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BEFORE THE WASHINGTON STATE

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UTILITIES AND TRANSPORTATION COMMISSION

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STERICYCLE OF WASHINGTON, INC.,) Docket TG-121597

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Complainant,)

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v.) Pages 1-36

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WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a)

WM HEALTHCARE SOLUTIONS OF WASHINGTON,)

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Respondent.)

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PREHEARING CONFERENCE, VOLUME I

11

Pages 1-36

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ADMINISTRATIVE LAW JUDGE ADAM E. TOREM

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10:03 A.M.

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NOVEMBER 28, 2012

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Washington Utilities and Transportation Commission

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OLYMPIA, WASHINGTON, NOVEMBER 28, 2012

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10:03 A.M.

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P R O C E E D I N G S

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JUDGE TOREM: Let's be on the record.

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This is the docket of TG-121597. It's Wednesday morning, and it is November the 28th, already, 2012, a little after ten o'clock.

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I'm Administrative Law Judge Adam Torem presiding in the case today, a complaint filed by Stericycle of Washington, Incorporated, against Waste Management of Washington, Incorporated, doing business as WM Healthcare Solutions of Washington.

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I've got all the parties assembled, and I want to have their appearances taken first, and then we'll talk briefly about if there's anyone that wants to petition to intervene. I don't see anybody else here but parties, and there is no bridge line today, so we'll address a request for someone to be an interested party, and then we'll talk about discovery, procedural schedule, and a number of other connections with other cases going on at the Commission.

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Let me start with the Complainants, and Mr. Johnson and Mr. Van Kirk?

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MR. JOHNSON: Thank you, Your Honor. Stephen Johnson

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1 representing Stericycle of Washington, Inc., and my colleague
2 Jared Van Kirk, from the law firm of Garvey Schubert Barer.

3 JUDGE TOREM: All right. And I have all of your
4 contact information already in what will soon become Appendix A.
5 Waste Management, please?

6 MS. McNEILL: Thank you, Your Honor. Polly McNeill
7 with Summit Law Group, and my colleague Jessica Goldman, with
8 Summit Law Group. And also with us today is Andrew Kenefick,
9 in-house with Waste Management.

10 JUDGE TOREM: All right. Thank you very much.
11 And Commission Staff is present today.

12 MS. WOODS: Good morning, Your Honor. I'm Fronda
13 Woods, Assistant Attorney General, representing Commission
14 Staff. I have with me today Penny Ingram from Commission Staff.

15 JUDGE TOREM: Excellent.

16 Did you want me to add Ms. Ingram to the service list
17 e-mail as well?

18 MS. INGRAM: We have a good system worked out.

19 MS. WOODS: Apparently not.

20 JUDGE TOREM: All right. We'll save you the e-mails,
21 Ms. Ingram.

22 All right. Those are the appearances for today, and
23 if you'll make sure that the court reporter has all of your
24 contact information before you leave today, that would be
25 fantastic.

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1 We did get yesterday a letter from Mr. James Sells
2 asking to represent the Washington Refuse and Recycling
3 Association, the WRRRA, as an interested party that's under WAC
4 480-07-340(1)(c). And he's asked not to be a participating
5 party, but simply to receive copies of everything, so I'm going
6 to add him, unless there's an objection to Appendix A as an
7 interested party, and send everything to him electronically.
8 He's asked that the Commission serve him. That doesn't
9 necessarily mean that the parties need to serve him all the
10 pleadings, but he will get all copies of all the orders,
11 notices, and other things sent out by the Commission. If the
12 parties want to keep him otherwise informed of what they're up
13 to, I'll leave that up to you. But as I see the rules, it's a
14 rule that imposes the Commission to keep him informed.

15 Are there any objections to that?

16 MR. VAN KIRK: No, not from Stericycle.

17 MS. McNEILL: No, not from Waste Management.

18 MS. WOODS: No, Your Honor.

19 JUDGE TOREM: All right. So we'll have Mr. Sells and
20 the WRRRA as an interested party as described.

21 Let's turn, then, to the topic of this case. This is
22 a complaint filed. I understand it's somewhat connected to
23 Docket TG-120033. My understanding is that Judge Kopta has got
24 a prehearing conference with the same parties this afternoon on
25 that case to get ready for a litigated hearing next week.

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1 Just for your information today, I think your notice
2 indicated your prehearing conference this afternoon would be
3 downstairs in Room 108. That won't be necessary. You can stay
4 in place here in Room 206 for this afternoon as well.

5 This case here differs. I understand 120033 involves
6 an application by Ms. McNeill's client to extend their existing
7 certificate; this case is a complaint filed with regard to
8 allegations about Waste Management's activities in collecting
9 biomedical waste and how they're treating it; and there's also a
10 motion now being presented for summary judgment as to whether or
11 not this is recycling or solid waste collection.

12 So those are the main topics here, though, but the
13 complaint alleges two different claims: One about unlawful
14 rebating, and the second, which I believe the motion deals with,
15 is misclassification; essentially, unauthorized service and
16 making offers to provide service below tariff rates for
17 recycling services. So those are the two claims.

18 Let me turn back to Stericycle and ask Mr. Johnson
19 and Mr. Van Kirk if you have any further description you want to
20 put on the record, and then other issues we need to take up to
21 deal with that. And maybe describe the purpose of the motion
22 that you presented and if I have accurately established if it
23 only deals with the second claim, or if I have missed something
24 in Claim 1 as well.

25 MR. JOHNSON: Your Honor, this is Steve Johnson for

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1 Stericycle. I think you've characterized the complaint very
2 accurately. The motion that's on the table for summary
3 determination is a motion dealing with one of two claims. It
4 deals with the issue of service misclassification, as you've
5 described it, and service outside Waste Management's
6 certificated territory. If the material being handled is
7 properly categorized as biomedical waste subject to Commission
8 regulation, then Waste Management is unlawfully serving outside
9 of its territory.

10 Similarly, if it is properly characterized as
11 biomedical waste subject to Commission jurisdiction, regulatory
12 jurisdiction, then offering that service at non-tariff rates
13 inside Waste Management's existing service territory is also a
14 violation of law. That's the issue that's been presented by our
15 motion for summary determination. The issue with respect to the
16 unlawful rebating is a separate -- conceptually and factually,
17 it's a separate set of issues.

18 I don't know if you want me to describe that in any
19 more detail, but it seems to me that at this point, the motion
20 for summary determination and Waste Management's response are on
21 the record. We think that it might be of assistance for Your
22 Honor to take oral argument on that at some appropriate point,
23 perhaps after the hearing next week in the Waste Management
24 application case, if Your Honor thinks that would be useful. We
25 think it probably would be just to sort of put a point on things

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1 on the motion dealing with misclassification and unlawful
2 service outside of the certificate territory.

3 With respect to the other issue, I think there may
4 well be a hearing required, the rebating issue. It depends. We
5 believe the discovery would be appropriate and is permitted
6 under the Commission's rules for anticompetitive practices in
7 violation of RCW Chapter 81 -- or Title 81 are alleged as we
8 have done.

9 We have provided some information that's available to
10 us with the complaint. We have, you know, ground around on
11 these issues to some extent in the application case as you know,
12 but Judge Kopta has precluded discovery in depth on those issues
13 in that case. Our view was -- and it still is -- that these
14 issues are properly in the application case as well.

15 Nonetheless, Judge Kopta has limited our ability to
16 address them, and so he has invited us, in essence, to bring
17 this complaint case which we have not done. We think that the
18 issues are relevant to the application case, and we would hope
19 that Your Honor can make a disposition at least on the motion
20 for summary determination before the application case is ready
21 for decision so that that can be taken into account in the
22 application case as well.

23 We think -- the sum schedule for discovery we think
24 it's relatively narrow. It should be relatively focused. We
25 think we should be able to wrap it up by the spring or end of

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1 March type of thing, just given how the time goes with these
2 kinds of matters. But that's sort of our view of the issues and
3 how they might be resolved in roughly the scheduled timing.

4 JUDGE TOREM: Okay. Thank you, Mr. Johnson.

5 Ms. McNeill, did you want to weigh in on a couple
6 things, first off, as to the motion and oral argument, if you
7 think that would be helpful from your perspective, and then as
8 to the discovery limitations and anything else that might have
9 been mentioned by Mr. Johnson?

10 MS. McNEILL: Thank you, Judge Torem. Let me
11 initially say that we do not believe oral argument would be
12 necessary in this case, but, certainly, if you deem it to be
13 helpful for your ruling on it, we're happy to do it. We don't
14 think that it's necessary to put a finish on it. I think what
15 has been presented is adequate.

16 With regard to issues about handling the hearing
17 procedures, we have a very different view of how this should go.
18 And on these points, I'm going to cede my microphone to my
19 co-counsel, Jessica Goldman, to discuss with you our view of how
20 we think the hearing should commence.

21 JUDGE TOREM: Okay.

22 MS. McNEILL: Thanks.

23 MS. GOLDMAN: Good morning, Your Honor. We believe
24 that this case is right for determination on motions, and
25 pending before you is, as Mr. Johnson has discussed,

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1 Stericycle's motion for summary determination on the one claim.
2 We filed a brief in opposition to that, which cross-moved on the
3 same claim, and also a cross-motion for summary determination as
4 to the entire case based on its procedural defects.

5 We also anticipate filing a motion for summary
6 determination on the remaining claim if Your Honor does not
7 determine that our global motion for summary determination is
8 appropriate and dismiss the entire case, and we anticipate that
9 will happen in relatively short order. As soon as we can
10 complete the hearing next week, we would get to that motion, so
11 we anticipate that we'd have it to you no later than January for
12 determination.

13 As Mr. Johnson indicates, we have been round and
14 round on several of these issues before, and discovery has been
15 conducted not -- not to the breath and desire of scope that
16 Stericycle would prefer, but all of the documentation that has
17 been submitted in support of their complaint came from the
18 discovery that we conducted in the application proceeding.

19 It's our very firm position that there is no need for
20 any further discovery in this case. They have the evidence they
21 need to make their claims, and really now it's an issue of law.
22 Is this practice, which is fully defined by the contracts which
23 they have submitted and which we will stipulate to their
24 accuracy and that those are indeed the contracts with the
25 relevant generators, are those appropriate? We think that they

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1 fully are, and that -- and we will continue to make those
2 arguments, the second set of those arguments, as to the other
3 claim in a motion for summary determination.

4 We have been through, Your Honor, a bruising,
5 bruising piece of litigation, which we're not quite yet done
6 with, and the discovery process has been, frankly, abusive. We
7 have been through three sets of motions to compel filed by
8 Stericycle, 99 percent of which were denied.

9 We have been through multiple rounds of voluminous
10 numbered data requests, and we -- we believe that that is a
11 completely inappropriate way to handle this process. And given
12 the fact that they have the information they need, we're very
13 keen to make you aware of that process and how it has impacted
14 both the parties, which, frankly, has been felt like
15 bludgeoning.

16 And the Commission Staff itself --

17 JUDGE TOREM: Let me just interrupt.

18 I understand that the case before Judge Kopta has had
19 limitations on discovery. I have reviewed through RMS the
20 dockets, and I understand where your position is coming from. I
21 also understand Stericycle's desire to obtain as much
22 information as possible and use the discovery process
23 aggressively as is allowed under our rules.

24 Let me say that I have read Judge Kopta's discovery
25 limitations. I have skimmed through the motion to compel, and I

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1 can see from the tone of that that's reflected not only in your
2 tone this morning, but Mr. Johnson's leaning forward to hit the
3 microphone and -- and either as well.

4 If that's how the parties are going to conduct it,
5 I'm going to do my best to rein in both sides to give the
6 information that's required and get the information that I need
7 to decide the case so you can characterize it as advocates do.

8 I do understand, Ms. Goldman, the idea to not let the
9 genie out of the bottle if it's not necessary, and the
10 Commission doesn't want to go into formal discovery unless we
11 choose to invoke it.

12 It may be a good idea to not invoke the discovery
13 rules this morning if we're going to proceed on the motions
14 first and then set up a hearing later. It may be, as
15 Mr. Johnson indicated, depending on how I rule on this motion
16 and if I can get it done sooner rather than later so it's on the
17 record before the Commission -- whether it's impactful in Judge
18 Kopta's case or not -- that I get this case done in the month
19 ahead as far as the motion, hear any argument, if I choose to,
20 and then also rule on the motions on the topic of the second
21 claim.

22 I saw actually that Waste Management's electronic
23 copy of its response to the motion came in yesterday. I didn't
24 look closely enough at it to even see that there was a
25 cross-motion for summary judgment on an additional topic. But

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1 just looking at what's before me now, based on the first motion,
2 if that can be decided, it didn't appear there's any further
3 need for discovery on that topic.

4 Mr. Johnson, you've already had, as Ms. Goldman
5 accurately says, items from the other case in declarations and
6 exhibits from Mr. Van Kirk as your supporting documents; is that
7 correct?

8 MR. JOHNSON: Your Honor, with respect to the motion
9 for summary determination, the issues addressed there, we think
10 that's complete. You know, we think that the presentation, the
11 factual presentation is fundamentally not in dispute.

12 JUDGE TOREM: All right. And I haven't read the --

13 MR. JOHNSON: It's an interpretive matter for the
14 Commission to decide what it means, and we have laid it in front
15 of you on the two -- with the two -- our motion and their
16 response. Oral argument, as I said, I think might be helpful,
17 but that should be something that can be disposed of.

18 In terms of Ms. Goldman's other issues, if she's
19 brought a motion that would require the disposition of the
20 entire case, then, of course, that should be addressed. We
21 would, of course, respond to it. I doubt it's going to work
22 that way, but, you know, everybody's entitled to bring their own
23 motions, and the information will resolve them. And if there's
24 something left, we'll go on for a hearing.

25 JUDGE TOREM: Certainly. So what I'm asking you,

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1 though, right now is on the motion you filed, you're not
2 anticipating any additional documentation?

3 MR. JOHNSON: No, Your Honor. We think that's done
4 and done and done.

5 JUDGE TOREM: All right. And, Ms. Goldman, that's
6 your agreement, too, that that particular motion that I haven't
7 read your response yet, there's no need for further discovery?

8 MS. GOLDMAN: That's correct, Your Honor.

9 JUDGE TOREM: Okay. And I know Commission Staff had
10 weighed in on that motion, and I'll get to Ms. Woods in a
11 moment, but I -- it sounds as though I should resolve that
12 motion with an order, and maybe we'll talk again.

13 Again, I haven't read your cross-motion, but whether
14 that should be resolved and whether Mr. Johnson's prepared to
15 address that today at the same time, I don't know. He has a
16 certain amount of time left to respond to it, and whether that
17 would slow things -- and I'll give you some other procedural
18 constraints with my own schedule in January -- you may choose to
19 have me resolve Mr. Johnson's motion first, Waste Management's
20 motion in turn, and then determine if we have a status
21 conference again as to a further procedure in this case and
22 perhaps by then, Mr. Kopta's case in the other docket will be
23 moving toward resolution as well.

24 So that's where I cut you off there, and I just
25 wanted to at least give you an idea of what I'm thinking and

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1 when discovery would be necessary. If we get to a point where
2 the case is resolved, perhaps. You may think you need discovery
3 to respond the motion. I don't know if you're prepared to
4 address that now, Mr. Johnson.

5 MR. JOHNSON: Your Honor, we have not determined how
6 we're going to respond to Ms. Goldman's motion -- or Waste
7 Management's motion and we, of course, reserve our right to do
8 so.

9 JUDGE TOREM: Okay.

10 MS. GOLDMAN: And if I might add, obviously, they
11 just got it yesterday, so they're certainly entitled to an
12 opportunity to review it carefully. But it's a fully procedural
13 argument as to the entire case, and there's really no
14 information from the parties that is relevant at all, other than
15 the complaint and what's pled and the nature of this type of
16 proceeding based on what the statutory permission is.

17 So I think your idea makes a lot of sense, and we're
18 fine to allow those. And I would say that we have a
19 cross-motion on their claim motion, so there are actually three
20 motions pending. We have the cross-motions on the issue claim
21 they have raised, and then we have this second motion by Waste
22 Management as to the entire case. And I think it makes a lot of
23 sense to wait to see how those are resolved and then determine
24 at that point and allow you to determine if there's any possible
25 need for discovery beyond that which has been conducted in the

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1 application proceeding.

2 MS. McNEILL: May I add?

3 The only point that I would add to that is it does
4 make sense for you to rule on our motion really for a dismissal,
5 which is based on the procedural aspects of the filing and the
6 Administrative Procedures Act requirements for dealing with
7 these kinds of complaints.

8 And as Ms. Goldman said, Stericycle also just
9 received our response yesterday. They are entitled, I think, to
10 a response on that, on that new matter, and then it does depend
11 on your ruling, certainly, of the motion that we brought that
12 would eliminate the entire case.

13 Whether we would want to bring a second motion, we
14 believe that the first claim -- I'm kind of dealing with them
15 backwards over here, but the first claim, the rebating claim, we
16 think that as Ms. Goldman alluded, they have the facts that are
17 necessary to bring their claim. We think that the remainder of
18 the arguments are legal, and so we can defer further discussion
19 about discovery or about hearings pending a determination from
20 you on the motions that are before you.

21 But it is certainly our strong conviction that there
22 is no need for further discovery, and that the entirety of this
23 case is subject to resolution by motion practice. But,
24 obviously, we're not going to bring the second motion if there's
25 a possibility of having the entirety of the case dismissed now,

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1 so I just want to make clear that if you do not dismiss this
2 case, then we will immediately be filing a second motion.

3 JUDGE TOREM: Okay. If I understood, Ms. Goldman,
4 what I have before me is Mr. Johnson's motion on behalf of his
5 client, and you've responded to that yesterday. What also came
6 in with that was the cross-motion, and then also a motion to
7 dismiss on procedural grounds, so that's when you added up that
8 there were three motions?

9 MS. GOLDMAN: Yes, Your Honor. We have basically
10 just opposed, slash, cross-moved the same argument on their
11 motion, so you're correct.

12 JUDGE TOREM: Okay. So those are the -- that will be
13 the same issue, and it's just a question of which motion will
14 carry?

15 MS. GOLDMAN: We are unanimously in agreement that
16 their motion should be determined as a matter of law. We should
17 win, but...

18 JUDGE TOREM: Right. You've made it -- it's the same
19 topic, because I've got Motion A and Motion B. One side must
20 win.

21 MS. GOLDMAN: Right.

22 JUDGE TOREM: All right. Or -- well, there's always
23 another option, at least, with these numbers.

24 All right. And then the second, second distinct
25 motion, which would be No. 3 in ordering, is Waste Management's

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1 motion to dismiss on the procedural grounds you've both
2 described?

3 MS. GOLDMAN: Right. And I don't necessarily think
4 that that's the right order. I do think that the procedural
5 motion to dismiss is probably where you should start, given that
6 it does address the propriety of this proceeding from the
7 git-go and what --

8 JUDGE TOREM: Understood. Now, I had not, again,
9 like I said, read into it enough --

10 MS. GOLDMAN: Right.

11 JUDGE TOREM: -- to know there was a new motion
12 there, so it sounds to me that Mr. Johnson really needs time to
13 read it and respond to it.

14 MS. GOLDMAN: Mm-hm.

15 JUDGE TOREM: Given the service dates and looking at
16 the calendar, because of the dispositive motion, I think you
17 have three weeks to respond.

18 MR. JOHNSON: I believe that's right, Your Honor.

19 MS. GOLDMAN: Yes.

20 JUDGE TOREM: So taking that as just the -- the
21 judgment it was served -- we'll call it "perfected service" --
22 today, responses would come in around -- the 19th of December is
23 what the Wednesday three weeks from now is, which would put us,
24 if we wanted to have any oral argument, right into the holiday
25 season. So we can talk about that when we start sketching out a

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1 procedural schedule. It might be helpful, then, to have oral
2 argument, if I chose to have it, on both motions.

3 Again, not having read the new motion and the
4 responses, I don't know what's appropriate, but we might
5 tentatively schedule an oral argument. Then I can send out a
6 notice either docketing or not, but at least pencil something in
7 on your calendars informally as a hold date. And then I'll
8 determine if I want to grant oral argument or not based on
9 reading all of the motions, and then we can have a decision out,
10 it would sound like, sometime in January.

11 MS. GOLDMAN: And what would you propose for the date
12 for the oral argument if you're inclined to that?

13 JUDGE TOREM: Well, let's do that off the record,
14 because I have a few other things to share with you as far as
15 scheduling constraints in January, and determine if we want to
16 rush it or we want to wait.

17 And I don't know how it dovetails with the other
18 case, so I can be flexible to a certain degree. But, again, it
19 depends on the parties' needs, and just reasonable needs for the
20 season as well.

21 MS. GOLDMAN: Can I address the relationship between
22 the two cases that you're raising?

23 JUDGE TOREM: (Nods head.)

24 MS. GOLDMAN: It's our position that there is no
25 relationship. These issues, these precise issues have been

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1 raised to Judge Kopta, and he has ruled that they are irrelevant
2 to the proceeding. He has --

3 JUDGE TOREM: No, I understand that. That's why he's
4 created and suggested that this complaint be filed.

5 MS. GOLDMAN: Right.

6 JUDGE TOREM: But I can see also, depending on where
7 determination comes down from the Commission, as to what Waste
8 Management is applying to do. If it's not solid waste
9 collection, and that's what the ruling turns out to be, it turns
10 out to be recycling, then, perhaps, it does have an impact on
11 what he's doing in the application for the extension. I don't
12 know enough about that case to know.

13 MS. GOLDMAN: And, Your Honor, the issue regarding
14 this recycling is one generator. It's a pilot program. They
15 know that. They have conducted discovery. It's one generator,
16 and it's the one generator that they have raised in this claim.
17 There's nothing there -- out there on this ecoFinity program
18 other than the one generator that they raised.

19 So --

20 MR. JOHNSON: Your Honor, that's, of course, not
21 quite correct because --

22 JUDGE TOREM: Well, I don't want to get into the --

23 MR. JOHNSON: Yeah, I know. I understand that, Your
24 Honor, we should keep it -- keep this confined to what we're
25 here to do, but it is not correct.

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1 JUDGE TOREM: All right. Well, let's --

2 MS. McNEILL: I just wanted to point --

3 JUDGE TOREM: Ms. McNeill, let me just -- I just want
4 to stop the discussion on this altogether.

5 MS. McNEILL: Okay.

6 JUDGE TOREM: We can talk about the timing off the
7 record and whether it makes a difference or not, and maybe
8 you'll disagree on that. I won't be surprised. You know, one
9 party, again, could think that something could influence, and
10 reasonable minds could disagree. Not a problem.

11 Again, we'll just look at the constraints, and if I
12 can get it done in a timely fashion that Judge Kopta can look at
13 the record, great. But it's still going to be just an initial
14 order from an ALJ subject to review by the Commissioners. And
15 if there is an interlocutory review of something that I do here
16 in this case and the Commissioners change it, again, that's when
17 it become precedential, when the Commissioners would enter it.

18 So it may be a strategic issue, but it may not be a
19 legal issue that has to influence Judge Kopta. It won't be the
20 first time in the ALD hallway that judges have gone opposite
21 directions, if that were to occur.

22 So, I understand the parties' desire to have a
23 uniform resolution, but until it gets to the three
24 Commissioners, who were appointed by the Governor, there's no
25 sense of finality. And even from there, federal district courts

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1 have disagreed with us on the Telco side, so some cases continue
2 to drone on.

3 So, Ms. McNeill?

4 MS. McNEILL: Thank you, Judge Torem. I just would
5 like to correct what I think is a misapprehension on your part,
6 which is that if you were to rule in this case that the
7 challenged activity is not regulated, it would not affect Waste
8 Management's application. The application stands for regulated
9 services, and if you were to rule in this case that the services
10 are regulated, then it would simply be considered as part of the
11 operating authority that may or may not be granted in Judge
12 Kopta's case.

13 So I just wanted to make sure that you weren't under
14 the impression that a ruling about the classification could
15 somehow eliminate the need for the application proceeding.

16 JUDGE TOREM: I'm sorry if I gave you that
17 impression.

18 MS. McNEILL: Thank you.

19 JUDGE TOREM: And from my review of the dockets on --
20 and the documents on file in the other case, there are distinct
21 issues that would go on regardless of this one, so I do
22 understand that.

23 Let me turn now to Commission Staff and ask for,
24 Ms. Woods, you to comment on the motions that have been
25 presented. We'll go back to whether Staff thinks, at least on

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1 the original Stericycle argument regarding classification, if
2 there's a need for oral argument, and Staff's impressions based
3 on what you have heard this morning, or perhaps already thought
4 about for how to proceed in this matter.

5 MS. WOODS: Thank you, Your Honor. Staff doesn't
6 have an opinion on whether there needs to be oral argument on
7 Stericycle's motion. Staff did file a response and -- not
8 taking a position on the merits of the motion, but intending to
9 alert the tribunal that there may be some connection between the
10 issues raised in Stericycle's motion and a rulemaking that the
11 Commission initiated that did not complete several years ago.

12 I have read the cross-motion that Waste Management
13 filed yesterday, but I have not had an opportunity to discuss
14 with Staff whether Staff wants to respond to that motion. Just
15 my initial impression is that it does make sense for a
16 cross-motion -- or the motion to dismiss to be considered first
17 before the cross-motions on the question of whether the
18 ecoFinity program is recycling or solid waste collection.

19 Staff does not have a position on discovery. Staff
20 expects to play only a limited role in this proceeding.

21 JUDGE TOREM: Okay. Thank you, Ms. Woods.

22 Mr. Johnson?

23 MR. JOHNSON: Your Honor, the only issue that we
24 would have with the sequence is with the sequence that's been
25 suggested. We think that the motion for summary determination

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1 filed several weeks ago needs to be decided first, and that any
2 further motion practice should flatly be decided in sequence,
3 simple as that.

4 JUDGE TOREM: All right. I feel slightly at a
5 disadvantage for not having gone through the motion when it hit
6 my e-mail box yesterday afternoon to be able to tell you if I
7 have an opinion on the sequence yet, so maybe at this point it
8 makes sense -- we've flushed out all the issues that are at
9 least being presented now and those that Waste Management
10 indicates, depending on if the first set of motions don't go
11 their way, they have another motion that they would like to have
12 time to file -- that we would set up some kind of a procedural
13 schedule at this point.

14 I'm mulling over in my head as to whether discovery
15 should be initiated now or later or if at all in this case, but
16 we can discuss that further when we come back on the record.

17 But I think if we go off the record shortly, we can
18 talk about the procedural schedule, constraints of the season in
19 December and January that might be out there for some, and where
20 we go from here.

21 Is there anything else we need to cover on the record
22 right now?

23 MR. JOHNSON: Your Honor, just on the discovery
24 point, I don't think we're there yet. As you have indicated,
25 there are motions pending that can resolve substantial portions

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1 of the case, it appears.

2 On the other hand, it is clear that our ability,
3 Stericycle's ability, to conduct discovery on the rebating issue
4 in particular were severely truncated in the application case.
5 We wanted to do discovery of generator witnesses. Generator
6 witnesses are the people that know what motivated their decision
7 and what they were offered and what they accepted and what
8 they -- you know, what Waste Management's position was on what
9 we believe were unlawful rebates. And we think we're entitled
10 to discovery on that, and, of course, we would like to argue
11 that.

12 But this isn't the time for that, and what we would
13 like to see you do, however, is to reserve that issue, and,
14 frankly, what we think the correct approach would be is to allow
15 the discovery to proceed in accordance with the rules. The
16 rules authorize discovery in just this kind of case under the
17 discovery rule. If there's anticompetitive practice alleged in
18 violation of Title 81, the Commission's discovery rule provides
19 for discovery in that circumstance.

20 This is what we have alleged. We ought to be able to
21 initiate discovery, and if Waste Management has a problem with
22 what we have initiated, they can bring it before you, and we
23 think that's the proper way to deal with it.

24 MS. GOLDMAN: Your Honor, at the risk of beating a
25 dead horse here, you know, Ms. McNeill has stated our position,

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1 which is we think that this is right for your resolution today
2 and discovery is not necessary. But to the degree that you are
3 not prepared to make that ruling yet, we think that, no, you
4 should not authorize any discovery without hearing from the
5 parties, and particularly we would ask that a specific set of
6 discovery requests be offered up as to what it is that
7 Stericycle needs.

8 Having now waded into the discovery battle with them
9 for eight months, we want very clear limitations put on any
10 discovery that is authorized so that it's very clear on what it
11 is that you're permitting them to do, if anything.

12 And, frankly, I think that will save all of us a lot
13 of time and headache, including Your Honor, because I can
14 promise you that if you just authorize discovery as Mr. Johnson
15 proposes, we are going to be facing motions to compel over and
16 over again, which is not very efficient and is very expensive.

17 MR. JOHNSON: Your Honor, just one point on this
18 motion to compel situation. Issues that are relevant to the
19 case are appropriate subjects for discovery. Nobody's
20 suggesting that we should be allowed to abuse the discovery
21 rules, and Waste Management's crying about abuse of the
22 discovery process in the application case is disingenuous. They
23 have had every opportunity to limit discovery. Judge Kopta has
24 been very open to that and has done so.

25 One of the problems we have in the application case

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1 is nobody knows what's permitted until Judge Kopta rules,
2 because we aren't following the standard rules that would
3 normally apply to discovery, so it's just whatever, you know,
4 Judge Kopta has to say at the end of the day after we've already
5 fought about it.

6 If we just move forward on sort of standard discovery
7 authorizing appropriate inquiry into relevant subjects, we
8 should be able to get in and get out of this thing in short
9 order, and nobody wants to drag this thing on further.

10 JUDGE TOREM: Ms. McNeill?

11 MS. MCNEILL: Thank you, Judge Torem. And I just
12 would like to point out that Judge Kopta has delineated the
13 limitations of discovery in the application proceeding very
14 clearly and at several times, and yet despite his clear
15 delineations, Stericycle has repeatedly inquired into the topics
16 that are now the subject of this complaint.

17 And the reason that we have this complaint is that in
18 one of the many several motion hearings, Judge Kopta said,
19 "Look. I'm not going to allow further discovery on this. They
20 asked again and again and again. I'm saying no, and if you want
21 to bring a complaint proceeding, do that."

22 So it's not -- I just would echo first, of course,
23 our position that we don't think discovery would be relevant,
24 and I would urge you wait until after the motions have been
25 completely filed, including the potential second one that we

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1 have in mind if we have to go there before making a
2 determination whether the Commission would allow discovery. And
3 if the Commission does feel that discovery is appropriate, I
4 would echo Ms. Goldman's exhortation to try to define the scope
5 and limitations of discovery as unambiguously and as clearly for
6 both parties before the discovery starts rather than waiting for
7 debates. I think we would all really benefit from that.

8 JUDGE TOREM: Okay. I'll, again, keep that matter
9 under consideration and think about it as we go on today.
10 Hopefully, I'll be able to tell you before you walk out of here
11 and get ready for this afternoon's prehearing, and maybe it will
12 come out during our discussion of the procedural schedule, if
13 and when discovery will be permitted in this matter and once we
14 sort out what's before us.

15 But I think we are all in agreement that I've got a
16 motion and a cross-motion on the same topic to decide, and then
17 a procedural motion to decide as well, the sequence of which is
18 in dispute.

19 Staff thinks that it may be, as was Waste
20 Management's suggestion, that the procedural motion filed
21 yesterday might dispose of the whole case. If it does, then
22 maybe it does make sense to only decide the one. Courts have a
23 habit of taking the least amount of work they can do and
24 disposing of cases in that regard.

25 On the other hand, if that procedural motion is not

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1 going to be granted in Waste Management's favor to dismiss the
2 entire proceeding, then we would have the substantive issue to
3 deal with as to the classification.

4 So when we go off the record, I want to talk about
5 how to handle those issues in one fell swoop, whichever
6 sequence. I am inclined, I think, by the description of the
7 motions, to follow Staff's recommendation to handle the
8 procedural issue first, and then in turn, if necessary, the
9 substantive issue that even though it was filed first by
10 Waste -- by Stericycle, to handle them in perhaps one order.

11 So if we can discuss that and if we're off the record
12 and you convince me otherwise to go back, we'll restate that on
13 the record. That's what I'm inclined to do, is set up a
14 schedule for the response brief to come in, Staff to weigh in if
15 they're going to on this case, which it doesn't sound as though
16 they're taking a position, and then have a set time for oral
17 arguments to be scheduled and confirmed, if I decide that it is
18 actually necessary once I have read all the responses, and then
19 determine what's going to happen with our ruling, okay?

20 Anything else we need to talk about before we go off
21 the record?

22 MS. GOLDMAN: Nothing further, Your Honor.

23 JUDGE TOREM: Ms. Woods?

24 MS. WOODS: No, Your Honor.

25 JUDGE TOREM: Mr. Johnson?

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1 MR. JOHNSON: No, Your Honor. Thank you.

2 JUDGE TOREM: All right. So it's now 20 till eleven.

3 Let's go off the record.

4 (Discussion off the record.)

5 JUDGE TOREM: Let's be back on the record, then, at

6 11:15.

7 We've now been able to discuss a number of what-ifs
8 in this case and procedural schedulings, and I think we have
9 come to the following agreement, and we've also identified
10 another issue.

11 Today is November the 28th, and we think that within
12 three weeks from today will be the deadline for Stericycle to
13 respond to Waste Management's motions filed yesterday, or at
14 least one motion that they will have require a response.

15 What we're looking at is questioning whether there
16 will be a need for oral argument. There's been a request, and
17 I'm going to set a date for oral argument of Friday, the 28th of
18 December, and that oral argument would occur at ten o'clock in
19 the morning.

20 Once I have read all of the parties' submissions, I
21 may yet determine that that's not actually necessary. If I do
22 so, I'll issue something striking that date the day before
23 Christmas on 24 December. That's a Monday. So for now, parties
24 should be prepared to offer oral argument to me on Friday, the
25 28th of December, until and unless I issue another subsequent

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1 notice after the prehearing conference order telling you that I
2 find it unnecessary.

3 In either case, my intent is to issue the ruling on
4 the pending motions that will be Stericycle's substantive
5 motion, which Waste Management has now responded to, as well as
6 Waste Management's procedural motion that I'm waiting for the
7 response for Stericycle and/or Staff. That will come out after
8 the 1st of the year, and no later than Friday, the 4th of
9 January.

10 The parties have indicated that depending on how the
11 motions go, Waste Management, if the case is not dismissed, has
12 another motion they wish to file that following week. That
13 would probably happen on the 7th or the 8th of January.

14 When that motion, if it's necessary is filed, that
15 will give a few weeks for Stericycle and Staff to file a
16 response -- and that takes us into the last week of January,
17 first week of February, or at least February 1st is the Friday,
18 and allowing time to make sure that Waste Management gets the
19 filing in and there's responses and an opportunity for everybody
20 to be available -- we're going to set a status conference on
21 February the 8th. That's yet another Friday. We'll do that
22 again at ten o'clock in the morning. That may yet be
23 telephonic. If the parties think they don't need to drive down
24 and be here, we might be able, depending on what issues are
25 pending, so parties will let me know. But for now we're going

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1 to schedule it and allow the bridge line participation on
2 February 8th at ten o'clock.

3 The current agenda for that is to take up any pending
4 new motions that are filed after the 1st of the year, and
5 perhaps also the issue of discovery. We had a bit of a
6 discussion on whether when and how discovery might be taken up.
7 It's certainly the right of any party to file a motion anytime
8 about seeking discovery, whether in bulk or a specific issue,
9 and I have indicated if I get a motion like that in the
10 remaining time before I depart on military leave on Saturday,
11 the 5th of January to leave for Japan, I'll determine if I think
12 it's right for determination in the weeks ahead, or if it should
13 be taken up and a response waiting when I get back to us on
14 February the 8th.

15 So if I get a motion before I leave for Japan, I will
16 try to immediately establish for the other parties do you need
17 to respond now, in 10 days, 21 days, whatever the rules say, or
18 on some other date that I will set so the parties can file what
19 they need to when they think it's appropriate, and I'll let the
20 other responding parties know when I think I need to have the
21 answer.

22 I think that's all of the items that we had on the
23 procedural schedule.

24 Ms. Goldman?

25 MS. GOLDMAN: Your Honor, I'd like to request one

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1 correction.

2 We had suggested that we, if you don't dismiss the
3 case, would be filing our second motion for summary
4 determination on January 11th. And you mentioned January 7th,
5 and that's after the holiday weekend and I will be out of town
6 and I will be the one filing it, so I would request that we move
7 that date.

8 JUDGE TOREM: I'm not going to actually put that date
9 in.

10 MS. GOLDMAN: Okay.

11 JUDGE TOREM: That was just a summary as to why we're
12 doing it on the 8th, but...

13 MS. GOLDMAN: Okay. Thank you, Your Honor. As long
14 as January 7th is not our deadline.

15 JUDGE TOREM: No. Certainly no deadline on filing
16 that other motion, but that certainly does leave enough time
17 to -- that does leave enough time for a response to come in on
18 February 1st and for the status conference to take these motions
19 up on the 8th. So I think that's fine, Ms. Goldman. You can,
20 again, as I said with the motion for discovery, you can choose
21 when to time your motions. All we're doing now is what's on the
22 table. Future motions, if we have them filed and responded to
23 ahead of the 8th, would be most convenient so I can have read
24 them and digested them. Your schedule suggestion of January
25 11th would satisfy that need.

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1 Okay. So that takes care of the procedural schedule.
2 Let's turn, then, also to the pending motion for -- there was a
3 request, anyway, for a continuance to file the late answer in
4 this case. As described in Ms. McNeill's motion and supporting
5 declaration, there was an internal reason that the answer was
6 not timely under the Commission's rules, if there are such for
7 this, and there was permission sought just to be clear that
8 their late answer would be filed under a motion seeking
9 permission to file late.

10 Mr. Johnson, did you want a chance to respond?

11 MR. JOHNSON: Your Honor, we have no objection to
12 granting that motion.

13 JUDGE TOREM: All right. Then I -- unless Staff has
14 some objection?

15 MS. WOODS: Your Honor, Staff has no objection to
16 granting the motion.

17 JUDGE TOREM: All right. I think the Commission does
18 want to resolve this case on its merits and not worry too much
19 about this. Hopefully, whatever the filing issue was with staff
20 at Waste Management's been resolved, and we'll move forward from
21 there.

22 I understand the parties are going to be doing
23 everything electronically now anyway amongst the acting
24 counsels, so this case, at least, is safe procedurally for the
25 foreseeable future.

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1 So that request is granted, and we'll accept Waste
2 Management's answer and consider it as such.

3 MS. GOLDMAN: Thank you, Your Honor.

4 JUDGE TOREM: Are there any other issues we need to
5 take up today?

6 MS. GOLDMAN: Nothing further for us, Your Honor.

7 MR. JOHNSON: I think Your Honor has handled all the
8 issues needed to be addressed today. Thank you.

9 JUDGE TOREM: Okay.

10 Staff?

11 MS. WOODS: Nothing further, Your Honor. Thank you.

12 JUDGE TOREM: All right. Then the prehearing
13 conference order is just going to hold discovery in abeyance,
14 kind of reserve the issue, and lay out the procedural schedule
15 we've got. There won't be a notice of hearing because we
16 haven't set one yet.

17 And as far as the document preparation and filing
18 requirements, I think it'll be the same as in your other docket,
19 which, I believe, is original plus six. So I'll confirm that,
20 but the standard boilerplate for the first prehearing conference
21 order will be in there as well, and I think that's all we have.

22 All right. Thank you. We're adjourned for today.

23 (Proceeding concluded at 11:22 a.m.)

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C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, SHELBY KAY K. FUKUSHIMA, a Certified Shorthand Reporter and Notary Public in and for the State of Washington, do hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of December, 2012.

SHELBY KAY K. FUKUSHIMA, CCR

My commission expires:
June 29, 2013

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