

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

STERICYCLE OF WASHINGTON, INC.,	)	DOCKET TG-121597
	)	
	)	ORDER 02
Complainant,	)	
	)	ORDER DENYING WASTE
v.	)	MANAGEMENT’S MOTION TO
	)	DISMISS; DENYING
WASTE MANAGEMENT OF	)	STERICYCLE’S MOTION FOR
WASHINGTON, INC., d/b/a WM	)	SUMMARY DETERMINATION;
HEALTHCARE SOLUTIONS OF	)	DENYING WASTE
WASHINGTON,	)	MANAGEMENT’S MOTION FOR
	)	SUMMARY DETERMINATION
Respondent.	)	
.....	)	

**INTRODUCTION**

1     **NATURE OF PROCEEDING.** This proceeding arises out of a complaint and petition for declaratory relief filed on October 3, 2012, with the Washington Utilities and Transportation Commission (Commission) by Stericycle of Washington, Inc. (Stericycle) against Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington (Waste Management). Stericycle’s first claim alleges that Waste Management is soliciting biomedical waste collection business from Washington generators by offering discounts on Waste Management’s recycling or other services or otherwise offering unlawful rebates on biomedical waste tariff rates. Stericycle’s second claim alleges that Waste Management is misclassifying its ecoFinity sharps waste program as recycling in order to unlawfully provide biomedical waste collection services both inside and outside its authorized territory at rates lower than or different from its tariff filed with the Commission.

2     **APPEARANCES.** Stephen B. Johnson and Jared Van Kirk, Garvey Schubert Barer, Seattle, WA, represent Stericycle. Polly L. McNeill and Jessica L. Goldman, Summit Law Group PLLC, Seattle, WA, represent Waste Management. Fronda Woods,

Assistant Attorney General, Olympia, WA, represents the Commission's regulatory staff (Staff).<sup>1</sup>

3 **PROCEDURAL HISTORY – MOTIONS.** On November 8, 2012, Stericycle filed a motion for summary determination on the second of the claims raised in its complaint. Stericycle seeks to have Waste Management's ecoFinity sharps collection program classified as solid waste collection.

4 On November 20, 2012, Staff filed a response to Stericycle's motion urging the presiding officer to "avoid a ruling that might be perceived as setting a numerical standard for determining whether an activity" is defined as solid waste collection, subject to regulation under RCW Chapter 81.77, or recycling.

5 On November 28, 2012, Waste Management responded to Stericycle by cross-moving for summary determination and dismissal. Waste Management seeks to have its ecoFinity sharps collection program classified as recycling. Additionally, Waste Management asks the Commission to dismiss Stericycle's complaint on procedural grounds.

6 On November 30, 2012, Staff filed a response opposing Waste Management's motion to dismiss.

7 On December 18, 2012, Stericycle filed its opposition to Waste Management's motion to dismiss. On December 19, 2012, Stericycle filed its response to Waste Management's cross-motion for summary determination.

## MEMORANDUM

### **A. Motion to Dismiss**

8 Stericycle commenced this proceeding by filing a complaint and petition for declaratory relief (complaint) under RCW 81.04.110. The statute authorizes "any

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<sup>1</sup> In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

person or corporation” to file a written “petition or complaint” alleging violations of the Commission’s laws or rules.

- 9 Waste Management contends that Stericycle’s complaint must be dismissed as procedurally defective under the Administrative Procedures Act (APA). According to Waste Management, Stericycle cannot simultaneously file a complaint and a petition for declaratory relief.<sup>2</sup> Commission procedural rules require the filing party to choose either a declaratory or an adjudicative order.<sup>3</sup> Waste Management argues that Stericycle’s complaint fails to elect an appropriate form of relief.<sup>4</sup>
- 10 Waste Management characterizes Stericycle’s filing as more petition for declaratory relief than complaint because one-third of the relief Stericycle seeks is in the form of declaratory orders.<sup>5</sup> Waste Management also criticizes Stericycle for asking the Commission to resolve a policy question through the declaratory order process.<sup>6</sup>
- 11 Waste Management concedes that Commission rules allow for converting a declaratory order proceeding into an adjudication.<sup>7</sup> However, Waste Management argues that even when viewed as a private complaint bringing an enforcement action, Stericycle’s filing does not seek any relief that the Commission can grant.<sup>8</sup> Waste Management focuses on what it calls the “anticompetitive complaint statute”<sup>9</sup> and contends Stericycle is limited to requesting that the Commission establish “rates, charges, rules, regulations or practices” designed to “correct the abuse complained of.”<sup>10</sup> Hence, Waste Management argues that Stericycle’s private complaint cannot obtain declaratory relief or a cease and desist remedy.<sup>11</sup> Waste Management also

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<sup>2</sup> Waste Management’s Opposition ¶¶ 11 and 13.

<sup>3</sup> WAC 480-07-930(1)(b).

<sup>4</sup> Waste Management’s Opposition ¶¶ 13-15.

<sup>5</sup> *Id.* ¶ 16; *see also* Complaint ¶¶ 21b, 21c, and 21d.

<sup>6</sup> Waste Management’s Opposition ¶¶ 19-20.

<sup>7</sup> *Id.* ¶ 21.

<sup>8</sup> *Id.* ¶¶ 21 and 23.

<sup>9</sup> *Id.* ¶ 23. Waste Management interprets the second paragraph of RCW 81.04.110 to be the sole and “limited means of recourse for business harms caused by the alleged misconduct of” a private party’s competitor(s).

<sup>10</sup> *Id.* ¶¶ 23-24.

contends that Stericycle's private complaint may not ask the Commission to impose penalties under RCW 81.04.110.<sup>12</sup> According to Waste Management, these alleged flaws in Stericycle's pleadings require dismissal of Stericycle's filing.

12 Commission Staff disagrees. According to Staff, Stericycle's complaint is properly drafted and "unambiguously invokes the procedures of RCW 81.04.110 and WAC 480-07-370 governing formal complaints" to request an adjudicative order.<sup>13</sup> Staff points out that the Commission can grant declaratory relief, albeit under a different provision of the APA than that cited by Stericycle.<sup>14</sup> Staff recommends disregarding such a minor error in Stericycle's pleadings and hearing the complaint on its merits.<sup>15</sup>

13 Staff further contends that the Commission is authorized to impose monetary penalties in this complaint proceeding, even though the complaint was filed by Stericycle and not on the Commission's own motion.<sup>16</sup> Stericycle's complaint does not seek a specific monetary penalty but asks only that the Commission impose an amount it deems appropriate.<sup>17</sup>

14 Staff concurs with Waste Management that cease and desist orders are not available in a private complaint proceeding. However, Staff points out that other meaningful relief remains available in this case. Staff would not have the Commission dismiss Stericycle's filing.<sup>18</sup>

15 Stericycle also disagrees with Waste Management's proposed dismissal of its complaint. Echoing the bulk of Staff's filing, Stericycle argues that its pleading

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<sup>11</sup> *Id.* ¶ 25. Waste Management argues that a cease and desist remedy would only be appropriate if the Commission itself had brought a classification proceeding under RCW 81.04.510.

<sup>12</sup> *Id.* ¶ 26, n. 39. Waste Management relies on *Glick v. Verizon Northwest, Inc. (Glick)*, Docket UT-040535, Order 03 (January 28, 2005) for the proposition that RCW 81.04.405 authorizes only the Commission to seek penalties under RCW 81.04.110, not a private complainant.

<sup>13</sup> Staff Response to Waste Management Motion for Dismissal ¶¶ 5-6; *see also* Complaint ¶¶ 4-5.

<sup>14</sup> *Id.* ¶¶ 6-7. Waste Management's APA arguments focus on RCW 34.05.240 while Staff relies on the Commission's powers to grant declaratory relief under RCW 34.05.461.

<sup>15</sup> *Id.* ¶ 5, n. 5, and ¶ 7.

<sup>16</sup> *Id.* ¶¶ 8-9. According to Staff, *Glick* preserved the Commission's discretion to impose and set the amount of any penalties imposed as a result of a private complaint proceeding.

<sup>17</sup> *Id.* ¶ 9, n. 12.

<sup>18</sup> *Id.* ¶¶ 11-12.

meets all the requirements of WAC 480-07-370(a) and qualifies as a formal complaint.<sup>19</sup> Stericycle urges the Commission to liberally construe the pleadings under WAC 480-07-395(4), disregard errors or defects that do not affect substantial rights of the other parties, and hear this case as a formal complaint.<sup>20</sup> Finally, Stericycle contends that all the forms of relief it requests are available and appropriate under RCW 81.04.110.<sup>21</sup>

- 16 **Commission Decision.** We disagree with Waste Management’s contention that Stericycle’s filing fails to choose an appropriate form of relief. Stericycle properly filed a formal complaint against Waste Management. Stericycle’s pleading meets all the requirements of RCW 81.04.110 and WAC 480-07-370(a): it is in writing, sets forth the grounds of the complaint and relief requested, contains facts constituting the basis of the complaint, and cites to relevant law and authority. Although Stericycle’s complaint mistakenly references RCW 34.05.240 in seeking declaratory relief, this flaw in the pleading is insufficient to require dismissal. The intent of Stericycle’s filing remains clear and the Commission will adjudicate it as a formal complaint.
- 17 We also disagree with Waste Management’s argument that Stericycle’s authority to file a complaint is limited in scope to issues of competition. The express language of RCW 81.04.110 puts private parties and corporations on equal footing with the Commission when filing a formal complaint.<sup>22</sup> The statute’s further description of complaints between competitors does not limit Stericycle’s filing in this docket.
- 18 Stericycle’s complaint seeks a variety of forms of relief, several of which may be available in this proceeding. After considering all available evidence, the Commission may elect to issue one or more of the requested declaratory rulings via its authority under RCW 34.05.461(3) and RCW 81.04.120. Further, as Waste

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<sup>19</sup> Stericycle Opposition to Waste Management’s Motion to Dismiss ¶ 3.

<sup>20</sup> *Id.* ¶¶ 4-5.

<sup>21</sup> *Id.* ¶¶ 6-10.

<sup>22</sup> The first paragraph of RCW 81.04.110 provides that “Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service company or any person, persons, or entity acting as a public service company in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.” *See also Waste Connections of Wash., Inc. v. Enviro/Con & Trucking, Inc.*, Docket TG-071194, Order 05 ¶ 17 (Oct. 7, 2008).

Management acknowledges, the complaint statute itself authorizes the Commission to “correct the abuse complained of” by Stericycle. Finally, we agree with Staff that if the evidence merits such action in this case, the Commission may elect to exercise its prosecutorial discretion under RCW 81.04.110 and RCW 81.04.405 to impose an appropriate monetary penalty on Waste Management.<sup>23</sup>

19 Stericycle also asks the Commission to enter several cease and desist orders against Waste Management. RCW 81.04.110 does not identify cease and desist orders as an available form of relief and the Commission has previously refused to enter such an order in a complaint proceeding.<sup>24</sup> Cease and desist orders are available in a classification proceeding brought under RCW 81.04.510, but only the Commission can initiate a special proceeding under this statute. The Commission will not consider Stericycle’s requests for cease and desist orders. Nevertheless, Stericycle’s complaint can proceed because it seeks other meaningful and potentially available relief.<sup>25</sup>

20 We exercise our discretion under WAC 480-07-395(4) to disregard the minor errors or defects in Stericycle’s pleading. We deny Waste Management’s motion to dismiss the filing on procedural grounds.

### **B. Motions for Summary Determination**

21 Under its procedural rules, the Commission may grant summary determination when the pleadings, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.<sup>26</sup> Summary determination is appropriate if, based on all the evidence, there are no issues of material fact and reasonable persons could reach but one conclusion.<sup>27</sup>

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<sup>23</sup> As pointed out by Stericycle (Opposition ¶¶ 6 and 9), Waste Management’s contrary interpretation of *Glick* relies on an administrative law judge’s initial order (*Waste Connections of Wash., Inc. v. Enviro/Con & Trucking, Inc.*, Docket TG-071194, Order 07 (Nov. 19, 2009)) that is not precedential in this matter; the Commission has not endorsed its reasoning and conclusions.

<sup>24</sup> See *In re San Juan Express, Inc.*, Docket TS-940956, Fifth Supp. Order at 10 (Dec. 20, 1994).

<sup>25</sup> *Waste Connections of Wash., Inc. v. Enviro/Con & Trucking, Inc.*, Docket TG-071194, Order 05 ¶¶ 18-19 (Oct. 7, 2008).

<sup>26</sup> See WAC 480-07-380(2)(a).

<sup>27</sup> *Vallandingham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

- 22 The Commission must consider the facts in the light most favorable to the non-moving party.<sup>28</sup> Once the moving party has demonstrated that there are no material facts in dispute, the burden shifts to the non-moving party to set forth specific facts sufficient to rebut the moving party's contentions.<sup>29</sup> If the non-moving party fails to set forth any such facts, summary determination is proper.<sup>30</sup>
- 23 Here, the parties agree on certain basic facts at issue, despite reaching irreconcilable conclusions in their competing motions. The Commission recognizes the potential difficulties in distinguishing authorized recycling activities from unauthorized solid waste collection. Our rules do not rely on a strictly quantitative definition to differentiate a load of recyclable materials from a load of solid waste but instead require a multi-factor evaluation of not only the load's content, but also the intentions of the entities involved in generating and transporting the material.
- 24 For the reasons discussed below, we reject Stericycle's arguments that would definitively characterize Waste Management's ecoFinity sharps program as unauthorized solid waste collection. We accept, in part, Waste Management's arguments that its ecoFinity sharps program could be characterized as recycling. However, the parties have not presented evidence sufficient for us to address all of the factors set out in our rules and enter a final determination on this matter. Therefore, we deny both parties' motions for summary determination.

### C. Agreed Facts

- 25 Waste Management is authorized under Certificate G-237 to provide solid waste collection services in certain portions of Washington.<sup>31</sup> Waste Management's certificate permits biomedical waste collection and transportation services in its specified territory.<sup>32</sup> Under this authority, Waste Management collects and transports biomedical waste, including "sharps," to the company's processing facility in Seattle for autoclave disinfection.<sup>33</sup> All such waste collected under Waste Management's

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<sup>28</sup> *Homestreet, Inc. v. State Dept. of Revenue*, 139 Wash. App. 827, 162 P.3d 458, 464 (2007).

<sup>29</sup> *Atherton Condo. Apartment-Owner Ass'n Bd. Of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 512, 799 P.2d 250 (1990).

<sup>30</sup> *Atherton*, 115 Wn.2d at 516.

<sup>31</sup> Stericycle's Motion ¶ 7.

<sup>32</sup> *Id.* ¶ 8.

<sup>33</sup> *Id.* ¶¶ 8-9.

certificate is incinerated and then disposed of in a landfill; generators pay a Commission-approved tariff rate for this solid waste collection service.<sup>34</sup>

26 Waste Management has applied to extend its authority to collect biomedical waste statewide.<sup>35</sup> However, Waste Management's certificate does not currently authorize such operations in Bellingham, Washington.<sup>36</sup>

27 In 2011, Waste Management partnered with Becton Dickinson, Inc., to initiate a separate program known as the ecoFinity Life Cycle Solution (ecoFinity service).<sup>37</sup> Under the ecoFinity service, Waste Management collects biomedical sharps waste and transports it to the company's facility in Seattle for storage and eventual disinfection.<sup>38</sup> These untreated sharps are periodically transported to Vernon, California for sterilization, washing, and shredding.<sup>39</sup>

28 Waste Management transports the treated sharps to Talco Plastics Corporation (Talco), also located in California, where the load is processed using "float/sink technology" to separate out and recover a portion of the plastics in the shipment.<sup>40</sup> Talco pelletizes and then ships the reclaimed plastics to Becton Dickinson for use in manufacturing new disposable sharps containers; the remainder of the load is discarded.<sup>41</sup>

29 Measuring by weight, Talco has been able to reclaim as much as 28 percent of the plastics contained in the ecoFinity loads; however, on some loads its recovery has been as low as 8 percent. Talco's recovery rate averages approximately 22 percent.<sup>42</sup>

30 PeaceHealth St. Joseph Medical Center of Bellingham (PeaceHealth) is currently the only generator utilizing Waste Management's ecoFinity service. PeaceHealth pays a

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<sup>34</sup> *Id.* ¶¶ 9-10.

<sup>35</sup> Waste Management's Opposition, ¶ 4. *See also* Docket TG-120033.

<sup>36</sup> Stericycle's Motion ¶¶ 7 and 12.

<sup>37</sup> *Id.* ¶ 11; *see also* Waste Management's Opposition, ¶ 7.

<sup>38</sup> Stericycle's Motion ¶ 14; *see also* Waste Management's Opposition, ¶ 7.

<sup>39</sup> Stericycle's Motion ¶ 15; *see also* Waste Management's Opposition, ¶ 7.

<sup>40</sup> Stericycle's Motion ¶ 16; *see also* Waste Management's Opposition, ¶ 7.

<sup>41</sup> *Id.*

<sup>42</sup> Stericycle's Motion ¶ 17; *see also* Waste Management's Opposition, ¶ 7.



lower rate for this service than the rate approved by the Commission in Waste Management's solid waste collection tariff.<sup>43</sup>

#### D. Summary of Party Positions

- 31 RCW 81.77.040 makes it unlawful for a “solid waste collection company to operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation.” The competing motions for summary determination ask the Commission to determine whether Waste Management can lawfully offer the ecoFinity service to PeaceHealth. In essence, the parties ask the Commission to classify the ecoFinity service as unlawful solid waste collection or legal commercial recycling.
- 32 Stericycle argues that the ecoFinity service is solid waste collection and can only be offered within Waste Management's certificated territory at rates set out in Waste Management's tariff.<sup>44</sup> Specifically, Stericycle argues that sharps waste transported under the ecoFinity service is not a recyclable material and that it is not being transported for recycling under any applicable definition of the term.
- 33 To the contrary, Waste Management claims that its ecoFinity service is exempt from Commission regulation of solid waste collection because it qualifies as commercial recycling. Waste Management argues that the ecoFinity service satisfies all relevant prongs of the Commission's rules for determining that its activities in Bellingham do not require a solid waste certificate. Specifically, Waste Management relies on the lack of a quantitative minimum threshold of materials recovery in the Commission's laws and rules defining recycling.
- 34 Taking no position in this dispute, Staff calls our attention to a withdrawn rulemaking in Docket TG-080591 in which the Commission attempted to resolve disagreement within the industry over what should be regulated as solid waste collection under RCW 81.77 and what should be regulated as common carriage of property (*i.e.*,

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<sup>43</sup> Stericycle's Motion ¶¶ 7 and 18; *see also* Waste Management's Opposition, ¶ 7. Waste Management's tariff rate for solid waste collection of biomedical waste is approximately 25¢/gallon. Waste Management charges PeaceHealth approximately 20.9¢/gallon for its ecoFinity service.

<sup>44</sup> Stericycle's Motion ¶¶ 21-25.

recycling) under RCW 81.80. Staff urges that we not adopt a numerical standard for determining whether an activity is subject to regulation under RCW 81.77.<sup>45</sup>

### E. Analysis and Discussion

35 The Commission has wrestled with this topic on previous occasions, most recently in 2008 when we classified several companies hauling and disposing of construction, demolition, and land clearing (CDL) debris as solid waste collection companies.<sup>46</sup> Those companies collected CDL debris, sorted out recyclable materials, and hauled the remaining “industrial waste stabilizer” to a private landfill where they paid a fee for its disposal.<sup>47</sup> The Commission rejected arguments that the CDL debris was a recyclable material, even when it helped maintain the landfill’s structural integrity, and concluded that placing waste into a landfill could not be considered recycling.<sup>48</sup>

36 This case presents two key questions about PeaceHealth’s biomedical sharps waste:

- Are they “recyclable materials?”
- Does the ecoFinity service dispose of or recycle these materials?

The parties agree that the majority of the material collected under the ecoFinity service is eventually disposed of in a landfill, but an average of 22% is recovered for reuse. Stericycle argues that this recovery rate is necessarily too low to allow the ecoFinity service to qualify as recycling. Waste Management disagrees.

37 Our analysis begins with a comparison of Waste Management’s certificated solid waste collection activities and the ecoFinity service it provides to PeaceHealth. Under its certificate, Waste Management’s biomedical waste collection practice is essentially a three step process:

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<sup>45</sup> Staff Response to Stericycle’s Motion, ¶¶ 4-7.

<sup>46</sup> In re the Matter of Determining the Proper Carrier Classification of Glacier Recycle, LLC; Hungry Buzzard Recovery, LLC; and T&T Recovery, Inc., Docket TG-072226, *Order on Motions for Summary Determination*, Order 06 (June 13, 2008); *see also* Order 08 ¶¶ 27-28, endorsing and adopting Order 06 as a precedential decision for the Commission.

<sup>47</sup> Hungry Buzzard, Order 06 ¶¶ 8-10 and 13.

<sup>48</sup> *Id.* ¶¶ 27-29, 34-38, and 45-47.

- Collect.
- Disinfect.
- Dispose.

Everything Waste Management collects is disinfected at its Seattle autoclave facility, incinerated, and then disposed of in a landfill. No portion of the material is diverted from the waste stream. Plainly, this activity is regulated solid waste collection.

38 Waste Management characterizes its ecoFinity service as a “sharps recycling program” that “converts the sharps waste stream into a resource stream, creating a source of raw material for use in products” such as Becton Dickinson’s Recykleen containers.<sup>49</sup> The ecoFinity sharps program builds on the biomedical waste collection process, partnering with other entities to add several additional steps:

- Collect.
- *Store.*
- Disinfect.
- *Wash and shred.*
- *Reclaim plastics for reuse.*
- Dispose of remainder.

As noted above, Talco extracts an average of 22% of the plastics and diverts that material from the waste stream. Talco provides the reclaimed and pelletized plastic to Becton Dickinson for reuse and reincorporation into new sharps containers.

### 1. Is the ecoFinity service exempt under RCW 81.77?

39 RCW 81.77.010(8) explains that solid waste collection does not include “collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation.” Instead, the Commission regulates transportation of such recyclable materials under RCW 81.80. Solid waste that “may incidentally contain recyclable materials” does not qualify for this exemption.<sup>50</sup>

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<sup>49</sup> Exhibit E to Stericycle’s Motion, *Waste Management Healthcare Solutions Proposal to PeaceHealth*, page 2; *see also* page 5.

<sup>50</sup> *See* RCW 81.80.470.

40 In order for Waste Management’s ecoFinity service to qualify as exempt from regulation under RCW 81.77, we must find that:

- PeaceHealth is a commercial or industrial generator of recyclable materials.
- Talco Plastics is a recycler.
- Waste Management collects and transports recyclable materials from PeaceHealth to Talco Plastics.
- Talco Plastics uses or reclaims the material delivered by Waste Management.

41 The parties do not dispute that PeaceHealth is a generator of biomedical waste.<sup>51</sup> Further, there is no serious dispute that Talco Plastics qualifies as a recycler: Talco processes loads of biomedical sharps to reclaim a portion of the plastics and provides that reclaimed material to Becton Dickinson for reuse.<sup>52</sup>

42 The remaining question is whether the biomedical sharps PeaceHealth produces can be considered “recyclable materials.” As explained further below, the parties have not presented all of the necessary information required to complete the analysis under applicable laws and regulations. In other words, material facts remain in dispute.

## 2. Recyclable Materials – RCW 70.95.030

43 RCW 70.95.030(17) defines “recyclable materials” as “those solid wastes that are separated for recycling or reuse, such as papers, metals, and glass, that are identified as recyclable materials pursuant to a local comprehensive solid waste plan.” Thus, we must determine two facts: whether these are solid wastes separated for recycling or reuse and whether they are identified as recyclable materials under a local comprehensive solid waste plan.

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<sup>51</sup> Stericycle’s Motion ¶ 12; Waste Management’s Opposition, ¶ 7.

<sup>52</sup> Stericycle’s Motion ¶ 16; Waste Management’s Opposition, ¶ 7.

a. *Are the subject materials Separated for Recycling or Reuse?*

44 The parties do not dispute that PeaceHealth separates biomedical sharps from other portions of its waste stream. However, Stericycle questions whether PeaceHealth is doing so “for recycling or reuse.” Stericycle contends that all generators of sharps waste are required by law to separate biomedical waste prior to transportation. According to Stericycle, PeaceHealth would separate its sharps waste the same way for disposal.<sup>53</sup> Stericycle further argues that PeaceHealth doesn’t actually separate the components of the sharps waste stream, as that process is accomplished by an outside reclamation company after treatment.<sup>54</sup> To the contrary, Waste Management contends that PeaceHealth had an expectation that its sharps waste would be recycled when it contracted for the ecoFinity service and separates it for that purpose.<sup>55</sup>

45 As to the “separation” prong of RCW 70.95.030(17), we agree with Waste Management. PeaceHealth signed up for ecoFinity service knowing that it was a recycling program and that Waste Management was not authorized to offer solid waste collection services in Bellingham. The undisputed fact that PeaceHealth segregates its biomedical sharps waste and packages it in the manner required by the ecoFinity program supports a finding that PeaceHealth is separating these sharps for recycling or reuse. That PeaceHealth does not further separate the component materials is irrelevant.

b. *Are the subject materials Identified as Recyclable Materials Pursuant to a Local Plan?*

46 The next step of our inquiry under RCW 70.95.030 is whether a local comprehensive solid waste plan identifies these materials as “recyclable.” PeaceHealth is located in Bellingham where the Whatcom County Comprehensive Solid and Hazardous Waste Management Plan (Whatcom County Plan) applies.

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<sup>53</sup> Exhibit D to Stericycle’s Motion, *Deposition of Jeffrey Norton* at 115:11 – 118:1; *see also* Stericycle’s Opposition to Waste Management’s Cross-Motion ¶ 9.

<sup>54</sup> Stericycle Motion ¶ 27. In its Opposition to Waste Management’s Cross-Motion, Stericycle focuses on the “unique risks of biomedical waste” and essentially contends that this category of solid waste can never be eligible to be commercially recycled. The governing statutes and rules do not support such a broad conclusion.

<sup>55</sup> Waste Management’s Opposition, ¶¶ 43-44 and 49.

- 47 The Whatcom County Plan defines “recyclable materials” as “those solid wastes that are separated for composting, recycling, or reuse into usable or marketable materials.” The Whatcom County Plan states that “residual material remaining after recyclables have been removed” is not considered a recyclable material under this definition.<sup>56</sup> The Whatcom County Plan does not list biomedical sharps waste among its specific “designated recyclables,”<sup>57</sup> referencing them instead in its provisions for handling “infectious waste.”<sup>58</sup>
- 48 The Whatcom County Plan is ambiguous with regard to biomedical sharps waste. Its general language echoes that of the statute and could be interpreted to allow certain biomedical sharps waste that is separated from the general waste stream for “reuse into usable or marketable materials” to be considered “recyclable materials.” On the other hand, the section of the Whatcom County Plan that designates specific materials as recyclable does not expressly identify biomedical sharps.
- 49 Stericycle argues that the Whatcom County Plan’s separate reference to “infectious waste” and its special handling requirements mandate against any possibility of biomedical sharps waste being considered recyclable. However, we are not convinced that the two categories are mutually exclusive. The Whatcom County Plan seeks to achieve a goal of 50 percent recycling and does not explicitly exclude any solid waste from the possibility of being diverted from the solid waste stream. The record should be further developed to allow a factual determination in this regard.
- 50 Additionally, no party provided evidence or argument as to whether the Whatcom County Plan must specifically designate biomedical sharps waste as a recyclable material in order to satisfy the second prong of RCW 70.95.030(17). The Whatcom County Plan is unclear as to whether its Solid Waste Advisory Committee only designates recyclables that the county itself will accept, or if such designations have a wider application and might be relevant to evaluating the ecoFinity service. The record does not yet contain sufficient information about the Whatcom County Plan to

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<sup>56</sup> Exhibit H to Stericycle’s Motion, *Whatcom County Comprehensive Solid and Hazardous Waste Management Plan 2008*, page 20.

<sup>57</sup> *Id.* The Whatcom County Plan specifically designates certain recyclables and references a method for expanding that list with “other materials for which the County determines that viable markets with beneficial uses exist” and where there is a “potential for waste stream diversion, collection efficiency, processing requirements and market conditions.”

<sup>58</sup> *Id.* at 33-34.

allow a legal determination on whether biomedical sharps waste might be considered recyclable materials without such a specific designation.

### 3. Recyclable Materials and Recycling – WAC 480-70

51 Having taken the statutory analysis as far as the existing record would allow, we now look to the Commission’s own rules defining “recyclable materials” and “recycling.” Similar to the definitions contained in RCW 70.95.030, above, WAC 480-70-041 provides as follows:

“Recyclable materials” means materials that are transported for recycling, reprocessing, reclamation, or for any process that extracts or modifies the commodity for reuse or another commercially valuable purpose.

“Recycling” means transforming or remanufacturing materials into usable or marketable materials for use other than landfill disposal or incineration.

52 The Commission has previously recognized that “virtually anything is capable of being recycled”<sup>59</sup> and therefore defines “recyclable materials” by focusing on *why* materials are being transported. If the transportation is undertaken to allow processing and transformation of materials into something reusable or commercially valuable, the materials can be considered recyclable. If the materials are not disposed of in a landfill or incinerated, their transformation can be considered recycling.

53 The Commission uses a case-by-case approach to evaluate whether a particular activity must be regulated as solid waste collection. WAC 480-70-016(3) states:

In some instances, transportation of a specific commodity may be subject to commission regulation under the provisions of chapter 81.80 RCW, or as solid waste under the provisions of chapter 81.77 RCW, depending on the circumstances involved in the transportation of that commodity. For example, if soil is transported to a landfill to become part of the cover of the landfill, the transportation is subject to regulation as a motor carrier under the provisions of chapter 81.80 RCW. However, if the soil is being

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<sup>59</sup> See Commission Decision and Order Denying Administrative Review; Affirming and Adopting Initial Order, In the Matter of Determining the Proper Classification of Drop Boxes R Us, Inc. and In the Matter of Determining the Proper Classification of Puget Willamette Xpress, Inc., Order M.V.G. No. 1840, Hearing Nos. H-5039 and H-5040 (October 8, 1998).

transported to a landfill merely for disposal, the transporter is subject to regulation as a solid waste collection company under the provisions of chapter 81.77 RCW.

The Commission has applied this approach to commodities as diverse as kiln dust<sup>60</sup> and agricultural sludge.<sup>61</sup> The purpose of the transportation governs the outcome of the analysis: if for disposal, the material is garbage; if for movement to a location for a higher use, the material is considered property.

- 54 With regard to medical waste, when biomedical sharps are collected and transported solely for disinfection, incineration, and disposal in a landfill, the Commission regulates the activity as solid waste collection. However, our rules leave open the possibility that medical waste could be considered a valuable commodity and transported by a common carrier to a willing purchaser. The record here does not yet contain sufficient information about the arrangements between Waste Management, Talco Plastics, and Becton Dickinson to allow a complete evaluation.
- 55 We recognize that the Commission has previously required a solid waste collection certificate for activities somewhat akin to Waste Management's ecoFinity service, but we find the circumstances of each of those cases potentially distinguishable. None of our previous orders fully address the situation of a company seeking to implement a recycling program to divert biomedical waste from the waste stream and reclaim some portion of it for reuse.
- 56 In 1992, the Commission granted temporary solid waste collection authority to Ryder Distribution Systems (Ryder) to collect biohazardous waste from generators in 17 counties around the state and transport it to Stericycle's then-new treatment plant in Morton.<sup>62</sup> Stericycle's intent was to eventually recycle 100 percent of certain "non-

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<sup>60</sup> In re Fedderly-Marion Freight Lines, Inc., Order M.V. G. No. 1201, App. No. GA-802 (June 1985). Cement manufacturers typically dispose of kiln dust in a landfill. However, on a seasonal basis, farmers purchase kiln dust from cement companies for use as a soil conditioner (due to its high lime content).

<sup>61</sup> C&C Transfer Co., Inc., Order M.V. No. 143632, App. No. E-74249 (July 1991). When a shipper must pay for disposal of agricultural sludge because it has no commercial value, it is solid waste. In other circumstances, the sludge may have value as animal feed, soil enrichment or some other valuable end use which removes it from solid waste classification.

<sup>62</sup> In the Matter of Application No. GA-5563 of Ryder Distribution Systems, Inc., Order M.V.G. No. 1536 (Jan. 29, 1992).



pathologic materials,” but at the time most such material was accepted for disposal.<sup>63</sup> The Commission held that a grant of solid waste collection authority was necessary, but that if the planned recycling became the dominant activity, Ryder might instead require only motor carrier authority under RCW 81.80.<sup>64</sup> Thus, in Ryder, the Commission recognized the possibility of a company hauling biohazardous waste for recycling without a solid waste collection certificate.<sup>65</sup>

57 In 1994, the Commission granted a solid waste collection certificate to Medical Resource Recycling System, Inc. (MRRSI), to provide a specialized service collecting and transporting biohazardous wastes in Spokane County.<sup>66</sup> MRRSI distinguished its service by avoiding use of an incinerator, relying instead on an autoclave to disinfect the waste, then shredding it and recycling approximately 20 percent of the material. The Commission primarily analyzed the need for MRRSI’s proposed service on whether existing carriers offering only incineration were providing service to the satisfaction of the Commission. Unlike the Ryder case, the Commission did not analyze the possibility that MRRSI’s recycling activities might allow its operation solely with common carrier authority.<sup>67</sup>

58 Also in 1994, the Commission required a solid waste collection certificate for a company owned by Lowell Haugen to collect medical waste in western Washington and transport it to Spokane, where the Haugen company paid MRRSI to treat and dispose of the material.<sup>68</sup> Noting that “only a very small part” of the waste was recycled, the Commission rejected claims that the Haugen company was a recycler

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<sup>63</sup> *Id.* at 4.

<sup>64</sup> *Id.* at 6. The Commission noted that “a parallel motor carrier application could resolve the issue,” allowing Ryder to operate under dual authority of RCW 81.77 and RCW 81.80.

<sup>65</sup> *Id.* See also n. 9 where the Commission presciently noted that “specialized needs and services outside the ‘universal’ waste stream and the increasing prevalence of recycling tend to blur the lines between traditional solid waste activity and traditional motor carrier activity.”

<sup>66</sup> In the Matter of Application GA-76820 of Medical Resource Recycling System, Inc., Order M.V.G. No. 1707 (May 25, 1994).

<sup>67</sup> *Id.* at 2-3. MRRSI was seeking solid waste collection authority, not common carrier authority.

<sup>68</sup> In the Matter of Determining the Proper Classification of Lowell Haugen d/b/a Medical Waste Management Systems, Inc., Order M.V. No. 148396, *Initial Order on Classification* (Dec 16, 1994). See also Order M.V. No. 148521, Commission Decision and Order Rejected “Appeal” Except for Limited Purpose; Affirming and Adopting Initial Order to Cease and Desist (Apr 27, 1995).

and therefore exempt from solid waste regulation.<sup>69</sup> Although Stericycle argues that the ecoFinity service's 22 percent average recovery rate is a similarly small proportion, Commission rules do not establish a quantitative threshold for defining recycling and distinguishing such a program from solid waste collection.

59 In order to distinguish Waste Management's ecoFinity service from its certificated solid waste collection business, we must consider more than the effectiveness of Talco Plastics' reclamation efforts. WAC 480-70-016(4) sets out an illustrative list of the factors the Commission considers in determining whether a particular activity requires a solid waste certificate:

- The intent of the shipper.
- The intended destination of the shipment.
- The actual destination of the shipment.
- Special handling or conditions placed on the shipment by the shipper and/or receiver.
- The value of the commodity being transported.
- Whether the carrier is primarily engaged in the business of providing solid waste collection or is primarily engaged in the business of providing a service other than the collection of solid waste.
- Whether the carrier holds itself out to the public as a transporter of solid waste.

60 The parties have provided sufficient evidence to analyze some, but not all of these factors. As noted above, we have already found that PeaceHealth's intent in contracting with Waste Management for the ecoFinity service is to engage in recycling. This is an important factor in the analysis, but not necessarily definitive.

61 Further, the available evidence demonstrates that the intended and actual destinations of the shipments are the same: Waste Management transports the PeaceHealth shipments to Talco Plastics to facilitate processing of the sharps for plastic reclamation; the residual waste then goes to a landfill for disposal.<sup>70</sup>

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<sup>69</sup> *Id.* Neither the *Initial Order on Classification* nor the subsequent *Commission Decision* assign a numerical quantity to the "very small part" of the medical waste recycled in that case.

<sup>70</sup> The record developed thus far does not indicate whether Waste Management transports this residual waste from Talco to the landfill in California or if some other entity performs this task.

62 The record contains some evidence of the special handling requirements that shipper PeaceHealth imposes on Waste Management, but the record does not identify whether Talco Plastics or Becton Dickinson impose any such requirements of their own.

63 Additionally, no party has provided sufficient evidence to determine the value, if any, of PeaceHealth's biomedical sharps waste. The record contains no information about any fees charged by Talco Plastics to receive and process the shipments Waste Management delivers. Further, the record does not establish to whom Becton Dickinson makes payment, if any, for the recycled plastic pellets. This factor may not be singularly dispositive of the matter, but we cannot complete an evaluation under WAC 480-70-016(4) without further evidence on this question.

64 Turning to the last two factors in WAC 480-70-016(4), we have little doubt that Waste Management is primarily engaged in the business of providing solid waste collection service and that it generally holds itself out to the public as a transporter of solid waste. However, Waste Management argues that it is holding itself out to PeaceHealth as a commercial recycler for purposes of offering the ecoFinity service as a pilot program. The existing record does not provide a ready reconciliation of this apparent identity conflict.

65 **Conclusion.** The parties have not supplied the Commission with sufficient factual evidence to allow a complete evaluation of Waste Management's ecoFinity service as either solid waste collection or recycling. The record is deficient with regard to Whatcom County's comprehensive solid waste plan; the specific arrangements between Waste Management, Talco Plastics, and Becton Dickinson; and the value of PeaceHealth's biomedical sharps in the context of the ecoFinity service. Until the parties develop the record further, we cannot resolve certain questions of law. Consequently, the Commission denies both motions for summary determination.

### ORDER

#### THE COMMISSION ORDERS:

66 (1) Waste Management's motion to dismiss Stericycle's complaint is denied.

67 (2) Stericycle's motion for summary determination is denied.

68 (3) Waste Management's motion for summary determination is denied.

Dated at Olympia, Washington, and effective January 4, 2013.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM  
Administrative Law Judge

**NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.**