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7 BEFORE THE WASHINGTON STATE
8 UTILITIES AND TRANSPORTATION COMMISSION

9 STERICYCLE OF WASHINGTON, INC.,

Docket TG-110553

10 Complainant,

11 vs.

12 WASTE MANAGEMENT OF
13 WASHINGTON, INC.

RESPONSE OF WASHINGTON
REFUSE & RECYCLING
ASSOCIATION TO STERICYCLE'S
MOTION FOR SUMMARY
DETERMINATION

14 Respondent.

15 **COMES NOW** Intervenor Washington Refuse and Recycling Association
16 (WRRRA) and respectfully submits the following:
17

18 **WRRRA'S POSITION:** Stericycle's Petition for Summary Determination
19 should be denied, as it fails to meet even the most preliminary of its burdens,
20 while seeking the ultimate form of relief. On the other hand, Waste
21 Management's Motion to Dismiss should be granted as the combination of
22 Stericycle's Petition and its Response fail to provide any legal or factual basis
23 for a favorable ruling and relies on outdated and/or non-applicable
24 Commission authority, and a Division II decision which posed more questions
25 than answers; questions which were never subsequently answered by the
26 Courts or the Commission.

Response of Washington Refuse & Recycling
Association to Stericycle's Motion for
Summary Determination - 1

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1 **ABANDONMENT:** It is instructive to note that the vast majority of
2 Stericycle's citation to Commission rulings on this issue involve motor carrier
3 transfer applications. There is a very simple explanation; the "pre
4 deregulation" rule, **WAC 480-12-050(4)(a)**, required a showing of activity in
5 order to grant a transfer application. There is not, nor has there ever been,
6 such a requirement for solid waste. The Commission pointed this out when
7 faced with a protested solid waste transfer application.¹ There, the
8 Commission said, at page 3:

9 . . . Under the existing rules there is no indication that activity
10 under a certificate will be an element in determining whether a
11 transfer will be consistent with the public interest

12 This, of course, was a transfer application, not a complaint, but the
13 principle set forth is useful here, in rebuttal of those of Stericycle's arguments
14 which are "supported" by motor carrier transfer applications. There is little, if
15 any, relevance of those decisions to the issues in this matter.² If the
16 Commission (or the Legislature) felt activity language would be in the public
17 interest, it would be in the law and/or the rules. It is not.

18 Of course, what is in the statute (RCW 81.77.030) is the language which
19 allows (but does not require) the Commission to find abandonment if a permit
20 holder fails to "operate as a solid waste collection company for a period of at
21 least one year" We need to pay as close attention to what is not said
22 here as to what is said. The Legislature could simply have specified failure to
23 "operate a portion" of a certificate, but it chose not to. Rather, it would seem
24 that the statute is general, not specific, because the problem being addressed
25 was the fear that a certificate holder would just close its doors one day,
26 leaving its customers without service. This, of course, would be absolutely

1 ¹ In the Matter of Joint Application of SnoKing Garbage Co., Inc. and R.S.T. Disposal Co., Inc.
2 Order M.V.G. 1185, Hearing GA-788 (Nov. 1984).

3 ² One can understand why the motor carrier "activity" rule was adopted when it is recalled
4 that motor carrier permits were for carriage of a myriad of commodities, all different and
5 frequently contained in one permit, as opposed to solid waste.

1 and dangerously contrary to “public policy” which, correctly, is that all who
2 wish solid waste service have access to it.

3 That is not the situation here, by any stretch of the imagination. As has
4 been argued; first, Waste Management has obviously operated as a “solid
5 waste collection company” for the past many years. It can, and has, been
6 argued that it has not “operated as a medical waste collection company in the
7 past year,” but that is not what the statute says. Again, if there is to be a
8 specific statute or rule separating “operating as a medical waste collection
9 company” and “operating as a solid waste collection company,” it is up to the
10 Legislature (or the Commission in a rule making) to make that distinction.

11 **LeMAY DECISION:** Everyone involved here, the undersigned included,
12 has referenced *Harold LeMay Enterprises v. WUTC and Mason County*
13 *Garbage*, 67 Wn. App. 878, 841 P.2d 58 (1992). However, the closer one
14 examines this case, the more convinced one can become that it is not
15 determinative here and actually is of little help with the issue at hand.

16 The Court of Appeals did not rule that a certificate could or could not be
17 fragmented for the purpose of an abandonment claim. What it specifically
18 said at page 3 was:

19 Even if we assume that the Commission has the authority to
20 amend a garbage collection certificate based upon a certificate
21 holder’s abandonment of only a portion of its authority, there has
22 been no showing of abandonment. (emphasis added.)

23 Reading this paragraph carefully, and applying common meaning to non legal
24 words such as “assume,” leaves the reader without the ability to ascribe
25 precedential value to the decision. The Court did not rule that the
26 Commission could amend a portion of a certificate; rather, it speculated by
means of the phrase “even if we assume . . .” that if such authority were to
exist, whatever burden of proof had to be met was not present. The
Commission simply failed to provide the Court with the necessary findings for

1 the Court to do anything other than to speculate what that ruling might be if
2 a more complete record were before it.³

3 That being said, there certainly can be differing interpretations of the
4 law of the case, most of them supportable and clearly arguable. However, the
5 one part of the decision which is clear is that the Superior Court, which
6 reversed the Commission, was affirmed, and that ruling was based upon the
7 lack of findings that LeMay was “. . . either unavailable to serve customers or
8 refuses to serve customers.” **LeMay** at p. 3. (Even that language was
9 preceded by the words “We believe,” rather than, for example, “We find,” or
10 “We rule.”)

11 However, even if it is decided that **LeMay** did indeed find that the
12 Commission has the authority it defended at the time, it is not helpful to
13 Stericycle’s argument; it, in fact, is fatal. Stericycle’s Motion contains not a
14 single sworn declaration or any objective evidence that Waste Management
15 has been “unavailable to serve customers or has refused to serve potential
16 customers.” We must assume that no such materials exist, or they certainly
17 would have been provided. In fact, during whatever the “test year” may be,
18 Waste Management held solid waste authority, which includes medical waste,
19 and, if asked by a customer, would have only needed to file its tariffs, obtain
20 equipment, and provide the service. This is not an unusual circumstance in
21 the industry. Frequently a commercial customer will develop a new line of
22 business which requires the certificated hauler to amend its tariff, obtain
23 specialized equipment, and even hire additional specially trained personnel.

24 Apparently Mason County Garbage couldn’t prove abandonment by
25 using what essentially is Stericycle’s argument. Stericycle has not even tried
26 to meet that burden. The simple fact is that whichever construction of **LeMay**
is correct, Stericycle loses, here and now. If **LeMay** does not support the

³ It is interesting and perhaps instructive that the introductory summary in the Washington Reports uses the phrase “. . . even if Commission had authority to amend certificate based on abandonment of portion of its authority” Again, this certainly more than implies that there was no ruling on that specific overall issue.

1 Commission's view of its partial abandonment authority, there is no
2 abandonment at all. If **LeMay** does approve of partial abandonment, it is only
3 upon a showing that the certificate holder is "unwilling or unable" to provide
4 service during the test period. There is nothing in any of Stericycle's
5 pleadings with such a showing; not even a hint that there will be.

6 The "abandonment" process is composed of two steps. First, there must
7 be authority which could be shown to be abandoned; secondly, there must be
8 proof that the holder of that authority has been unwilling or unable to provide
9 service. Here, there is no question that Waste Management has authority, but
10 there has been no showing (or even an offer of proof) that it has been
11 unwilling or unable to provide service (after, of course, the non-compete
12 expires - more on that below).

13 **NON-COMPETE:** As we all are aware by now, Stericycle apparently
14 purchased the medical waste "assets" of Waste Management nationwide in
15 1996.⁴ It does not appear that any "G-Permit" authority was included in the
16 sale, which makes sense in view of Stericycle's statewide authority. The
17 purchase and sale included a fairly standard "non-compete" clause of five
18 years' duration, which has long since expired. This transaction brings to
19 mind at least two conclusions, or perhaps issues, which probably should be
20 addressed.

21 First, there is no indication that this sale was approved by, or even
22 presented to, the Commission. **RCW 81.77.040** provides in pertinent part:

23 Any right, privilege, certificate held, owned or obtained by a solid
24 waste collection service company may be sold, assigned, leased,
25 transferred, or inherited as other property, but only upon
26 authorization by the Commission.

27 "Authorization by the Commission" may or may not have been required back
28 in 1996, as no certificate rights were sold. However Stericycle now argues
29 that the purchase, sale and five-year non-compete demonstrate an intent to

30 ⁴ see Stericycle's Motion for Summary Determination, p. 8.

1 abandon a portion of its certificate rights by Waste Management. This is not
2 the case at all. First, if there was that intent (or agreement), a portion of
3 Waste Management's certificate would have been included in the sale, and it
4 was not. Secondly, the non-compete has expired, so that is a non-issue,
5 particularly when the "abandonment test" involves one year, a year which is
6 at least ten years after expiration of the non-compete agreement. Perhaps if
7 Stericycle's arguments here were made in 1997 or 1998, they would carry
8 more weight, but they were not, and Waste Management's authority has
9 remained intact.

10 It probably is too late for the Commission to do anything about this if
11 there was a violation of statute and/or rules. However, Stericycle should not
12 be encouraged to argue abandonment of rights when rights that could have
13 been sold (with Commission approval) were retained.⁵

14 **PUBLIC POLICY:** WRRRA believes that this state's regulatory structure
15 for solid waste collection and transportation is a combination of the "best of
16 two worlds." Regulatory supervision ensures that customers pay a fair price
17 for service and can count on that service being regular, safe and reliable. The
18 involvement of private industry in this true "public/private partnership"
19 brings, we believe, a level of efficiency, accountability and customer service
20 that is amongst the best in the nation, if not the best. "Public policy"
21 decisions by the Commission have been made over the years with these
22 objectives clearly in mind.

23 Sometimes the best public policy is the regulated monopoly status of
24 most G-Certificate holders. If the certificated holder does not perform in
25 accordance with the standards of the Commission, and the industry itself, it
26 will lose its status as the sole provider of service, and it should. **RCW**
81.77.040.

⁵ Interestingly, the Commission did not appear to have a problem with the "gentlemen's agreement" in *LeMay* by which LeMay would restrict itself to drop box service, while Mason County Garbage served residential customers. *Mason County Garbage v. Harold LeMay Enterprises*, Hearing TG-2163, Order M.V.G. 1403 (Aug., 1989) at Finding of Fact (6).

1 But public policy does, and should, adapt to our rapidly changing
2 times. The collection and transportation of medical waste is an obvious
3 example. The Commission has made it clear that it sees a certain amount of
4 competition in medical waste as desirable and appropriate.⁶ It appears that
5 all participants in this matter agree; but the primary parties seem to disagree
6 on what the “public policy” regarding competition should be.

7 To WRRRA, the issue of competition/public policy as to medical waste is
8 simple. Stericycle has statewide authority, and each G-Permit holder has
9 authority within its permitted territory, including Waste Management. Thus,
10 in some areas of the state there is actual ongoing competition between
11 Stericycle and the local hauler, while in others there is not, as there simply is
12 not a broad enough customer base and/or demand for true competition. This
13 does not mean the local hauler has “abandoned” its certificated right to collect
14 and transport medical waste. It simply means that, at present, there is not a
15 demand for the service. The Commission put it very well in its order in
16 **LeMay**⁷ in stating that:

17 The Commission recognizes that not all garbage and refuse
18 collection services are required at all times. A certificate holder
19 should not be required to provide services which are not required
20 by its customers because it fears losing its authority. A certificate
21 holder with general garbage and refuse collection authority
22 should have some flexibility in the services it provides to allow it
23 to meet customer/community demands. (para. (2)).

24 In other words, if there is no consumer demand/need for a particular
25 service, the certificate holder need not offer it simply from the fear of losing a
26 portion of its authority. On the other hand, if there are serious and legitimate
27 requests for the service, the service should be provided that is at the basis of
28 our entire regulatory system. The ability of the local hauler to provide service
29 under these circumstances should not be restricted or removed.

30 ⁶ see *In re Sureway Incineration, Inc.*, Hearing 868, Order M.V.G. 1451 (Nov., 1990)

31 ⁷ *Mason County Garbage Co. v. Harold LeMay Enterprises*, Hearing TG-2163, Order M.V.G.
32 1403 (Aug. 1989)

1 The sorts of safeguards which good public policy requires are already in
2 place, in **WAC 480-70-426/476**. Any hauler who has not offered medical
3 waste service because of lack of consumer need, must, and should, meet
4 these requirements, along with submitting an updated tariff if appropriate. It
5 should not, however, have its certificate eviscerated simply because a need
6 which has not existed now exists.

7 **CONCLUSION:** At the obvious risk of repetition, WRRRA's position here
8 is very simple. Each and every G-certificate holder has the right to provide
9 medical waste services, including Waste Management, and, of course,
10 Stericycle. We have no indication that Stericycle is not meeting the
11 obligations of its certificate, nor do we intend to imply that is the case.
12 Similarly, we have no doubt that Waste Management will properly provide
13 service within its certificated areas. This will mean there will be competition
14 within Waste Management's territory just as there is within the territories of
15 WRRRA local hauler members who actively provide this service. The
16 Commission has decided that, at least limited, competition is appropriate in
17 the medical waste arena. WRRRA understands and accepts that conclusion
18 (and has lived with it for many years).

19 However, the quantum leap from that policy to either force Waste
20 Management (or any other permit holder) to apply for authority which it
21 already holds, and/or to apply for statewide authority it does not want and
22 cannot serve, is far beyond the Commission's authority, and is authority it
23 neither seeks nor desires.

24 On perhaps a more basic level, Stericycle simply has not provided the
25 Commission with any legal or factual support for this motion. If the
26 Commission follows what appears to be is acceptance of the **LeMay** reasoning
by Division II, Stericycle has completely failed to meet its burden with this
motion. There is absolutely no showing of a failure by Waste Management to
be available for service (if required) or its refusal to provide service if asked to
do so. A property right such as a G-Certificate cannot be taken on the basis

1 of argument and speculation alone. There must be proof, and here there is
2 none.

3 DATED this _____ day of May 2011.

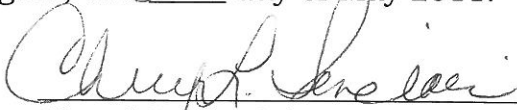
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5 *Cheryl Rife WSBA 20772*
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this day served this document upon all parties
3 of record in this proceeding, by the method as indicated below, pursuant to WAC
4 480-07-150.

<p>5 Stephen B. Johnson 6 Donald B. Scaramastra 7 Garvey Schubert Barer 8 1191 Second Ave., Suite 1800 9 Seattle, WA 98101 10 (206) 464-3939 11 sjohnson@gsblaw.com</p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email</p>
<p>10 Washington Utilities and 11 Transportation Commission 12 1300 S. Evergreen Park Dr. SW 13 PO Box 47250 14 Olympia, WA 98504-7250 15 360.664.1160 16 records@utc.wa.gov</p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email</p>
<p>14 Hon. Dennis Moss 15 Administrative Law Judge 16 dross@utc.wa.gov</p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email</p>
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24 DATED at Silverdale, Washington, this 25th day of May 2011.

25 
26 Cheryl L. Sinclair