

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STERICYCLE OF WASHINGTON, INC.,)	THURSTON COUNTY
)	CAUSE NO.
)	13-2-01696-3
Plaintiff,)	
)	PETITION FOR
vs.)	JUDICIAL REVIEW
)	
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,)	
)	
Defendant.)	

THE COURT'S RULING

BE IT REMEMBERED that on [!CREATION DAY 1], the above-entitled matter came on for hearing before the HONORABLE ERIK PRICE, Judge of Thurston County Superior Court.

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APPEARANCES

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ALSO PRESENT: STEVE BONDS
MIKE FILLPOTS
ANTHONY KEENAN
MIKE WEINSTEIN

1 Before the Honorable ERIK PRICE, Presiding
2 Representing the Plaintiff, JARED VAN KIRK
3 Representing the Defendant, STEVEN W. SMITH
4 Representing the Intervenor, JESSICA GOLDMAN
5 SONYA WILCOX, Official Court Reporter

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8 THE COURT: Please be seated. I appreciate
9 the patience of the parties. I found the time useful
10 as I reviewed my notes and the arguments made by the
11 parties. Before I get started with my ruling, and I
12 am prepared to rule today, let me compliment the
13 parties on the briefing. Although it was probably
14 more voluminous than I would have wanted, it was,
15 nevertheless, of high quality, and I appreciate the
16 briefing from all sides.

17 Also, before I get started with my ruling, let me
18 say what I typically say in administrative review
19 cases, and that is our administrative law in this
20 state involves a system under which there are many
21 critical decisions made with much resources expended
22 by the parties at the administrative level by
23 administrative decision makers and administrative
24 agencies.

25 There are, at times, independent decision makers,

1 but there are often not entirely independent decision
 2 makers. It is some time before parties get to the
 3 place of Superior Court or even longer to go higher
 4 than that before there is a decision maker that is
 5 less linked with the agencies that are making
 6 determinations affecting parties.

7 Before taking this side of the bench, I, myself,
 8 had much experience in this area, and because of
 9 that, I take very seriously the importance of this
 10 stage of the proceedings. Only if there is
 11 meaningful review at the Superior Court level and
 12 higher does, in my view, the administrative system
 13 provide assurances to parties that they receive a
 14 level of detachness from the decision maker. So
 15 that's my opening spiel.

16 With respect to this case, Stericycle has brought
 17 a petition for review challenging the decision of the
 18 Washington Utilities and Transportation Commission
 19 permitting Waste Management of Washington Inc. to
 20 have biomedical waste service in territory that
 21 Stericycle previously held the permit for. In their
 22 brief, the Commission argues the following: That the
 23 burden is on Stericycle; that there is great
 24 deference to the agency in these types of cases and
 25 an exercise of discretion should be reviewed under an

1 arbitrary and capricious standard; because of the
 2 specific language of RCW 81.77.040, there is a very
 3 high degree of deference that needs to be provided to
 4 the Commission, specifically, the phrase "to the
 5 satisfaction of the Commission."

6 The Commission further argues there is no
 7 Legislative policy for a monopoly demonstrated under
 8 RCW 81.77.040, that the Commission has approved
 9 overlapping waste collectors in the past, and there
 10 is a great difference between biomedical waste and
 11 neighborhood garbage collection, and, finally, that
 12 there is ample evidence in the record to support the
 13 decision of the Commission.

14 The intervenor, Waste Management, (and I will
 15 just refer to it as "Waste Management,") argues much
 16 the same: again, that the standard of review is
 17 deferential; the Commission, not the courts, needs to
 18 decide what is satisfactory in terms of service and
 19 cites to the *ARCO Products Service vs. Utilities and*
 20 *Transportation Commission* decision of 125 Wn.2d 805.

21 Stericycle replies to those arguments that the
 22 distinction the Commission is making between solid
 23 waste and biomedical waste has no basis in the
 24 statute; to adopt the Commission's argument of what
 25 makes "satisfactory service" would make the

1 requirement meaningless; and the PCN standards, which
 2 are an earlier paragraph of 81.77.040, already take
 3 into account the public sentiment as to the need for
 4 the service.

5 It argues that the limitation of the
 6 "satisfactory service" requirement cannot be
 7 satisfied by a finding that more service providers
 8 are "appropriate," "beneficial," or "consistent with
 9 the public interest," because that's already taken
 10 care of earlier in the statute; "need" for
 11 competition is just another element of the PCN
 12 determination and cannot justify disregarding the
 13 legislature's preference for a monopoly delivery
 14 model; and further, that this involves a "de novo"
 15 review, which is not a deferential standard like the
 16 arbitrary and capricious review.

17 Stericycle also argues that the Commission fails
 18 to offer any analysis of this statute, and even
 19 though the Commission has discretion, there are
 20 statutory limits. A phrase argued by Stericycle that
 21 caught my attention was when it argued that perhaps
 22 the Commission has discretion to decide how to
 23 evaluate service, but the Legislature says the
 24 subject of the evaluation must be the "existing
 25 service," and that that is consistent with what the

1 Court did in the *Superior Court Refuse Removal* case,
2 81 Wn. App. 43.

3 Finally, Stericycle argues there is nothing in
4 the record to substantiate any inadequate service
5 from Stericycle, and, moreover, that the benefits of
6 competition has no evidentiary support in the record
7 either.

8 When analyzing the arguments of the parties,
9 perhaps the best place to start is: What is the
10 decision below that everybody is talking about?
11 There are two statements that articulate what I
12 believe to be core holding of the Commission from the
13 Final Order Denying Petition for Review of Order 07
14 and Granting Application. On July 10, 2013,
15 paragraph 14 of the decision says, "The Commission
16 finds that its application of the statutory
17 provisions authorizing additional entry into the
18 biomedical waste collection market is not limited to
19 circumstances of inadequate service. We conclude
20 that an applicant can also demonstrate that the
21 existing companies will not provide service to the
22 satisfaction of the Commission by proving that (1)
23 generators of biomedical waste have an unmet need for
24 an effective competitive alternative to the incumbent
25 service providers, and (2) the new entrant will

1 enhance the effectiveness of competition in the
 2 marketplace."

3 An additional statement explaining the
 4 Commission's position, in my view, comes from the
 5 February 14, 2013, initial order, which this Court,
 6 of course, understands is not the actual order it is
 7 reviewing, but, nevertheless, there is an explanation
 8 there in paragraphs 14 and 15 that I found pertinent,
 9 and that is, "The Commission will find companies'
 10 service satisfactory only to the extent that the
 11 service provided furthers the Commission's ultimate
 12 goal of ensuring that consumers have access to this
 13 service at fair, just, and reasonable rates, terms,
 14 and conditions. The record evidence and the
 15 Commission policy favoring effective competition
 16 demonstrate that the Commission's prior decisions
 17 that a desire for competition is insufficient to
 18 satisfy 81.77.040 do not reflect the realities of the
 19 current marketplace. Accordingly, the Commission
 20 will not rely on those prior decisions to make the
 21 requisite determination in this case."

22 From those two statements, I gleaned two
 23 "take-aways." One is where I started, and that is,
 24 under RCW 81.77.040, can "satisfactory service" as
 25 used in that statute relate to market conditions

1 outside the control of the incumbent provider or, as
2 argued by Stericycle, is that determination limited
3 to the service characteristics of the incumbent
4 provider?

5 The second take away I gleaned from those two
6 statements from the underlying orders is that this is
7 in some respects a departure from what the Commission
8 has done previously.

9 So we are all clear, let me restate for the
10 record exactly what language we are talking about in
11 81.77.040. The language says, "When an applicant
12 requests a certificate to operate in a territory
13 already served by a certificate holder under this
14 chapter, the Commission may issue the certificate
15 only if the existing solid waste collection company
16 or companies serving the territory will not provide
17 service to the satisfaction of the Commission."

18 Now, experts on that language will note that I
19 edited out a small clause, but in substance that's
20 what the critical language is. So, again, the
21 question presents itself: How much discretion does
22 the Commission have to focus on market conditions
23 rather than the service characteristics of the
24 incumbent provider?

25 Stericycle makes many arguments, but on this

1 point it principally makes an argument focused on the
 2 language of the statute and the Legislative intent as
 3 it sees it, "incumbent provider," which is to say
 4 that the language focused on the "service provided by
 5 the incumbent provider" must mean that the focus need
 6 be on the service provided by the incumbent provider.

7 There is support for that construction from the
 8 case we have discussed at oral argument, the *Superior*
 9 *Refuse Removal* case, 81 Wn. App. 43, which the Court
 10 remanded to the Commission for reconsideration of
 11 four elements or four criteria, and each one of those
 12 criteria were solely related to the incumbent
 13 provider.

14 There is also logical appeal to Stericycle's
 15 argument in terms of the language of the statute
 16 relating to the service, the word "provide" and the
 17 word "service" related to the incumbent provider, it
 18 is rational to think that that needs to be where the
 19 Commission panel looks to see if they are satisfied,
 20 that is, looking to the incumbent provider.

21 Now, on the other hand, there is authority cited
 22 to this Court that suggests that the wording of
 23 81.77.040 gives great discretion to the Commission,
 24 rather than the courts, to decide what "provides
 25 service to the satisfaction of the Commission" means.

1 Both the Commission and Waste Management argue that
 2 the language of 81.77.040 is similar to the language
 3 in the *ARCO* case, which previously I cited at 125
 4 Wn.2d 825. In the context of a different statute,
 5 the Legislature gave the Commission the discretion to
 6 decide what refund was just and reasonable. The
 7 Supreme Court in that decision looked at that
 8 language and said, "Thus, the statute, itself,
 9 clearly states who is to determine what is 'just and
 10 reasonable' -- it is the Commission, not the courts.
 11 For this reason also, we defer to the WUTC's
 12 determination of whether the allocation of the refund
 13 is 'just and reasonable.'"

14 There is, in my view, merit to both arguments.
 15 There is merit to Stericycle's focus on the language.
 16 There is merit, too, to the Commission's position
 17 that "satisfactory service" as used in this statute
 18 should not be so limited. I think counsel for
 19 Stericycle analyzed the *ARCO* case accurately when he
 20 said the Court sort of said something was ambiguous
 21 and then it later kind of retreated from that ... and
 22 that's in some respects where I am with this statute.

23 I think the analysis of what a statute means with
 24 "service" is not clear, but what is clear is that the
 25 Legislature said and used the phrase "to the

1 satisfaction of the Commission." That, in my view --
 2 and I indicated this I think at oral argument -- is
 3 somewhat unusual. The Legislature frequently
 4 requires decisions to be made with some sort of
 5 adjective like "reasonable" or "justified" or
 6 "substantial." It is uncommon, in my view, to tie
 7 that adjective of "satisfactory" to the determination
 8 of the agency.

9 Moreover, I'm persuaded that the technical nature
 10 of the industries regulated by the Commission provide
 11 a plausible reason for the Legislature to use that
 12 phrase. I'm also persuaded by a statement made by
 13 counsel for Waste Management when it said on page 18,
 14 "The complexity and evolution of the medical waste
 15 market and its difference from universal garbage
 16 service are precisely the reasons why the Legislature
 17 delegated to an expert regulatory agency the
 18 determination as to whether incumbent service was or
 19 was not satisfactory. That the Commission's
 20 jurisprudence continues to evolve with the markets it
 21 regulates can be no indictment of the Commission's
 22 application of its substantive expertise and
 23 discretion."

24 Now, Stericycle claims that this decision would
 25 make the remaining requirements of the statute

1 meaningless or redundant. I'm not persuaded by that
 2 argument. While there is overlap, great overlap,
 3 between the considerations of public sentiment of the
 4 earlier paragraph of 81.77.040, I'm convinced that is
 5 not identical to the Commission's decision to value
 6 competition in a particular industry.

7 Now, as I said earlier, there are two things that
 8 were take aways from the decision below that the
 9 Court is reviewing. One is the decision to look at
 10 market conditions, and the other was that this is a
 11 departure, to some extent, from its previous
 12 decisions.

13 The parties dispute, and they have disputed at
 14 oral argument, whether this is a huge departure or an
 15 incremental one. As indicated at oral argument, the
 16 Court certainly understands the benefits to
 17 consistency in agency decisions, and policy
 18 predictability in regulated industries is important.
 19 When agencies adopt or don't adopt policies but
 20 rather make decisions in scattershot basis, that
 21 shift from one situation to another, that is poor
 22 government.

23 But the law does not lock agencies into one
 24 approach. I believe it is a correct statement of the
 25 law to say that agencies must follow established

1 precedent, unless the departure is explained. There
 2 is a cite from *Thompson v. U.S. Department of Labor*,
 3 855 F.2d 551, 558 (9th Cir. 1989), that has not been
 4 cited to this Court. It says, "It is an elemental
 5 tenant of administrative law that an agency must
 6 either conform to its own precedents or explain its
 7 departure from them."

8 So did the Commission sufficiently explain this
 9 departure? I spent some time, of course, with the
 10 decisions below, and looking at them, by my count,
 11 the Commission devoted more than five pages to
 12 explaining its decision to depart from its past
 13 decisions or its arguable departure from its past
 14 decisions that competition alone was insufficient to
 15 justify an additional provider.

16 I don't know that I would necessarily make the
 17 same decision if I was in the position of the
 18 Commission. I don't know that I would or that I
 19 wouldn't, but it's not this Court's job, as it sees
 20 it, to revisit that issue, if it was an exercise of
 21 discretion that was permissible under the statute and
 22 consistent with this rationale. I find that it was.

23 Deference to the agency in this, its decision
 24 under this statute, I find was not an error of law,
 25 and because it was not an error of law, I find no

1 arbitrary and capricious decision making. I further
2 find that substantial evidence supports the decision,
3 and, accordingly, I dismiss the petition.

4 That being said, are there any questions,
5 Mr. Van Kirk? And you will stand.

6 MR. VAN KIRK: Sorry about that. I guess
7 the only thing I didn't hear you address was the
8 issue about the Legislature's intent, at least not
9 specifically. It's up to you whether you want to
10 address that, but that would be a question that's in
11 my mind.

12 THE COURT: I find I am unpersuaded by the
13 arguments made on legislative intent and that the
14 Legislative intent, to the extent this Court can
15 discern it, was to give the Commission discretion to
16 make the decisions it made.

17 Any questions, Ms. Goldman?

18 MS. GOLDMAN: No, your Honor. Thank you.

19 THE COURT: Mr. Smith?

20 MR. SMITH: No questions, your Honor.

21 THE COURT: Do the parties want to work out
22 an order or present it at a later time.

23 MR. SMITH: Your Honor, I have a proposed
24 order I have not shared with counsel, but it's very
25 bare bones, given that the Court of Appeals will look

1 directly at the administrative decision, if it goes
2 up. I can distribute it now or later.

3 THE COURT: Mr. Van Kirk, do you have a
4 preference on whether you want to think about
5 strategically what type of order you want?

6 MR. VAN KIRK: Slight preference for having
7 Mr. Smith circulate it and submit it to the Court
8 later, but not a strong presence. I haven't seen it,
9 so it's hard for me to say.

10 MS. GOLDMAN: It's one paragraph.

11 MR. VAN KIRK: The only thing that I would
12 ask is to specifically identify the submissions that
13 the Court had considered. It just says "the
14 submissions" here. I don't know if that is a concern
15 of the Court.

16 THE COURT: Under these circumstances, it
17 would not be a concern of the Court, but if parties
18 are unwilling or unable to agree on a proposed order
19 at this time, an order can be presented at a later
20 time. Mr. Smith, your thoughts?

21 MR. SMITH: I'm comfortable with that, your
22 Honor. Ms. Goldman hadn't seen this order in advance
23 either. We were making assumptions in advance by
24 distributing it, and she may have some concerns, too.

25 THE COURT: With that in mind, with nothing

1 further, I do wish everybody a good day. We will be
2 in recess.

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4 (PROCEEDINGS ADJOURNED)
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CERTIFICATE OF REPORTER

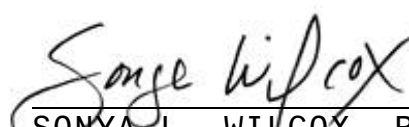
STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, SONYA L. WILCOX, RPR, Official Reporter
of the Superior Court of the State of Washington, in and
for the County of Thurston, do hereby certify:

That I was authorized to and did
stenographically report the foregoing proceedings held in
the above-entitled matter, as designated by Counsel to be
included in the transcript, and that the transcript is a
true and complete record of my stenographic notes.

Dated this day, March 27, 2014.



SONYA L. WILCOX, RPR
Official Court Reporter
Certificate No. 2112