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4 BEFORE THE WASHINGTON UTILITIES
5 AND TRANSPORTATION COMMISSION
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7 In the Matter of the Petition of
8 STERICYCLE OF WASHINGTON, INC.,
9 For an Order Suspending Tariff Filing and
10 Initiating an Adjudicatory Proceeding
11 concerning the Abandonment of Authority
12 Under G-237 and Proposed Biomedical Waste
13 Collection and Transportation Services of
Waste Management of Washington, Inc., dba
WM Healthcare Solutions (G-237)

Docket No. TG-110553

WASTE MANAGEMENT OF
WASHINGTON, INC.'S RESPONSE TO
STERICYCLE'S MOTION FOR
SUMMARY DETERMINATION

14 **I. INTRODUCTION**

- 15 1. Stericycle's Motion for Summary Determination must be rejected. It is long on the wrong
16 law and short on the evidence required to meet its burden of proof. The motor freight orders
17 on which Stericycle relies have no application in a solid waste case that arises under a
18 different and distinct statute and regulations and Stericycle's legal analysis cannot support
19 revoking Waste Management's certificate rights. Moreover, the evidence on which
20 Stericycle relies is insufficient to show abandonment under the law that *does* apply to this
21 proceeding. Its case for abandonment rests almost entirely on a 1996 business deal that is
22 ironically similar to the one factual scenario that was held to be an insufficient basis for
23 revoking solid waste certificate rights. Fifteen years after the fact, Stericycle now seeks
24 regulatory relief from the Commission on the basis of a transaction for which it never
25 bothered to obtain regulatory approval in the first place. Not only should Stericycle's Motion
26 be denied, but the Commission should dismiss Stericycle's Complaint entirely for failure to

1 meet its burden of proof. *Rubenser v. Felice*, 58 Wn.2d 862, 866, 365 P.2d 320 (1961)
2 (entering summary judgment in favor of nonmoving party); 4 Wash. Prac., Rules Practice CR
3 56 § 17 (5th ed.) (The courts “have long held that summary judgment may be granted in
4 favor of the nonmoving party if it becomes clear that he or she is entitled thereto.”) (citations
5 omitted).

6 II. ARGUMENT

7 A. Solid Waste Certificate Rights May Not Be Fragmented As Stericycle 8 Suggests.

- 9 2. Stericycle argues that the Commission should sever biomedical waste authority from Waste
10 Management’s traditional solid waste certificate. However, the determination of the
11 Commission’s authority is not based on motor freight law, as Stericycle suggests, and is
12 instead constrained by the statute governing solid waste certificates. According to applicable
13 standards, Stericycle’s Motion should be denied.

14 a. The Motor Carrier Decisions Do Not Govern Here.

- 15 3. Stericycle urges the Commission to apply precedent established in considering the transfer of
16 motor carrier permit rights to justify revoking Waste Management’s right to transport
17 biomedical waste. Stericycle is wrong. First – and importantly – this case does not involve a
18 transfer at all. Second, solid waste certificates operate under laws and policies that are
19 materially different from those that govern motor carrier permits. *In re Ryder Distrib. Res.,*
20 *Inc.* Order M.V.G. No. 1596 (Wash. Utils. & Transp. Comm’n, Jan. 25, 1996) (“Not only do
21 the [motor carrier and solid waste] laws or regulations differ, but the underlying purposes for
22 the laws and regulations differ.”). Whether a traditional solid waste certificate holder
23 continues to own the right to perform biomedical waste collection is determined by
24 regulatory and administrative standards applicable to a claim for abandonment under RCW
25 81.77.030, *not* on the “substantial body of precedent” in motor carrier orders on transfer
26 applications governed by Chapter 81.80 RCW. (Mot. ¶ 22.).

- 1 4. The motor carrier rule in effect at the time of the decisions cited by Stericycle,¹ former WAC
2 480-12-050(4)(a) (implementing RCW 81.80.270), required a motor carrier to demonstrate
3 activity as a condition for approving a transfer. (McNeill Decl. Ex. 1). To the contrary,
4 transfers of solid waste certificates required only that the transferee demonstrate that it would
5 be “fit, willing and able” to operate under the transferred rights and thus consistent with the
6 public interest. *See Yakima Valley Disposal, Inc./Yakima Waste Sys., Inc.*, Order M.V.G. No.
7 1562, Comm’n Decision & Order Approving Transfer, Conclusion No. 4 (Wash. Utils. &
8 Transp. Comm’n, July 7, 1992).
- 9 5. The Commission recognized this material difference in *Sno-King Garbage Co., Inc./RST*
10 *Disposal Co., Inc.*, Order M.V.G. No. 1185, Final Comm’n Order Affirming Prop. Order
11 Granting Application (Wash. Utils. & Transp. Comm’n, Nov. 8, 1984). In *Sno-King*, the
12 protestant urged the Commission to exercise its discretion “even in the absence of specific
13 statutory or regulatory authority to consider dormancy of a certificate in a transfer
14 proceeding.” *Id.* at 2. The Commission held that, unlike the case with motor carriers who
15 are governed by WAC 480-12-050(4)(a), activity under a solid waste certificate is not
16 relevant to determining whether transfer of the certificate is consistent with the public
17 interest. The Commission specifically recognized that different laws applied to motor carrier
18 permits governed by Chapter 81.80 RCW and solid waste certificates governed by Chapter
19 81.77 RCW.
- 20 6. The one judicial case on point is *Harold LeMay Enterprises v. Utilities and Transportation*
21 *Commission*, 67 Wn. App. 878, 841 P.2d 58 (1992), in which the Court of Appeals upheld

22
23 ¹ See Mot. for Summ. Determin. at 12 (citing *Lee & Eastes, Inc. v. Pub. Serv. Comm’n*, 52 Wn. 2d 701, 328 P.2d
24 700 (1958)); *id.* at 13 (citing *Herrett Trucking Co. v. Wash. Pub. Serv. Comm’n*, 61 Wn. 2d 234, 377 P.2d 871
25 (1963)); *In re General Delivery Serv., Inc.*, Order M.V. No. 14797, (Wash. Utils. & Transp. Comm’n, July 11 1994);
26 *Wash. Utils. & Transp. Comm’n v. Toledo Trucking, Inc.*, Order M.V. No. 145830 (Wash. Utils. & Transp.
Comm’n, Dec. 3, 1992 ; *In re Paffile Truck Lines, Inc.*, Order M.V. No. 132877 (Wash. Utils. & Transp. Comm’n,
Dec.20, 1985)); *id.* at 14 (citing *In re R.C. Kercheval, Inc.*, Order M.V. No. 144753 (Wash. Utils. & Transp.
Comm’n , Mar. 31, 1992); *In re Mercer Trucking Co.*, Order M.V. No. 143760 (Wash. Utils. & Transp. Comm’n ,
Aug. 26, 1991)).

1 the Superior Court's reversal of the Commission's finding that a solid waste company had
2 abandoned one segment of its solid waste collection authority. In fragmenting the solid
3 waste certificate rights, the Commission had suggested that some of the public policy
4 considerations applicable to fragmenting certificate rights on the basis of abandonment might
5 include the limitations on restrictive amendments set forth in WAC 480-12-050, the then-
6 applicable regulation governing transfers of motor carrier permit rights. *Mason County*
7 *Garbage Co. v. Harold LeMay Enters.*, Order M.V.G. No. 1403 at 7 (Wash. Utils. & Transp.
8 Comm'n, Aug. 18, 1989), *rev'd on other grounds*, 67 Wn. App. 878, 841 P.2d 58 (1992).
9 That regulation prohibited restrictive amendments that would divide rights at a point other
10 than along a clearly defined geographical or political line and barred separating a commodity
11 or commodities from a class of substantially related commodities or from a commodity
12 classification set forth in Appendix A to former Chapter 480-12 WAC. *See* Comm'n Staff
13 Resp. to Waste Mgmt's Mot. to Dismiss at 4 n.9 (quoting former WAC 480-12-050(5)); *see*
14 *also In re Arrow Transp. Co./Harris Transp. Co./McCall Oil & Chem. Corp.*, Order M.V.
15 No. 147766, Comm'n Decision & Order Granting Admin. Review; Reversing Initial Order;
16 Denying Applications for Partial Transfer (Wash. Utils. & Transp. Comm'n, April 29, 1994)
17 (denying proposed transfers of motor carrier authority to haul asphalt and heavy oils and
18 named refined petroleum products because it would be contrary to the public interest to
19 subdivide commodities from the classification for liquid petroleum products).

- 20 7. If the common carrier restrictive amendment policies have any significance here, it is to
21 counsel *against* the fragmentation requested by Stericycle. Here, geographic demarcations
22 are *not* implicated. More to the point, the relief sought by Complainant would sever the
23 commodity of biomedical waste from the greater category of solid waste, which undeniably
24 is a "substantially related" commodity – indeed, a subset of the four categories of solid
25 waste.
26

1 8. Thus, Stericycle's "substantial body of precedent" is neither controlling nor relevant in this
2 proceeding and must be disregarded.

3 **b. RCW 81.77.040 Only Authorizes Fragmentation of Certain Specific**
4 **Categories of Solid Waste.**

5 9. After the administrative litigation was initiated in *Mason County*, the Legislature amended
6 RCW 81.77.040 to set forth the "categories of solid waste" for which the Commission could
7 issue solid waste certificates:

8 For purposes of issuing certificates under this chapter, the
9 commission may adopt categories of solid wastes as follows:
10 Garbage, refuse, recyclable materials, and demolition debris. A
11 certificate may be issued for one or more categories of solid waste.
12 Certificates issued on or before July 23, 1989, shall not be
13 expanded or restricted by operation of this chapter.

14 RCW 81.77.040 (as amended by 1989 Reg. Session Laws ch. 431 § 21). Biomedical waste is
15 not a separate category, rather it is a subset of both refuse and garbage, and possibly
16 recyclables, depending on the type of biomedical waste. *In re Ryder Distrib. Res., Inc.* Order
17 M.V.G. No. 1596 (Wash. Utils. & Transp. Comm'n, Jan. 25, 1996). Thus, Waste
18 Management's certificate clearly includes the collection of biomedical wastes and the
19 Commission should not fragment that authority and indeed cannot fragment that authority.
20 The statute makes plain that certificates, like Waste Management's, that were "issued on or
21 before July 23, 1989, shall not be ... restricted by operation of this chapter." RCW
22 81.77.040. It suggests the converse, *i.e.*, that *only* these stated categories should be
23 subdivided from a vested certificate.

24 10. Moreover, even the motor carrier analysis pushed here by Stericycle dictates that biomedical
25 waste may not be fragmented from a solid waste certificate. Like the motor carrier
26 classifications that once were set forth in Appendix A to the motor carrier regulation, RCW
81.77.040 enacted "categories" of solid waste. Apportionment of the former WAC 480-12-
050 motor carrier categories was limited to the categories set forth in the regulation. The
same is true here. The commodity known as "solid waste" should not be subdivided any

1 more finely than the four categories set forth in the governing statute. Because biomedical
2 waste is *not* one of the four statutory categories of solid waste, it may not be severed from a
3 solid waste certificate.²

4 11. Finally, it is noteworthy that the Court of Appeals in *LeMay* did not accept the Commission's
5 holding that solid waste certificate rights may be fragmented. Rather, given that there was
6 insufficient evidence of fragmentation to start with, the Court did not need to decide that
7 issue. *LeMay*, 67 Wn. App. at 883 ("Even if we assume that the Commission had the
8 authority to amend a garbage collection certificate based upon a certificate holder's
9 abandonment of only a portion of its authority").

10 12. In sum, the fragmentation of biomedical waste from solid waste certificate rights advanced
11 here by Stericycle is unfounded. Solid waste certificates are not equivalent to common
12 carrier rights as a matter of statute, regulation, or practice. Moreover, because biomedical
13 waste service is not among the four divisible statutory categories of solid waste, it may not be
14 split from solid waste authority. Assuming that the facts are as Stericycle alleges, its Motion
15 for Summary Determination fails as a matter of law and the Commission should summarily
16 dismiss this action.

17 **B. Even If Biomedical Waste Services May Be Fragmented, Stericycle's**
18 **Evidence Cannot Support Revoking Waste Management's Rights.**

19 13. Even if the Commission were to conclude (which it should not) that biomedical waste
20 services may be severed from solid waste certificate rights, it is plain that Stericycle cannot
21 prove that Waste Management has abandoned its biomedical waste collection rights. The
22 standard established by the Court of Appeals in *LeMay* under RCW 81.77.030, attests to the
23 high burden that would be necessary to justify revoking a portion of Waste Management's
24 certificate rights. To satisfy this burden, Stericycle contends that biomedical waste should be

25 ² Of course, if a certificated carrier should elect to limit its authority to only certain categories or sub-categories of
26 solid waste it collects – e.g., Stericycle's collection of biomedical waste – nothing in the statute would preclude such
a limitation.

1 fragmented here because: (1) Waste Management’s parent company entered into a
2 noncompete agreement with Stericycle’s parent company, (Mot. ¶ 14); (2) Waste
3 Management did not collect biomedical waste until after it secured regulatory approvals, (*id.*
4 ¶ 16); and (3) Waste Management has not held itself out as a biomedical waste collection
5 services provider until recently. (*Id.* ¶ 7.) Assuming the truth of each of these statements –
6 just for a moment – Stericycle cannot prove abandonment.

7 **a. Decisions Addressing “Dormancy” in the Context of Applications to**
8 **Transfer Common Carrier Permit Rights are not Applicable.**

- 9 14. Ignoring the binding judicial authority set forth in *LeMay*, Stericycle again presses the
10 decisions involving transfers of common carrier permit rights to suggest that the “dormancy”
11 review undertaken in those cases governs here. (Mot. ¶ 22.) Just as it is irrelevant to the
12 question of whether certificate rights may be apportioned, so the law regarding dormancy in
13 permit transfers by motor carriers has no bearing on abandonment under RCW 81.77.030.
- 14 15. In a case involving transfer of solid waste certificate rights, the Commission was confronted
15 with arguments notably similar to the ones presented by Stericycle. In *Sno-King*, the
16 protestant argued against transfer approval on the basis of dormancy under the common
17 carrier regulations, urging the Commission to exercise its discretion to protect the public
18 interest. *In the Matter of Sno-King Garbage Co., Inc./RST Disposal Co., Inc.*, Order M.V.G.
19 1185, Final Commission Order Affirming Proposed Order Granting Application at 2 (Wash.
20 Utils. & Transp. Comm’n, Nov. 8, 1984). It argued that “activation of an essentially dormant
21 permit within a territory constitutes the imposition of competition” justifying the application
22 of standards used in determining fitness for new service. *Id.* at 3. The Commission ruled
23 that activity under a solid waste certificate is not an element used in determining whether a
24 transfer is consistent with the public interest. “In the absence of a rule or direct Commission
25 precedent on this point, the Commission believes that it is not proper to raise dormancy as a
26 test.” *Id.*

1 16. Because the dormancy regulation applied to common carrier permit rights, *not* to solid waste
2 certificate rights, it has no relevance to Stericycle's abandonment claim.

3 **b. *LeMay* Dictates the Applicable Burden of Proof.**

4 17. The appellate court decision in *LeMay* is the only precedent that addresses and sets forth the
5 standards for demonstrating that a solid waste certificate holder has abandoned its authority.
6 While the underlying administrative decision may retain relevance on some points, on the
7 question of what evidence is required to justify revoking certificate rights, the Commission's
8 order was reversed in *LeMay* and thus the appellate court decision describes the burden of
9 proof that Stericycle must meet or at least explains what does not suffice. The Court of
10 Appeals specifically identified factors that are *not* sufficient to prove abandonment and it
11 described what evidence must be shown to justify Commission action on an abandonment
12 claim. It sets a high burden of proof for a private party complainant trying to compel the
13 Commission to "alter, revoke, [or] amend" certificate rights. RCW 81.77.030.

14 **1. Evidence of Non-Performance, a Failure to Hold Out, and a
15 Contractual Restraint of Competition Is Not Sufficient to
16 Satisfy the Burden of Proof of a Competitor Seeking
17 Abandonment.**

18 18. *LeMay* establishes that evidence of a certificate holder's nonperformance is not enough to
19 show abandonment. *LeMay*, 67 Wn. App. at 883 ("the fact that LeMay served only drop box
20 customers during the pertinent one-year period does not indicate abandonment of residential
21 service."). Neither is the absence of holding out. *Id.* ("The finding that LeMay did not hold
22 itself out as being available to provide such service is not, in our judgment, significant").
23 Stericycle agrees that these factors are not evidence of abandonment under the established
24 precedent. (Mot. ¶ 45 ("The [*LeMay*] court stated that it could not adopt a mere non-
25 performance or failure to hold out standard.")).³

26 ³ Stericycle emphasizes that Waste Management filed a tariff in 1996 and then refrained from operating under it. If Waste Management had never filed its 1996 tariff, Stericycle would undoubtedly still make the same claims. With or without the tariff, the evidence boils down to nonperformance, which is not grounds for revoking a valuable certificate right.

1 19. One other thing that is squarely controlled by *LeMay* is that a private-party agreement to
2 refrain from competition does not prove that a company is “unavailable” to perform services.
3 Evidence of operating under an agreement to refrain from competition was inadequate to
4 show that a certificate holder had “not performed” or “not held itself out” as available to
5 perform the relevant services. *LeMay*, 67 Wn. App. at 883.

6 **2. Absent Evidence of Harm to the Public, There Can Be No
7 Abandonment.**

8 20. The claim of abandonment must be rejected for the independent reason that there is no
9 evidence of harm to the public. Even where a competitor has satisfied its burden of proving
10 abandonment, RCW 81.77.030 grants the Commission discretion to “suspend, revoke, alter
11 or amend” a certificate right that has been abandoned; it does not require the Commission to
12 do so.

13 21. In *LeMay*, the absence of evidence that the certificate holder “either is unavailable to serve
14 customers or refuses to serve potential customers” was determinative. 67 Wn. App. at 883.
15 The Court of Appeals focused on whether customers had service needs that were not being
16 met and found there to be no harm to the public from the one garbage company refraining
17 from performing service for a specific customer sector while the other company provided
18 adequate service. *Id.* Thus, pursuant to *LeMay*, without evidence of injury to the public from
19 a company’s operational restraint, the Commission should refrain from exercising its
20 discretion to take punitive actions. *Id.*

21 22. The Solid Waste Act’s legislative history also prescribes Commission restraint. In vetoing a
22 second provision to RCW 81.77.040, Governor Dan Evans articulated the importance of the
23 public interest:

24 It is possible that a company might fail to operate in a certain
25 territory because a competitor had all of the available customers;
26 and a deletion of this authority would thus eliminate any chance of
competition in the future.

1 Moreover, this bill does not require a showing that the company in
question has refused service to any potential customer.

2 I have vetoed the last paragraph of Section 1 because I fear that it
3 will have the effect of reducing competition in the garbage and
4 refuse collection industry which would not be in the best interests
of the public.

5 (Comm'n Staff Resp. to Waste Mgmt.'s Mot. to Dismiss, Attach. B § 1.) Thus, Governor
6 Evans expressly rejected an attempt to strip solid waste certificate rights merely because a
7 certificated hauler had not been providing those services.

8 23. Stericycle has failed to demonstrate any harm to the public from the fact that Waste
9 Management is only now entering the market. Customers have had service options, and
10 biomedical waste is not piling up in the halls of hospitals. Stericycle holds the statewide
11 authority that it sought, and presumably when called to pick up biomedical waste, it
12 responds. For some customers, in some areas, traditional solid waste collection companies
13 also perform biomedical waste collection. There is no public harm from the fact that Waste
14 Management has not heretofore exercised its certificate rights to collect biomedical waste.
15 Stericycle has failed to produce *any* evidence that Waste Management has refused to serve
16 customers. Tellingly, it has produced *no* affidavits from customers who were turned down
17 by Waste Management.

18 24. The fact that Waste Management has not operated echoes Governor Evans' rationale for
19 vetoing the second "failed to operate" clause. Where the public has service options, proving
20 abandonment is nearly impossible. And to invoke the Commission's discretion here where
21 no harm to the public resulted would curtail the competition that Stericycle so blatantly wants
22 to keep out.

23 25. Without evidence that the public interest has been harmed by delayed entry into a specialized
24 service, revoking a traditional hauler's certificate rights is not justified. Unless customer
25 need is not being satisfied, the Commission's justification for the draconian act of revoking
26

1 certificate rights is not presented and the Commission should refrain from exercising its
2 discretion to grant the relief Stericycle requests.

3 **C. Stericycle’s Claim Fails Because Waste Management *Has Been* “Operating
4 for the Hauling of Solid Waste” During the Last Year.**

5 26. Last year, the Legislature amended RCW 81.77.040 to clarify that the mere act of holding out
6 to perform solid waste collection constitutes sufficient activity to fall under the
7 Commission’s jurisdiction.

8 A solid waste collection company shall not operate for the hauling
9 of solid waste for compensation without first having obtained from
10 the commission a certificate declaring that public convenience and
11 necessity require such operation. *Operating for the hauling of
12 solid waste for compensation includes advertising, soliciting,
13 offering, or entering into an agreement to provide that service.*

14 RCW 81.77.040 (emphasis added). Not only is there no evidence of any *unwillingness* by
15 Waste Management to provide biomedical waste collection services, but pursuant to the
16 amendment, it cannot be disputed that Waste Management has in fact been “operating for the
17 hauling of” biomedical waste in the last year.⁴

18 ⁴ In the *Decision Not To Initiate Adjudicative Proceeding*, Administrative Law Judge Kopta found that Waste
19 Management’s marketing of biomedical collection services and registration of a new trade name did not “rise to the
20 level” of operating as a solid waste collection company in the context of determining whether an actual case or
21 controversy was present. (Docket No. TG-110287.) The ALJ rejected solicitation and marketing as a basis for
22 initiating an adjudicative proceeding based on anticompetitive practices. (Decision ¶ 8 (“Nor do we find compelling
23 Stericycle’s contention that Waste Management’s alleged solicitation activities trigger Commission jurisdiction *over*
24 *Stericycle’s claims.*”) (emphasis added).) There was no question regarding Waste Management’s regulatory status,
25 just whether it had yet engaged in anticompetitive activities warranting litigation on Stericycle’s claims. (Decision,
26 Note 1 (“The issue is whether the Commission has jurisdiction to determine whether Waste Management is
exceeding its authority under that certificate by informing potential customers that it intends to provide a particular
service. RCW 81.77.040 does not address that issue.”).) Mere solicitation did not create the controversy alleged by
Stericycle, and at that point there was no competition to be litigated under RCW 81.04.110. As a defense to
abandonment, however, advertising and solicitation is relevant because those activities are unambiguous evidence
that Waste Management was holding itself out to perform a new service and thus “operating” under its certificate.
In any event, the ALJ’s finding is not binding on this point since it was specifically made in the context of whether
to initiate litigation on allegations of anticompetitive practices. *In the Matter of Joint Application for Auth. to*
Transfer from Sno-King Garbage Co., Inc. to RST Disposal Co., Inc., Order M.V.G. 1185, Final Commission Order
Affirming Proposed Order Granting Application (Wash. Utils. & Trans. Comm’n, Nov. 8, 1984) (“the affirmation
without comment of an unexcepted proposed order carries no indication that the Commission accepts the logic, the
findings or the conclusions of the proposed order for any other purpose.”).

1 27. In the twelve-month period prior to Stericycle's Complaint, Waste Management has been
2 holding itself out to provide biomedical waste collection services. (Norton Decl. ¶ 3). Waste
3 Management employees have been soliciting customers and negotiating contracts. *Id.*
4 Indeed, it is the company's activities in this regard that triggered Stericycle's lawsuit. (Mot.
5 ¶ 7.)

6 28. Waste Management addressed the operational prerequisite of having processing capacity
7 first. In June, 2010, the company pursued and ultimately obtained approval from the
8 jurisdictional health department to treat biomedical waste at the Seattle autoclave facility.
9 (Norton Decl. ¶ 4) Waste Management made arrangements with the Covanta Waste to
10 Entergy incinerator in Brooks, Oregon, to process residual chemotherapy waste and
11 pathological waste that are not allowed to be autoclaved, and that are segregated by
12 customers in specially marked containers. (*Id.* ¶ 5) In late 2010, Waste Management set up a
13 partnership with a major medical device company to reuse plastics derived from recycling
14 plastics from sharps containers and medical devices generated at medical facilities. *Id.*⁵

15 29. For processing, Waste Management also has two directly owned backup facilities for
16 autoclaving the medical waste - Vernon, California and Reno, Nevada. (*Id.* ¶ 6.) The
17 company also owns an incinerator in Texas as a backup for waste that is not permitted to be
18 autoclaved. *Id.*

19 30. As part of the permitting for Waste Management's new Seattle facility, the company
20 prepared an Operations Plan that was the subject of review and comment by both the King
21 County Health Department and the Department of Ecology. (*Id.* ¶ 7 & Ex. 1.) The
22 Operations Plan comports with the regulations administered by the WUTC as well. (*Id.* ¶ 7.)
23

24 ⁵ Without taking those steps, Waste Management would have been at Stericycle's mercy since the Complainant
25 was the only local processor. (Not only will the customers benefit from competition at the collection front but the
26 ratepayers served by traditional companies who perform biomedical waste collection may also indirectly be
advantaged by having choices and competition for facilities to process the medical waste they collect.)

1 In March 2010, Waste Management obtained licenses for the collection vehicles from the
2 King County Department of Public Health. (*Id.* ¶ 8.)

3 31. In terms of collection, Waste Management has for some time been collecting medical waste
4 from cruise ships that dock in Seattle, along with other international waste that must be
5 treated. It also has been operating a sharps recycling program which encompasses a fully
6 recycled option for medical sharps and the sharps containers. (*Id.* ¶ 9.) The process is a
7 combination of treating the medical waste, grinding, reclaiming the plastics and metals,
8 supplying the metals to a metal recycler and the plastic is pelletized and goes directly to a
9 manufacturer to be made back into sharps containers. *Id.* The program currently reclaims
10 about 70-80% . This program is available as a part of an overall recycling program designed
11 for healthcare facilities. *Id.*

12 32. The Commission's regulations acknowledge that solid waste companies may have the need
13 to file tariff rates for new services. WAC 480-70-262. Waste Management's preparatory
14 activities are evidence of its intent to operate under its vested authority to perform biomedical
15 waste collection. It has invested considerable resources into ensuring that its start-up was
16 properly commenced in accordance with all applicable regulatory schemes. *See, e.g., In re*
17 *R.C. Kercheval, Inc.*, Order M.V. No. 144753, Hearing No. P-74415 (Wash. Utils & Transp.
18 Comm'n, March 31, 1992) (suggesting that investments can – and should – be relevant to
19 determining activity, even in the context of determining the more lax standards of
20 “dormancy” in a motor carrier permit transfer proceeding, unless made for interstate, not
21 regulated, operations).

22 33. The Commission's regulations acknowledge that solid waste companies may have the need
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3 determining activity, even in the context of determining the more lax standards of
4 “dormancy” in a motor carrier permit transfer proceeding, unless made for interstate, not
5 regulated, operations).

6 **D. Neither Stericycle’s Evidence Nor its Arguments Warrant Exercise of**
7 **Commission Discretion to Deem Segmanets of Waste Management’s**
8 **Certificate Abandoned.**

9 34. In addition to the legal prohibitions on a finding of abandonment here, neither the private
10 noncompete agreement nor public policy warrant the Commission’s exercise of its
11 discretionary authority to deem Waste Management’s certificate rights abandoned with
12 respect to biomedical wastes in certain parts of its territories.

13 **a. Stericycle’s Evidence of the 1996 Transaction Is Facile, and the**
14 **Complexities of Implementing Abandonment Further Justify Denial**
15 **of Stericycle’s Claim.**

16 35. As set forth above, biomedical waste *may not* be severed from a solid waste certificate as a
17 matter of law. Moreover, the complex and unworkable hodgepodge of territories that would
18 result from Stericycle’s claimed abandonment is further explanation of why Waste
19 Management’s certificate rights may not be carved up.

20 36. Stericycle simplistically alleges that Waste Management “has abandoned any authority it
21 may once have had” without regard to the nuances and complexities of proving
22 abandonment. (Mot. ¶ 1.) Stericycle paints with too broad a brush. The Commission should
23 refrain from exercising its discretion in response to Stericycle’s Motion, because doing so
24 raises more subtle and problematic issues than it would solve.

25 37. The transaction in 1996 between the parent corporations of the regulated companies is the
26 highlight of Stericycle’s evidence. It is, however, of dubious value in assessing whether
Waste Management has failed to exercise its biomedical waste collection rights. (*See Staff*
Resp. at 6 (“the public policy for the Commission to consider could include those disfavoring

1 contracts in restraint of trade”) (citing 15 USC § 1 and RCW 19.86.030)). First, Stericycle
2 has failed to present evidence that the certificate rights were part of the transaction in 1996.
3 In the list of assets sold from Waste Management, Inc. to Stericycle, Inc., the certificate is
4 glaringly missing. (Polark Decl. in Supp. of Stericycle’s Mot. for Summ. Determin., Ex. 1,
5 Sch. 1.) The certificate is a valuable asset. *Dahl-Smyth, Inc. v. Walla Walla*, 148 Wn.2d
6 835, 847, 64 P.3d 15 (2003). If it were part of the purchase and sale agreement, it would
7 have been listed in the scheduled assets. One of the limitations to the noncompete in
8 Washington was derived from specified mileage from three distinct operational centers, and
9 the geographic scope of the noncompete was not tied to the territories authorized by Waste
10 Management’s certificate rights. This is further evidence refuting Stericycle’s assumption
11 that Waste Management sold its certificate.

12 38. Stericycle has produced no evidence that it sought the Commission’s approval to transfer
13 those certificate rights because no such application was ever submitted. The asset purchase
14 agreement and the associated noncompete carries no weight in the absence of Commission
15 oversight.

16 39. There is a “right” way to retain or restrict against biomedical waste services. If the 1996
17 transaction were intended to permanently confer Waste Management’s biomedical waste
18 collection rights on Stericycle or its parent, such a restriction would have been stated in the
19 certificate. For example, buried deep in Waste Management’s certificate is a small territory
20 in which collection of biohazardous waste is prohibited. Waste Management acquired that
21 territory, along with others, from Allied Waste in 2004. *See In re Rabanco Ltd & Rabanco*
22 *Recycling, Inc./Waste Management of Washington, Inc.*, Order TG-11409, Granting
23 Application (Wash. Utils. & Transp. Comm’n, Jan. 31, 2002). When that pocket of territory
24 was transferred to Allied, the transferor restricted the certificate rights against
25 “biohazardous” waste collection. So, the fact that Waste Management’s certificate was never
26 amended to show a transfer of biomedical waste collection rights to Stericycle is further

1 evidence that Waste Management retained all of its solid waste certificate rights, including
2 biomedical waste collection rights.

3 40. Stericycle knows the proper procedures for incorporating acquisition of territory rights.

4 When it acquired BFI Medical Waste Systems of Washington, Inc., it filed a new tariff with
5 the Commission. *See* Docket TG-001559 (Revises Tariff No. 1, reflecting a cleaning up of
6 administrative and logistical housekeeping details arising from the acquisition of BRI
7 Medical Waste Systems of Washington, Inc.) (no action, effective Dec. 1, 2000).

8 41. Stericycle also glosses over the specific terms of the noncompete agreement. The most it
9 would mean is that Waste Management restricted its biomedical waste collection authority
10 with respect to the collection of untreated medical wastes from non-residential sources
11 located within 75-miles of three service locations in Renton, Redmond and Kennewick.
12 (Polark Decl., Ex. 1 ¶ 12.) Generally applying that geographic area results in a hodge-podge
13 of territories, as more specifically described in this table below:⁶

County within G-237	Within Non-Compete?
Benton	Entirely
Chelan	Partially (does not include Wenatchee)
Douglas	No
Grant	Partially (includes Moses Lake; does not include Ephrata)
Island	Entirely
King	Entirely
Kitsap	Entirely
Kittitas	Partially (does not include Ellensburg)
Lincoln	No
Mason	Entirely
Okanogan	No
Pierce	Entirely
Skagit	Partially
Snohomish	Entirely

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25 ⁶ The analysis presents an approximation of where the 75-mile limit would fall in counties within the territory
26 currently authorized by Waste Management's Certificate No. G-237. It is intended only to illustrate the dilemma of
implementing the most rudimentary interpretation of the effect of the 1996 noncompete suggested by Stericycle.

County within G-237	Within Non-Compete?
Spokane	No
Whatcom	Partially

42. Even Stericycle's own arguments would require a nonsensical parsing of territories – *i.e.*, Waste Management may collect biomedical wastes in Wenatchee but not in Leavenworth. And it excludes significant areas of G-237, such as parts of Spokane County. Although Waste Management confers no legal significance to the 1996 noncompetes, even if it were determinative it obviously is not susceptible to the simplistic application urged by Stericycle because Waste Management's existing territory is fragmented based on the date of acquisition and the nature of the rights acquired and because the Commission would be required to painstakingly interpret the private noncompetes agreement and apply it to Waste Management's fragmented territory.

43. And on the question of when, exactly, Stericycle believes abandonment would have occurred, the Motion is silent. If the 1996 agreement demarcates a determinative point in time (which Waste Management does not concede), Stericycle fails to address the implications of that date. In 1998, USA Waste Services, Inc. acquired Waste Management, Inc. and then assumed the name Waste Management Holdings, Inc. (McNeill Decl. ¶ 3, Ex. 1.). The noncompetes would not restrict a corporate successor's activities. It would exclude any territory owned by USA Waste at the time the noncompetes was executed, even if the certificate were later transferred to Waste Management. Furthermore, after December 2001, when the noncompetes expired, vast areas of certificated authority were transferred to Waste Management. *In re Brem-Air Disposal, Inc./Waste Mgmt. of Wash., Inc.*, Docket TG-011633, Order Granting Application (Wash. Utils. & Transp. Comm'n, May 8, 2002). Presumably those territories would not have been abandoned, according to Stericycle's logic. Waste Management continued to purchase, and obtain the Commission's approval to transfer, even in more recent years. (*In re Rabanco Ltd./Waste Mgmt. of Wash., Inc.*, Docket Nos. TG-041942 & TG-041965, Order Granting Applications (Wash. Utils. & Transp.

1 Comm'n, Dec. 2004.) Stericycle fails to consider the nuances of implementing its broad-
2 brush request.

3 **b. The Public Interest Does Not Require that Certificate Holders Prove**
4 **Ability to Meet Standards Governing Entry into the Market by**
5 **Untried and Untested Operators.**

6 44. Long before there was biomedical waste, there was garbage. When Chapter 81.77 RCW was
7 first enacted, companies collecting what is now known as "solid waste" were picking up *all*
8 *kinds of discarded materials that subsequently evolved* into specialized categories. What
9 used to be called "rubbish" and "trash" and cast-off materials became construction and
10 demolition debris, yard waste, compostables, used oil, spent batteries, and fluorescent light
11 bulbs. Stericycle would have the Commission believe that it and only it is qualified to
12 *protect human health and the environment* from the enormous risks associated with
13 transporting biomedical waste for collection and disposal, but in fact traditional solid waste
14 collection companies have been protecting the public and the environment from harm for
15 decades, constantly implementing increasingly protective strategies.

16 45. The risks with handling solid waste of almost any kind are inherent, but they are nothing new
17 for Waste Management which conducts operations in a manner intended to minimize risks.
18 Waste Management is fully cognizant of the regulatory controls and liabilities applicable to
19 biomedical waste handling (despite the apparent ignorance of its WUTC practitioner). The
20 suggestion in Stericycle's Motion that the Commission should find abandonment because
21 nobody should ever be permitted to collect biomedical waste without submitting to the
22 Commission's scrutiny and demonstrating its fitness, is not persuasive. It minimizes the
23 industry's expertise and exaggerates Stericycle's. Under Stericycle's logic apparently every
24 traditional solid waste collection company has abandoned its biomedical waste authority
25 unless and until it has demonstrated fitness.
26

III. CONCLUSION

1 46. Stericycle has failed – as a matter of law, as a matter of proof, and as a matter of public
2 policy – to prove that biomedical waste services may or should be excised from Waste
3 Management’s solid waste certificate. Waste Management respectfully requests that the
4 Commission deny Stericycle’s Motion for Summary Determination and dismiss Stericycle’s
5 Complaint entirely. *Rubenser*, 58 Wn.2d at 866 (entering summary judgment in favor of
6 nonmoving party); 4 Wash. Prac., Rules Practice CR 56 § 17 (5th ed.) (The courts “have long
7 held that summary judgment may be granted in favor of the nonmoving party if it becomes
8 clear that he or she is entitled thereto.”) (citations omitted).

9 DATED this 26th day of May, 2011.

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12 By




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CERTIFICATE OF SERVICE

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

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DATED at Seattle, Washington, this 26th day of May, 2011.



Kathy Moll