

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

STERICYCLE OF WASHINGTON, INC.,

Complainant,

v.

WASTE MANAGEMENT OF
WASHINGTON, INC., d/b/a WM
HEALTHCARE SOLUTIONS OF
WASHINGTON,

Respondent.

Docket No. TG-121597

COMPLAINANT STERICYCLE OF
WASHINGTON, INC.'S OPPOSITION TO
WASTE MANAGEMENT'S CROSS-
MOTION FOR SUMMARY
DETERMINATION

OPPOSITION TO WASTE CROSS-MOTION FOR SUMMARY
DETERMINATION

GARVEY SCHUBERT BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
eighteenth floor
1191 second avenue
seattle, washington 98101-2939
206 464-3939

1 **I. Introduction.**

2 1. Stericycle of Washington, Inc. (“Stericycle”), through its undersigned attorneys,
3 respectfully submits its opposition to Waste Management of Washington, Inc.’s (“Waste
4 Management”) cross-motion for summary determination. Waste Management’s cross-motion
5 should be denied because it ignores and misapplies the controlling statutes and Commission
6 and court precedent. Waste Management’s arguments also ignore the unique risks of
7 biomedical waste and the imperative that it be separated and treated prior to any disposal or
8 waste reclamation for the safety of workers and the public. When the law and facts are
9 correctly considered, it is clear that Waste Management’s ecoFinity service is and should be a
10 regulated biomedical waste collection and transportation service.

11 2. The Commission has never found that a biomedical waste collection service is
12 exempt from its economic and safety regulations as a commercial recycling service. Indeed, as
13 discussed below and in Stericycle’s motion for summary determination, on two occasions the
14 Commission has considered whether a biomedical waste collection service is recycling and has
15 found that it was not. *In re Lowell Haugen d/b/a Medical Waste Management Systems, Inc.*,
16 Order M.V. No. 148521, Hearing No. H-5024, p.3 (Apr. 27, 1995); *In re Ryder Distribution*
17 *Sys., Inc.*, Order M.V.G. No. 1536, App. No. GA-75563, p.6. These decisions reflect
18 Commission reluctance to find any biomedical waste service to be unregulated recycling,
19 particularly where only a small portion of the waste is eventually reclaimed for recycling, given
20 that such a decision would eliminate the Commission’s ability to assess the fitness of an
21 applicant for authority to provide such sensitive services and to enforce the Commission’s
22 biomedical waste regulations.

23 3. The Commission’s past refusal to exempt biomedical waste collection services
24 from regulation where some minimal recycling is performed is justified by the unique nature of
25 the waste and the public policy behind the Commission’s regulations. Biomedical waste,
26 especially sharps waste, poses a unique threat to human health that is different from any other

1 solid waste. Biomedical waste carries infectious agents that can cause direct harm to workers
2 or the public who come into contact with untreated waste. Sharps waste, such as used syringes,
3 is particularly dangerous because of its direct exposure to patient blood and associated
4 bloodborne pathogens and because, by its nature, it has the capacity to deliver these infectious
5 agents directly into the body of hospital personnel, solid waste workers or others who are stuck
6 or cut.

7 4. These dangers, as well as the Occupational Safety and Health Administration's
8 ("OSHA") bloodborne pathogen regulations and the risk of liability, compel biomedical waste
9 generators to handle sharps waste differently than all other solid waste. Generators separate
10 biomedical waste from all other waste for the safety of their workers and so that the biomedical
11 waste can be treated to eliminate its danger. This treatment renders the waste non-infectious
12 and, essentially, converts infectious biomedical waste into non-infectious general solid waste.
13 Because the paramount need of both the generators and the public is for treatment of
14 biomedical waste, it is unlikely that any service involving the collection and transportation of
15 untreated biomedical waste could be characterized as commercial recycling based on the
16 downstream reclamation of some amount of recyclable material after treatment has transformed
17 the waste into general solid waste.

18 5. If the Commission were to declare the collection and transportation of untreated
19 biomedical waste to be recycling simply because some amount of resource reclamation was
20 accomplished after the waste was treated, it would lose the regulatory oversight necessary to
21 ensure that biomedical waste collection companies offer safe and effective collection services.
22 The statutes and Commission precedent do not require the deregulation of untreated biomedical
23 waste collection. In fact, Commission precedent squarely evidences the Commission's
24 reluctance to deregulate biomedical waste collection services, particularly where only a small
25 portion of biomedical waste is reclaimed after treatment.

1 6. This is a biomedical waste case and the Commission must decide whether Waste
2 Management's biomedical sharps waste collection service should be exempted from regulation
3 based on a claim of minimal waste reclamation and recycling after the biomedical waste is
4 treated. This case is governed by Commission precedent unique to biomedical waste and will
5 not set precedent in the larger debate over what solid waste collection and construction debris
6 services are legitimate recycling services. Waste Management's arguments do not show that
7 the biomedical sharps waste in its ecoFinity program should be regulated any differently than
8 the biomedical waste previously considered by the Commission. Waste Management presents
9 no justification for exempting this uniquely dangerous waste from Commission regulation.

10 **II. Argument and Authority.**

11 7. In its cross-motion for summary determination Waste Management argues that
12 its ecoFinity sharps waste program involves the transportation of "recyclable materials" and not
13 regulated solid waste. This argument rests on ignoring and misapplying statutory definitions
14 and established Commission and court precedent.

15 **A. Waste Management's Cross-Motion Fails to Address the Statutory Definition of**
16 **"Recyclable Materials" that Excludes Sharps Waste.**

17 8. Although Waste Management relies exclusively on *In re Drop Boxes R Us, Inc.*,
18 Order M.V.G. No. 1840, Docket Nos. H-5039/5040 (Oct. 8, 1998), it fails to even discuss the
19 principle holding of that decision. *Drop Boxes* held that, in deciding whether a waste material
20 is a "recyclable material" being transported for "recycling," the Commission must "look to the
21 definition of 'recyclable material' included in RCW 70.95.030." *Id.* at 6. Despite this clear
22 guidance, Waste Management does not cite or discuss the RCW 70.95.030(17) definition of
23 "recyclable material" anywhere in its cross-motion. Stericycle, by contrast, placed primary
24 reliance on this statutory definition in its motion for summary determination. Stericycle
25 Motion for Summary Determination ("Stericycle Motion"), ¶26 et seq.

1 9. Waste Management’s reluctance to address RCW 70.95.030(17) is
2 understandable because ecoFinity sharps waste is not a recyclable material under that
3 definition. RCW 70.95.030(17) provides that “recyclable materials” are
4 those solid wastes that are separated for recycling or reuse, such
5 as papers, metals, and glass, that are identified as recyclable
6 material pursuant to a local comprehensive solid waste plan.
7 EcoFinity sharps waste fails both halves of this definition. First, it is simply not separated for
8 recycling “such as papers, metals, and glass.” Like all sharps waste regulated by the
9 Commission, sharps collected through the ecoFinity program are separated from other
10 regulated biomedical waste due to their unique danger to people because they can cut or
11 puncture human skin and thereby transmit infectious agents. Generators of biomedical waste
12 have an obligation under OSHA regulations to separate and safely handle sharps waste. *See* 29
13 C.F.R. 1910.1030(d)(2)(viii), (d)(4)(iii) (requiring that contaminated sharps be placed in
14 puncture resistant, closeable, leakproof containers distinct from containers used to collect other
15 regulated waste). For this reason, all sharps are segregated from other regulated biomedical
16 waste by all generators, regardless of whether the sharps waste is eventually put through a
17 limited reclamation process or landfilled, like the vast majority of sharps waste collected by
18 Waste Management. Sharps are not separated because they are a recyclable commodity, i.e.
19 they are not separated from other regulated medical waste “for recycling or reuse” and they are
20 not like “papers, metals, and glass” which are separated from other regulated solid waste
21 because they are themselves a valuable, recyclable commodity.¹ Waste Management’s
22 argument that sharps waste is “source separated” relies solely on a Department of Ecology
23 definition without addressing the governing statutory definition, does not acknowledge the
24 reason why all sharps waste is separated from other regulated biomedical waste, and is,

24 _____
25 ¹ In addition, as discussed in Stericycle’s motion for summary determination, since 78% on
26 average of the ecoFinity sharps waste is discarded in a landfill, and only an unknown portion of
the remainder is actually recycled, the evidence does not support any finding that the ecoFinity
material was separated, let alone collected and transported, for recycling. Stericycle Motion,
pp.10-11.

1 therefore, unconvincing.² See Waste Management Cross-Motion for Summary Determination
2 (“WM Cross-Motion”), ¶44.

3 10. Second, ecoFinity sharps waste is not “identified as recyclable material”
4 pursuant to the Whatcom County comprehensive solid waste plan and, therefore, is not
5 “recyclable material” under RCW 70.95.030(17). Importantly, Waste Management does not
6 even address the fact that the Whatcom County solid waste plan specifically provides that
7 transportation of infectious waste requires a solid waste certificate. Stericycle Motion, Ex. H
8 (Excerpts from Whatcom County Comprehensive Solid and Hazardous Waste Management
9 Plan 2008), §2, p. 34. The plan, therefore, clearly does not “identify” infectious sharps waste
10 as a “recyclable material” exempt from solid waste regulation and it cannot be deemed as such
11 under RCW 70.95.030(17).

12 11. Whatcom County’s solid waste plan defines recyclable materials as:

13 those solid wastes that are separated for composting, recycling, or
14 reuse into usable or marketable materials. . . . Materials disposed
15 of in a landfill or through incineration are not considered
16 recyclable materials, nor are residual material remaining after
17 recyclables have been removed.

18 Stericycle Motion, Ex. H, §2, p.20.³ As discussed above, all sharps waste is separated from
19 other regulated biomedical waste, but is not “separated for composting, recycling, or reuse.”

20 As discussed in Stericycle’s motion for summary determination, ecoFinity sharps waste is also

21 ² Indeed, the Department of Ecology definition does not even support Waste Management’s
22 argument that sharps waste is “source separated.” That definition states that “source
23 separation” is “the separation of different kinds of solid waste at the place where the waste
24 originates.” WAC 173-350-100. Sharps waste is not a different “kind” of waste than regulated
25 biomedical waste in any sense relevant to recycling or reuse. All biomedical waste, like all
26 general solid waste, contains plastics, glass, and metals. Sharps waste is different in kind only
by virtue of its unique danger. If Waste Management’s logic were to prevail, all biomedical
waste could be considered “source separated” for the purposes of recycling because all
biomedical waste is separated from general solid waste by virtue of its unique danger to people
and so that it can be treated prior to disposal. This is clearly not what is intended by RCW
70.95.030(17).

³ The full Whatcom County Comprehensive Solid and Hazardous Waste
Management Plan 2008 is available at
<http://www.co.whatcom.wa.us/publicworks/pdf/solidwaste/vol1-solidwastereport.pdf>.

1 primarily disposed of in a landfill after treatment and there is no evidence of the extent to
2 which the small portion of reclaimed plastics is actually recycled by Waste Management's
3 partner, Becton Dickinson ("BD"). Stericycle Motion, p. 11. In its cross-motion, Waste
4 Management has presented no evidence that reclaimed plastics are actually recycled by BD to
5 any significant extent. Any recycling actually accomplished by the ecoFinity program is small
6 and ancillary to the primary purposes of treatment of the infectious waste and the landfill
7 disposal of the vast majority of the waste after treatment. The ecoFinity sharps waste stream is,
8 therefore, not identified as a recyclable material under the Whatcom County solid waste
9 management plan and is not a "recyclable material" under RCW 70.95.030(17) and *Drop*
10 *Boxes*.

11 12. Solid waste authority is required for collection and transportation of the
12 ecoFinity biomedical waste under multiple Commission precedents addressing the
13 transportation of biomedical waste streams principally destined for landfill disposal. *See In re*
14 *Lowell Haugen d/b/a Medical Waste Management Systems, Inc.*, Order M.V. No. 148521,
15 Hearing No. H-5024, p.3 (Apr. 27, 1995) (reasoning adopted by *WUTC v. Haugen*, 94 Wn.
16 App. 552, 554, 972 P.2d 1280 (1999)) (holding that biomedical waste is solid waste despite its
17 separation from general solid waste and the reclamation for recycling of a small portion of the
18 waste); *In re Ryder Distribution Sys., Inc.*, Order M.V.G. No. 1536, App. No. GA-75563, p.6.

19 **Waste Management's Cross-Motion Misapplies the Commission's Precedent**
20 **Under Which Actual Recycling Outcomes Determine Whether a Carrier is**
21 **Transporting Regulated Solid Waste.**

22 13. Waste Management takes the position that it is irrelevant that only a small
23 portion – approximately 22% on average – of the ecoFinity sharps waste is actually reclaimed
24 as recyclable plastics. Waste Management's position would ignore actual recycling outcomes
25 and allow the transportation of biomedical waste to evade Commission regulation as long as it
26 is nominally "separated" from other waste in separate containers and no matter how little of the

1 material is actually recycled. All biomedical waste contains plastics, glass, and metals, is
2 “separated” from general solid waste for safety reasons and so that it can be treated, and so
3 could, under Waste Management’s theory, be transported free from Commission economic and
4 safety regulation if a process is employed to reclaim even a very small portion of the waste.⁴
5 This is not consistent with Commission practice or the intention of the legislature in giving the
6 Commission authority to regulate the collection and transportation of solid waste, including
7 biomedical waste.

8 14. Rather than the permissive standard advocated by Waste Management,
9 Commission precedent demonstrates a reluctance to consider any biomedical waste service to
10 be recycling, even if a portion of recyclable material is reclaimed from the waste after
11 treatment. In the *Haugen* case, amply discussed by Stericycle in its motion for summary
12 determination, the Commission explicitly considered the small portion of a mixed biomedical
13 waste stream that was ultimately recycled yet decided that the waste was solid waste and that
14 solid waste authority was required despite this amount of recycling.⁵ Stericycle Motion, ¶ 31 et
15 seq.; *Haugen*, Order M.V. No. 148521, Hearing No. H-5024, p. 3.

16 15. Contrary to Waste Management’s insinuation, Stericycle has not advocated for
17 any particular quantitative cut-off for determining whether the reclamation of material from a

18 ⁴ Waste Management argues that its position would not open the door Stericycle offering its
19 reusable sharps container service as unregulated commercial recycling. But this is not true.
20 Unlike containers for general solid waste and non-sharps biomedical waste, sharps containers
21 are part of the waste stream, typically thrown away with their contents. Stericycle’s reusable
22 sharps container service reclaims sharps containers for reuse, reusing over 50% of the waste
23 stream. Stericycle Motion, ¶43. Under Waste Management’s arguments, Stericycle’s
24 customers separate their sharps containers and waste from other biomedical waste and
25 Stericycle transports those containers to its facility where they are reclaimed and returned for
26 reuse; the rest of the waste stream is mere residual. Those are all the conditions necessary to
evade Commission rate and safety regulation under Waste Management’s theory.

⁵ Contrary to Waste Management’s attempt to distinguish *Haugen*, the Commission did not rely
on the fact that the biomedical waste stream was not “source separated” in reaching its
decision, perhaps because, like sharps, biomedical waste is “source separated” from general
solid waste for safety and treatment. See WM Cross-Motion, ¶44, 53, 59. Instead, the
Commission relied on the fact that only a small portion of the waste stream was recovered as
recyclable materials. *Haugen*, Order M.V. No. 148521, Hearing No. H-5024, p.3. The
superior court adopted this reasoning. *Haugen*, 94 Wn. App. at 554, 972 P.2d 1280.

1 mixed solid waste stream will, in all cases, satisfy the definition of “recyclable materials.” This
2 is a biomedical waste case and the decision on Stericycle’s motion will affect biomedical waste
3 collection only. As previously noted, Stericycle doubts whether the collection and
4 transportation of untreated biomedical waste should ever be viewed as the transportation of
5 recyclable materials. However, the Commission need not reach that ultimate question here,
6 since the Commission’s decision in *Haugen* has already addressed a nearly identical mixed
7 biomedical waste stream. *Haugen* establishes that the Commission will consider actual
8 recycling outcomes. *Haugen* establishes that the Commission considers a mixed biomedical
9 waste stream to be regulated solid waste where the limited amount of recycling involved
10 indicates that recycling is not the primary purpose of the transportation. In *Haugen*, the
11 Commission made clear that biomedical waste material is a regulated solid waste if only a
12 “small portion” of the waste stream, as in this case, is ultimately reclaimed as recyclable
13 material.

14 16. Waste Management argues that *Drop Boxes* either overrules or supersedes the
15 Commission’s analysis in *Haugen*. Specifically, Waste Management states that in *Drop Boxes*
16 “[t]he Commission . . . decided that the distinction between solid waste collection and recycling
17 was not susceptible to quantitative analysis.” WM Cross-Motion, ¶34. This is wrong for
18 several reasons. First, Waste Management does not cite to any portion of *Drop Boxes* or any
19 other authority for this proposition. This sentence is a patently false characterization of the
20 *Drop Boxes* decision. Second, *Haugen* and *Drop Boxes* are not alike. *Haugen* concerned a
21 mixed biomedical waste stream from which a small portion was reclaimed as recyclable
22 materials after the material was collected and treated. By contrast, *Drop Boxes* concerned
23 transportation of traditional solid waste where the Commission determined that there was no
24 evidence that any of the waste was recycled. *Drop Boxes*, Order M.V.G. No. 1840, Docket
25 Nos. H-5039/5040, p.6. In *Drop Boxes*, therefore, the Commission did rely on the amount of
26 waste recycled, because it found that amount to be 0%. The Commission did not, as Waste

1 Management intimates, give any consideration to how waste that contains some small portion
2 of materials that can be reclaimed should be characterized, let alone how to characterize an
3 infectious biomedical waste stream prior to treatment.⁶ The Commission confronted that issue
4 in *Haugen* and its reasoning, accepted by the superior court, is unaffected by *Drop Boxes*.
5 *Haugen*, therefore, offers clear precedent for the proposition that the Commission can and does
6 consider the extent to which recyclable materials are reclaimed from a mixed biomedical waste
7 stream in determining whether the collection of such waste should be categorized as recycling.
8 Under *Haugen*, since only a “small portion” of the ecoFinity waste stream is recycled, the
9 ecoFinity waste is regulated biomedical waste.

10 **C. Waste Management’s Factual Arguments Fail to Address the Unique Risks of**
11 **Biomedical Waste and the Needs of Biomedical Waste Generators and Ignore**
12 **Facts Demonstrating that the ecoFinity Program is a Regulated Service.**

13 17. In addition to failing to apply the correct statutory language and precedent,
14 Waste Management fails to justify exempting ecoFinity sharps collection from Commission
15 regulation. First, Waste Management’s arguments concerning “shipper intent” do not consider
16 the unique aspects of biomedical waste handling and treatment that are the very basis for the
17 Commission’s biomedical waste regulations. Waste Management does not appreciate, for
18 example, that due to the danger and risk of liability from infectious biomedical waste
19 generators’ paramount intent with all biomedical waste, including sharps waste, is to effectively
20 treat that waste prior to disposal or resource reclamation. All generators separate their
21 biomedical waste, softs and sharps, for the safety of workers and so that it can be separately
22 handled and treated. There is no evidence that the intent of the sole generator using the
23 ecoFinity program is any different. Second, Waste Management ignores substantial undisputed

24 ⁶ However, in the course of its analysis in *Drop Boxes* the Commission did contrast that case, in
25 which the waste was intended exclusively for a landfill, with an Oregon district court case in
26 which “a significant part of the material” could be separated and recycled. *Drop Boxes*, Order
M.V.G. No. 1840, Docket Nos. H-5039/5040, p.9. This juxtaposition supports the conclusion
that actual recycling outcomes are highly relevant to the Commission’s analysis.

1 facts that demonstrate the ecoFinity program must be considered a regulated service under
2 applicable standards.

3 18. Waste Management's factual arguments are addressed almost entirely to
4 "shipper intent," which is one of several factors identified by the Commission in WAC 480-70-
5 016(4). Yet Waste Management has presented no direct evidence of the intent of St. Joseph's
6 Hospital, the sole shipper in this case, and is instead asking the Commission to draw an
7 inference of intent. None of the evidence supports such an inference.

8 19. Waste Management argues that source separation is the most important factor in
9 establishing the shipper's intent. WM Cross-Motion, ¶¶53, 59. But Waste Management's
10 arguments ignore the fact that generators require unique handling of biomedical waste so that it
11 can be safely and effectively treated, not recycled. As discussed above, neither St. Joseph's nor
12 any other generator separates biomedical waste or sharps in order to segregate recyclable
13 materials. St. Joseph's separates all regulated biomedical waste because it must be separately
14 handled, transported and treated. St. Joseph's further separates sharps from other biomedical
15 waste because sharps present a unique safety hazard and it is required to separate sharps waste
16 under the OSHA regulations cited above. St. Joseph's separated its sharps before it signed up
17 for the ecoFinity program and it will continue to separate its sharps after it stops using the
18 ecoFinity program. Waste Management has presented no evidence that St. Joseph's separates
19 its sharps from other regulated biomedical waste for any reason other than its regulatory
20 obligation to do so for the protection of its employees and the public. If source separation is
21 the key evidence of shipper intent, the separation of regulated biomedical waste and sharps
22 waste does not support Waste Management's inference that St. Joseph's primary intent is
23 recycling.

24 20. The minimal documentary materials on which Waste Management relies to infer
25 shipper intent are misleading and do not support any inference about St. Joseph's intent. Waste
26 Management directs the Commission's attention to what it calls "a schematic of the sharps

1 recycling process” that Waste Management included in its proposal for the ecoFinity service.
2 WM Cross-Motion, ¶43. But this “schematic” is highly misleading. It identifies the
3 “12,000,000” BD medical devices purchased from BD, and with a bold arrow implies that
4 “With EcoFinity Sharps Recycling Program” the sharps “Container and Contents are processed
5 and shredded” and “Put into new BD products.” *Id.* (citing Ex. E to Stericycle’s motion). We
6 know, however, that this is not accurate. The sharps container and sharps waste are not simply
7 put into new BD products. In fact, only a small portion of this waste is even reclaimed as
8 potentially recyclable plastics. Of that portion, Waste Management has offered no evidence of
9 the actual amount of recycling accomplished by BD.⁷ None of this information was presented
10 to St. Joseph’s in the sales materials or in the contract for service Waste Management filed with
11 its cross-motion. The evidence is, to the contrary, that the actual extent of “recycling” of the
12 ecoFinity waste has never been communicated to St. Joseph’s.⁸ It is not reasonable to infer
13 from these misleading materials, as Waste management does, that St. Joseph’s actual intent is
14 to ship its sharps for recycling and not, as the biomedical waste separation would imply, to
15 secure treatment of this infectious waste or to simply take advantage of the lower, non-tariff

18 ⁷ Elsewhere in its cross-motion Waste Management relies on a BD ecoFinity promotional flyer
19 to argue that the shipper’s intent is to transport the sharps material for recycling. WM Cross-
20 Motion, ¶49 (citing Goldman Decl., Ex. 3). However, Mr. Norton testified that he could not
21 recall if he provided this document to any customer in Washington and, hence, it cannot reflect
22 St. Joseph’s intent. Declaration of Jared Van Kirk in Opposition to Cross-Motion for Summary
23 Determination (hereinafter “Van Kirk Opposition Decl.”), Ex. 1, 153:18-22 (Excerpts of Jeff
24 Norton Deposition). Moreover, this document is even more misleading, falsely claiming that
25 “70% or more” of the sharps material will be recycled. This misrepresentation cannot support
26 the inference of generator intent that Waste Management asks the Commission to draw.

⁸ The Waste Management employee responsible for setting up and monitoring the ecoFinity
pilot program testified that he has not informed St. Joseph’s about the recycling aspects of the
program and that the St. Joseph’s representative has never asked for information about the
materials recycled. Van Kirk Opposition Decl., Ex. 1, 135:8-24. Simply put, St. Joseph’s
actual involvement in the ecoFinity pilot program demonstrates no interest in recycling and
does not support any inference that St. Joseph’s has any intention for its sharps waste other than
safe and effective treatment prior to disposal, or perhaps securing a lower price service. Waste
Management does not address this evidence.

1 price that Waste Management offered St. Joseph's in the same proposal and contract.⁹ See
2 Stericycle Motion, ¶12 (identifying reduced, non-tariff price).

3 21. Finally, Waste Management attempts to explain away additional undisputed
4 evidence demonstrating that the ecoFinity program should be viewed as a regulated service,
5 ignoring its clear relevance under Commission rules. WAC 480-70-016(4) lists several factors
6 that the Commission considers relevant to deciding if an entity is providing regulated services.
7 In addition to "shipper intent," another factor is any special handling or conditions placed on
8 the shipment by the shipper or receiver. Stericycle noted in its motion that the ecoFinity waste
9 is transported by special bill of lading as "Regulated Medical Waste," requiring special
10 handling. Stericycle Motion, ¶38 (citing Ex. H to Stericycle motion). Waste Management does
11 not dispute this evidence, agrees that the waste "must be handled as 'regulated medical waste,'"
12 but argues that it is not relevant because special handling as regulated medical waste does not
13 "preclude categorizing the material as commercial recycling." WM Cross-Motion, p.17.
14 Waste Management misunderstands the nature of a factor analysis. No one factor determines
15 the decision, but evidence of special handling as regulated medical waste does weigh in favor
16 of determining that ecoFinity sharps waste is regulated solid waste under the Commission's
17 rules.

18 22. WAC 480-70-016(4) also indicates that whether the waste has value is an
19 important factor in deciding how to characterize a service. In its motion, Stericycle amply
20 demonstrated that the ecoFinty sharps waste has no value at the point of collection or at any
21 point within the state of Washington, given that it has no safe use until treated, and because of
22 the substantial costs required to transport it to California for treatment and subsequent delivery

23 _____
24 ⁹ The remaining portions of the proposal and contract cited by Waste Management are simply
25 Waste Management's own characterization of the program as "recycling" or "sharps only."
26 This self serving language is not relevant to the Commission's characterization of the ecoFinity
sharps waste and is not relevant to the shipper's intent where the shipper has been deprived of
actual information about the recycling outcomes and has expressed no interest in that aspect of
the program.

1 to a third party reclamation facility – and, finally, to process the treated waste to reclaim a
2 small portion of plastics. Stericycle Motion, ¶40. Waste Management does not dispute that
3 ecoFinity sharps waste has no value. Indeed, it is clear from the ecoFinity contract included
4 with Waste Management’s cross-motion that St. Joseph’s pays Waste Management to collect,
5 transport, and process its sharps waste, a fact that the Commission has held is evidence that the
6 waste has no value and is not “recyclable material.” Ex. 2 to Goldman Decl.; *See Drop Boxes*,
7 Order M.V.G. No. 1840, Docket Nos. H-5039/5040, p.8; *see also In re Glacier Recycle*,
8 *Hungry Buzzard, and T&T Recovery*, Order 06, Docket No. TG-072226, p.9 (June 13, 2008).
9 Waste Management again relies on the argument that this is just one factor. But, again, this
10 argument belies the fact that this factor strongly supports a finding that ecoFinity sharps waste
11 must be considered regulated biomedical waste. The factors against Waste Management’s
12 position add up.

13 23. Waste Management also argues that “some” shippers “may” wish to recycle
14 despite its costs and that “many” customers are “often” willing to pay more for recycling
15 services. Waste Management offers no evidence, however, that St. Joseph’s is a shipper that is
16 willingly paying more for the privilege of recycling a small portion of its sharps waste.¹⁰
17 Waste Management’s general speculation does not change the weight of this factor in favor of
18 finding the ecoFinity program a regulated biomedical waste collection service.¹¹

19 24. Waste Management’s factual arguments ignore the unique danger of biomedical
20 waste and the generators’ paramount need to separate and ship biomedical waste, including
21 sharps waste, for treatment. The shipper in this case separates all its biomedical and sharps

22 ¹⁰ Waste Management also does not reconcile this argument with the fact that St. Joseph’s pays
23 less for the ecoFinity service than for regulated biomedical waste service, a fact that indicates
24 St. Joseph’s does not want to pay more but instead ships its sharps waste through the ecoFinity
program simply because it costs less under Waste Management’s (unlawful) non-tariff rate.

25 ¹¹ The final two WAC 480-70-016(4) factors are whether the carrier is primarily engaged in the
26 business of providing solid waste collection and whether the carrier holds itself out to the
public as a transporter of solid waste. There is no dispute that Waste Management is primarily
engaged in the business of solid waste collection and that it holds itself out as a solid waste
collection company.

1 waste for treatment and that intent indicates the waste is regulated, even apart from the very
2 small portion of waste that is actually reclaimed. Waste Management's argument to infer a
3 contrary "shipper intent" from misleading promotional statements, when in fact the shipper
4 cares little about any actual recycling, is unconvincing. And, of course, Waste Management
5 continues to ignore that the vast majority of the ecoFinity sharps waste (up to 92% in some
6 months) is ultimately disposed of in a landfill. Waste Management also ignores the substantial
7 evidence that the factors identified in WAC 480-70-016(4) support the conclusion that Waste
8 Management's ecoFinity program is a regulated solid waste collection and transportation
9 service.

10 **D. The Commission's Withdrawn Rulemaking has No Bearing on this Complaint.**

11 25. In its cross-motion Waste Management notes the withdrawn Commission
12 rulemaking process related to the definition of commercial recycling.¹² WM Cross-Motion,
13 p.14. The Commission Staff also identified this withdrawn rulemaking in its response to
14 Stericycle's motion – without, however, ascribing to it any particular significance. This
15 aborted rulemaking is of no significance here. Whatever the proposals and positions of the
16 interested parties in that proceeding, no final rule emerged. This complaint proceeding is not
17 the venue for either supporting or opposing any position taken in that proceeding. This
18 biomedical waste proceeding will not establish precedent for differentiating solid waste
19 collection from commercial recycling as a general matter. This case involves biomedical waste
20 collection and its precedential significance, if any, will be limited to biomedical waste
21 collection. In fact, Stericycle seeks no more and no less in this proceeding than reaffirmation
22 by the Commission of its prior decisions holding that biomedical waste collection services are

23
24 ¹² Waste Management also states, while citing no support whatsoever, that the Commission
25 "abandoned efforts to quantify a demarcation by reference to volume." WM Cross-Motion,
26 p.14. No rule proposal "demarcated" commercial recycling based on the "volume" of
recycling. Hence, this non-existent effort was not "abandoned." Existing Commission
decisions speaking to the strict regulation of biomedical waste services even when some
amount of recycling is accomplished is the governing Commission precedent.

1 not exempt from Commission regulation where a small portion of the waste stream is
2 ultimately reclaimed or recycled after treatment.

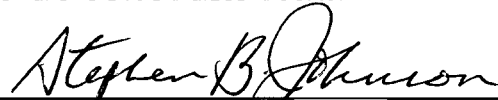
3 **III. Conclusion**

4 26. Stericycle respectfully requests that the Commission deny Waste Management's
5 cross-motion for summary determination and grant Stericycle's motion for summary
6 determination that Waste Management's ecoFinity sharps waste collection service is a
7 biomedical waste collection service subject to regulation by the Commission. Stericycle
8 respectfully requests that Waste Management be ordered to cease its unlawful practices and
9 that the Commission take such further action as is just and reasonable to remedy Waste
10 Management's unlawful conduct.

11 27. The Commission has for good reason maintained comprehensive regulation of
12 biomedical waste collection and transportation services, even where a small portion of the
13 waste is ultimately reclaimed after treatment. The unique danger posed by untreated
14 biomedical waste (and sharps waste in particular) and the paramount interest of generators and
15 the public in safe and effective collection, transportation and treatment services require
16 Commission oversight -- at least (as here) where a biomedical waste collection service like
17 Waste Management's ecoFinity sharps service involves only (at most) minimal actual
18 recycling. Due consideration of the Commission's statutory authority, precedent and
19 regulations requires rejection of Waste Management's arguments that its ecoFinity sharps
20 waste collection service should be exempt from the Commission's regulatory oversight.

21 DATED this 19th day of December, 2012.

22 Respectfully submitted,
23 GARVEY SCHUBERT BARER

24 By 

25 Stephen B. Johnson, WSBA #6196
26 Jared Van Kirk, WSBA #37029
Attorneys for Protestant Stericycle of
Washington, Inc.

CERTIFICATE OF SERVICE

I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of Washington that, on December 19, 2012, I caused to be served on the person(s) listed below in the manner shown a copy of COMPLAINANT STERICYCLE OF WASHINGTON, INC.'S OPPOSITION TO WASTE MANAGEMENT'S CROSS-MOTION FOR SUMMARY DETERMINATION:

Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
PO Box 47250
Olympia, WA 98504-7250
(360) 664-1160
records@utc.wa.gov

- Via Legal Messenger
- Via Facsimile
- Via FedEx
- Via Email

Administrative Law Judge
Adam E. Torem
atorem@utc.wa.gov

- Via Email

Jessica Goldman
Polly L. McNeill
Summit Law Group
315 5th Avenue South, Suite 1000
Seattle, WA 98104
jessicag@summitlaw.com
pollym@summitlaw.com
kathym@summitlaw.com
deannas@summitlaw.com

- Via Legal Messenger
- Via Facsimile
- Via U.S. Mail, First Class, Postage Prepaid
- Via Email

Frona Woods
Office of the Attorney General
Utilities and Transportation Division
1400 S. Evergreen Park Drive SW
PO Box 40128
Olympia, WA 98504-0128
(360) 664-1225
(360) 586-5522 Fax
fwoods@utc.wa.gov
BDeMarco@utc.wa.gov

- Via Legal Messenger
- Via Facsimile
- Via FedEx
- Via Email

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

James K. Sells
Attorney at Law
PMB 22, 3110 Judson Street
Gig Harbor, WA 98335
jamesells@comcast.net
cheryls@rsulaw.com
*Attorney for Washington Refuse and
Recycling Association*

- Via Legal Messenger
- Via Facsimile
- Via U.S. Mail, First Class,
Postage Prepaid
- Via Email

Dated at Seattle, Washington this 19 day of December, 2012.



Dominique Barrientes
dbarrientes@gsblaw.com