion of the Motion to Dismiss must also be denied.

63. It is premature to consider or decide Waste Management's Motion to Dismiss on Stericycle's non-abandonment claims. As Judge Moss recognized at the prehearing conference and in the Prehearing Conference Order, the key issue to be resolved on the present expedited procedural schedule is the issue of abandonment. This is because the abandonment of authority and Stericycle's request for a restrictive amendment of Waste Management's certificate G-237 will have a profound effect on the appropriate procedure for resolving Stericycle's remaining claims, as well as the scope and content of those claims.

64. If Stericycle is successful on its abandonment claim, Waste Management will be barred from conducting biomedical waste collection services unless and until it successfully prosecutes an application for biomedical waste collection authority. There will be no need to resolve Stericycle's remaining claims in this proceeding. Stericycle will reassert those claims, and others appropriate to an application proceeding, if and when a new Commission proceeding is commenced on Waste Management's application for

authority. For this reason, Stericycle indicated in its Complaint that its claims beyond abandonment were likely to be considered when “Waste Management seeks authority from the Commission to provide the proposed services.” Stericycle Complaint, p. 3, ¶3(e).

65. Further, in the event issues remain to be determined in this proceeding following resolution of abandonment issue, Stericycle will undoubtedly seek leave to amend its Complaint to add claims challenging Waste Management’s rates, rules and practices as unjust, unreasonable, and anti-competitive, based on Waste Management’s unlawful conduct and the harm actually incurred since the initiation of Waste Management’s service.

66. There is little point for the parties or the Commission to expend time and resources on substantive claims that will either never be reached in this proceeding or will be amended and supplemented prior to their ultimate resolution. If issues remain to be determined in this proceeding following resolution of Stericycle’s abandonment claim, a new prehearing conference should be held and a schedule established for submission of amended pleadings, dispositive motions, and an evidentiary hearing on any issues that remain. In all events, Stericycle’s claims that Waste Management’s rates, rules and practices as unjust, unreasonable, and anti-competitive present fact-intensive issues that cannot be properly resolved prior to discovery or without an evidentiary hearing.

VI. CONCLUSION

67. For the foregoing reasons, Stericycle respectfully requests that the Commission issue an order determining:

(1) That the Commission has the authority to find that Waste Management has abandoned biomedical waste collection authority under G-237 and to amend G-237 to delete abandoned biomedical waste authority;

(2) That Waste Management has, on the undisputed facts, abandoned its biomedical waste collection authority under G-237;

(3) That, because Waste Management has abandoned its biomedical waste collection authority, G-237 must be amended to delete biomedical waste collection authority; and

(4) That Waste Management's Motion to Dismiss must be denied.

Dated this 6th day of May, 2011.

Respectfully submitted,

GARVEY SCHUBERT BARER

By 

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Attorneys for Stericycle of Washington, Inc.

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 as indicated below, pursuant to WAC 480-07-150.

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Dated at Seattle, Washington, this 6th day of May, 2011.

A handwritten signature in blue ink that reads "Vickie L. Owen". The signature is written in a cursive style with a large initial "V".

Vickie L. Owen