BEFORE THE WASHINGTON UTILITIES

AND TRANSPORTATION COMMISSION

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| In the Matter of the Petition of  STERICYCLE OF WASHINGTON, INC.,  For an Order Suspending Tariff Filing and Initiating an Adjudicatory Proceeding concerning the Abandonment of Authority Under G-237 and Proposed Biomedical Waste 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 motion to dismiss stericycle’s complaint and petition |

1. COMES NOW Waste Management of Washington, Inc. d/b/a WM-Healthcare Solutions (“Waste Management”), by and through Summit Law Group, in response to the *Complaint and Petition/Request for Investigation and Immediate Suspension of Proposed Tariff* (“Complaint”) filed on March 21, 2011, by Stericycle of Washington, Inc. (“Stericycle”), and respectfully moves the Commission to dismiss the Complaint for failure to state a claim upon which relief may be granted, pursuant to WAC 480-07-380(1), RCW 34.05.437, and Civil Rule 12(b)(6).
2. Stericycle’s interests in bringing this action are obviously for the sole purpose of protecting its monopoly. Its shotgun-style Complaint cites to every possible statutory ground – legally applicable or not – in an attempt to co-opt the Commission’s authority and manipulate administrative procedures in a blatant effort to prevent meaningful competition from a solid waste certificate holder entering the biomedical waste market. The Commission should not countenance such an effort. It should deny each and every request in Stericycle’s Complaint because, for the legal reasons set forth below, it has failed to state any claim upon which relief may be granted.

# facts alleged by stericycle

1. Waste Management “holds general solid waste authority under G-237” and, along with its affiliated companies, is “engaged in solid waste collection and disposal within this state and throughout the United States.”[[1]](#footnote-1) Waste Management’s authorized service area under Certificate G-237 includes densely populated cities and vast, sparsely-populated unincorporated territories in King, Snohomish and Skagit Counties and throughout the state, including Mount Baker National Park in Whatcom County.[[2]](#footnote-2) Many lucrative areas, such as large portions of the City of Bellevue, are excluded from Certificate G-237.[[3]](#footnote-3) Waste Management may only operate solid waste collection services in the specified territories authorized by Certificate G-237.[[4]](#footnote-4)
2. Pursuant to a 1996 agreement with Stericycle’s parent company, Waste Management’s parent company contractually agreed not to provide biomedical waste collection services in competition with Stericycle for several years.[[5]](#footnote-5) However, the parties to that agreement never sought – and the Commission never granted – the transfer of any of Waste Management’s rights under Certificate G-237 to Stericycle (or to anyone else).[[6]](#footnote-6)
3. Stericycle applied for and was granted state-wide authority to perform biomedical waste collection in 1995 following four years of administrative litigation to obtain that certificate right.[[7]](#footnote-7) Since then, Stericycle has acquired control of all other certificates specifically authorizing specialized biomedical waste collection.[[8]](#footnote-8) Pursuant to the state-wide territory it sought and acquired, Stericycle “is required to serve the whole state ….”[[9]](#footnote-9) Stericycle has not requested that its certificated territory be amended by the Commission.[[10]](#footnote-10)
4. “For several months” prior to the filing of the Complaint, Waste Management has been approaching prospective customers “and soliciting them for the new biomedical waste collection and transportation service to be offered by Waste Management ….”[[11]](#footnote-11) Waste Management will offer medical waste collection services in all of the areas in Washington “where Waste Management holds general solid waste authority under G-237.”[[12]](#footnote-12)
5. “Stericycle recognizes that the Commission may welcome additional competition in biomedical waste collection and does not oppose fair competition if in the public interest and initiated in accordance with the requirements of applicable law.”[[13]](#footnote-13)

# procedural status

1. On January 3, 2011, Waste Management filed an application for a name change reflecting an additional trade name of WM Healthcare Solutions of Washington.[[14]](#footnote-14) On March 18, 2011, Waste Management filed a tariff for biomedical waste collection rates under the one-day notice provision of WAC 480-70-261.[[15]](#footnote-15) The tariff was rejected by the Commission.[[16]](#footnote-16) On March 28, 2011, Waste Management filed a tariff for biomedical waste collection under the seven-day notice provision of WAC 480-70-262.[[17]](#footnote-17)
2. Stericycle filed its Complaint on March 21, 2011. It was docketed with Waste Management’s initial tariff filing. After the Commission rejected the one-day filing, Stericycle’s Complaint was assigned its own docket number, processed by the Administrative Law Division and served on Waste Management on April 1, 2011.[[18]](#footnote-18)

# argument

1. The Commission will consider Waste Management’s Motion to Dismiss under the standard applicable to motions to dismiss filed pursuant to the Superior Court Rules 12(b)(6) and 12(c).[[19]](#footnote-19)
2. For purposes of deciding a motion under CR 12(b)(6), all of the factual allegations in the complaint are accepted as true.[[20]](#footnote-20) Where a complainant fails to allege facts – and none may be imagined – which would entitle it to relief, a complaint must be dismissed.[[21]](#footnote-21)
3. Although the standard is stringent, assuming as true the facts alleged in the Complaint, Stericycle’s claims fail as a matter of law. In this case, it is evident that Stericycle cannot allege any set of facts which could justify recovery. First, Stericycle’s claim of abandonment must be dismissed because biomedical waste services may not be fragmented from a traditional solid waste certificate. Second, none of the long list of statutory citations advanced by Stericycle justifies any action by the Commission.

## Stericycle’s claim of abandonment must be dismissed for failure to state a viable claim.

1. Under Certificate G-237, Waste Management is authorized to perform biomedical waste collection. Its certificate broadly authorizes “solid waste collection”[[22]](#footnote-22) and the Commission long has held that traditional solid waste certificates subsume the right to perform biomedical waste collection and disposal.[[23]](#footnote-23)
2. Stericycle argues that pursuant to RCW 81.77.030(6), one of Waste Management’s bundle of rights under Certificate G-237 may be fragmented and revoked. Stericycle is wrong. The statute provides that where the holder of a certificate

has failed to operate as a solid waste collection company for a period of at least one year preceding the filing of the complaint …, [the Commission] may suspend, revoke, alter, or amend any certificate issued under the provisions of this chapter.[[24]](#footnote-24)

Undisputedly, Waste Management has *not* failed to operate as a solid waste collection company in the last year. Stericycle cannot assert that Waste Management has failed to performed any solid waste collection services in the preceding year, and therefore its allegation fails to state a claim under RCW 81.77.040. Moreover, the express language of this provision authorizes the revocation of a “certificate,” not a single right granted by a certificate. Stericycle does not – and cannot – seek revocation of Certificate G-237 here.

1. Indeed, under the facts as pleaded by Stericycle, Waste Management actually has operated as a biomedical waste collection company in the year preceding its Complaint.[[25]](#footnote-25) As alleged by Stericycle, Waste Management registered its trade name in January and was “advertising, soliciting, offering, or entering into an agreement to provide that service” prior to the filing of the Complaint.[[26]](#footnote-26) In light of the express statutory language and the facts as alleged by Stericycle, it cannot now produce any facts that would refute the legal conclusion that Waste Management’s certificate rights to perform biomedical waste collection have not been abandoned.
2. Moreover, RCW 81.77.030 is permissive; that is, the Commission “may” revoke a certificate. The Commission must exercise this discretion in light of the public interest. Stericycle is candid about its monopoly: it “is the only solid waste collection company that offers biomedical waste collection services throughout the state.”[[27]](#footnote-27) Stericycle argues that retaining its monopoly better serves the public’s interest than would allowing competition.[[28]](#footnote-28) This flies in the face of long-standing Commission policy and the public interest does not support abandoning this policy under any set of facts.
3. The Commission has recognized that its regulation of the specialized service of collecting biomedical waste for transport and disposal is underpinned by different policies than the ones applicable to traditional solid waste collection. The Commission regulates certificated companies in the public interest.[[29]](#footnote-29)

[T]he Commission believes that in the context of neighborhood solid waste collection, the statute contemplates an exclusive grant of authority as the best and most efficient way of serving all customers in a given territory. In this general context, it is assumed that all or most people and businesses in a given territory are also customers needing garbage service. Under these circumstances, an exclusive grant of authority in a given territory promotes service, efficiency, consistency and is generally in the public interest. The collection of medical waste is quite a different situation. Customers are only a small percentage of the total business in any given territory. The applicants for medical waste authority wish to serve the entire state or large portions of the state. The entire operation more closely resembles that of a motor freight common carrier with statewide authority than that of a typical garbage company. The Commission is at this point unconvinced that any single carrier presently authorized to serve in the state of Washington could provide a level of service, on its own, which would satisfy the Commission and meet the needs of the waste generators.[[30]](#footnote-30)

1. For this reason, finding abandonment of biomedical waste collection authority in the context of protecting Stericycle’s monopoly is not consistent with Commission policy and thus should not be subject of any further inquiry. Indeed, not only would it be contrary to the public interest to eliminate Waste Management’s rights to perform biomedical waste collection, but the public interest will be served by allowing competition instead of protecting Stericycle’s monopoly.
2. In *Harold LeMay Enterprises v. WUTC*, the Court of Appeals expressed skepticism on the question of whether a portion of a solid waste certificate can be abandoned.*[[31]](#footnote-31)* The question of whether the statute authorizes fragmenting of solid waste certificate rights is not authorized for all situations, and even in the order that was reversed by the Court of Appeals, the Commission noted:

When a certificate holder has failed to operate as a garbage and refuse collection company for a (sic) least one year preceding the filing of a complaint, the Commission is authorized to suspend, revoke, alter or amend the certificate. The statutory language is permissive (may) rather than mandatory (shall) and the Commission therefore has discretion to take any or none of the authorized actions, depending on the particular facts of the case and on public policy considerations.[[32]](#footnote-32)

1. Thus, because public policy dictates otherwise, abandonment cannot be demonstrated and the burden of proof on a complainant seeking partial revocation cannot be satisfied. In the *Mason County* matter, the Commission could identify no compelling policy reasons precluding a restrictive amendment.[[33]](#footnote-33) In this case, prior Commission articulation of policies regarding the need for competition in the field of biomedical waste collection warrants a strict interpretation of the statutory language.
2. Stericycle assigns much weight to the Commission’s decision in the *Mason County* matter, but that order is not controlling in this instance. First, when the Commission was reversed, the Court of Appeals found it unnecessary to reach, but specifically earmarked, the issue of fragmentation.[[34]](#footnote-34) Thus, the precedential weight of the administrative order is dubious at best. Second, the policies applicable to traditional solid waste collection are not on point for specialized biomedical waste collection.
3. While the Commission has arguably authorized fragmentation of rights in the context of traditional solid waste services, that decision is not controlling here. *Herrett Trucking Co. v. Washington Public Serv. Comm’n*, 61 Wn. 2d 234, 377 P.2d 871 (1963), the nearly half-century old decision upon which Stericycle relies, concerned the laws applicable to transfers of common motor carrier permit rights under Ch. 81.80 RCW. These laws are distinct from the laws that govern solid waste collection companies under Ch. 81.77 RCW.[[35]](#footnote-35) Activity is not even a factor or element in determining whether the transfer of a garbage certificate will be consistent with the public interest.[[36]](#footnote-36) In the context of grandfathering garbage collection operations into certificate rights, parsing various service types has been rejected.[[37]](#footnote-37)
4. Fragmentation of broadly-stated traditional solid waste authority is all the more improper when considering a specialized waste service. Indeed, in rules adopted since the *Mason County* litigation, the Commission specifically articulated a policy of protecting against carving out specialized collection rights from traditional solid waste certificate rights.[[38]](#footnote-38)
5. Thus, in *In re American Environmental Management Corp.*,[[39]](#footnote-39) in discussing the pre-existing rights of the traditional solid waste collection companies, the Commission declined the opportunity to alter or amend those certificates to revoke biomedical waste collection services despite its conclusion that biomedical waste collection “was not available, in any way, shape or form” from the traditional solid waste certificate holders.[[40]](#footnote-40) Rather, the lack of existing service was simply evidence that supported the public need for the applicant to enter the market.
6. That certificate rights may not be fragmented and held abandoned also derives from the fact that a certificate is a property right.[[41]](#footnote-41) A contrary ruling would be akin to a taking, in that it would effectuate a governmental action that diminishes a privately-owned asset.[[42]](#footnote-42) For that reason, under RCW 81.77.030, the Commission “may suspend, revoke, alter, or amend” a solid waste certificate only under egregious circumstances. Violation of law is grounds for taking a certificate right, but only if it is willful. Abandonment based on failure to operate should be reserved for only the most egregious circumstances.
7. Given the harsh outcome of a finding of abandonment that would be contrary to Commission policy, the Commission should not parse certificate rights so finely as to deprive the public of meaningful competition and to punish companies for not entering evolving markets and commencing all possible services at once.
8. Stericycle makes much of the fact that the two parent companies negotiated a sale of biomedical waste management assets in 1996.[[43]](#footnote-43) It confers legal significance on the fact that Waste Management’s parent company entered into a noncompete agreement as part of that transaction.[[44]](#footnote-44) However, these facts – which are not disputed for purposes of this Motion – are completely beside the point. The presence of a noncompete agreement has been found to be legally irrelevant to a determination of abandonment.
9. In *LeMay Enterprises*, the Court of Appeals dismissed the significance of a noncompete agreement not approved by the Commission. In that case, two solid waste companies held overlapping solid waste collection certificates. They had entered into a “gentleman’s agreement” that LeMay would provide only commercial collection services. The court held that the side agreement – tantamount to a noncompete – was not sufficient evidence of abandonment to support revoking LeMay’s authority to also collect solid waste from residential customers.

The Commission found only that LeMay did not actually serve residential customers and did not hold itself out as providing that service during the pertinent time period. We believe that a certificate holder can be deemed to have abandoned a portion of its “business of transporting garbage and/or refuse for collection” only if the certificate holder either is unavailable to serve customers or refuses to serve potential customers. The Commission, as we have noted, made no such finding.[[45]](#footnote-45)

Thus, the existence of a side agreement among competitors to allocate resources and refrain from service – like the one alleged here by Stericycle – is not sufficient to support a claim of abandonment.

1. Moreover, Stericycle and Waste Management are undisputedly familiar with the standards and procedures of Title 81 RCW. For them to operate under the protections from antitrust afforded by Commission oversight, the Commission’s approval to transfer certificate rights must have been obtained.[[46]](#footnote-46) It was not. The deal struck between Stericycle’s and Waste Management’s parent companies in 1996 cannot diminish in any way the broad rights held by Waste Management under Certificate G-237.
2. Finding that a certificate holder has failed to operate as a solid waste collection company diminishes the value of a private asset and should not be lightly undertaken. Especially in light of the Commission’s expressed support for competition in this specialized waste collection industry, and the fact that Stericycle has eliminated almost all other service-providers, the draconian measure of revoking Waste Management’s certificate right should not be driven by Stericycle’s aggressive efforts to stifle competition.
3. There can be little doubt that Waste Management has been exercising its certificate rights for solid waste collection. Moreover, even putting aside these policies supporting a strict interpretation of the abandonment statute and opposing fragmentation of specialized collection rights from a traditional solid waste certificate, in this case Waste Management – as Stericycle alleges – *has* operated as a biomedical waste company by advertising it services and holding itself out to customers as a provider of biomedical waste collection services. Stericycle’s claim for abandonment must be dismissed.

## None of Stericycle’s Myriad Other Authorities State a Claim For Relief.

1. Under the guise of invoking statutory protections from anticompetitive behavior, Stericycle’s other requests for relief would actually prevent further competition entirely and each must be dismissed for failure to state a claim.

### RCW 81.04.110 Does Not Authorize Any Relief Here.

1. Stericycle is forthright about its monopoly. It proudly notes that it “is the only solid waste collection company that offers biomedical waste collection services throughout the state.”[[47]](#footnote-47) In the context of RCW 81.04.110, citing the statute that is intended *to protect competitors*, Stericycle bizarrely argues that retaining its monopoly is more in the public’s interest than allowing competition.[[48]](#footnote-48)
2. RCW 81.04.110 is not intended for protection of market domination. Stericycle’s reliance on RCW 81.04.110 subjects many of its claims to dismissal because there is a difference between ensuring fair competition and preventing additional competition entirely.
3. RCW 81.04.110 may be invoked to seek equitable actions by the Commission with regard to activities of competitors, not perceived threats of companies entering the market. It speaks in the present tense, and is not effective to protect against speculation and hyperbole:

When two or more public service companies … are engaged in competition…either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service companies in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service company or companies complained of in any other locality or localities in the state.[[49]](#footnote-49)

This paragraph of the statute addresses complaints brought by competing companies. Stericycle has no basis for invoking the Commission’s equitable authority before Waste Management has performed service long enough to demonstrate the impacts of competition – and even then, Stericycle’s efforts to utilize RCW 81.04.110 to protect its monopoly would have to be grounded on allegations capable of proof, not just fearful speculation, for it to state a claim upon which relief may be granted.

1. Essentially, there is no case or controversy that would make the matters raised in the Complaint subject to RCW 81.04.110.[[50]](#footnote-50) “A claim is fit for [judicial] decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.”[[51]](#footnote-51) For a claim to arise under RCW 81.04.110, Stericycle’s Complaint must have presented more than a speculative, academic issue; it did not do so.
2. Moreover, even where properly cited, RCW 81.04.110 does not authorize declaratory relief.[[52]](#footnote-52) Stericycle asserts that allowing Waste Management to perform biomedical waste collection will “either drive Stericycle from the marketplace or require Stericycle to drastically reduce service or raise rates.”[[53]](#footnote-53) Until Waste Management has performed service long enough to demonstrate the impacts of competition, that allegation is completely without foundation.[[54]](#footnote-54)
3. Instead, Stericycle peppers the Complaint with claims of potential anticompetitive behavior. It wants the Commission to investigate Waste Management’s rates without any justification other than its fears of competition. It accuses Waste Management of “cream skimming” by operating within the confines of its certificated territory. It requests that the Commission unilaterally grant Waste Management statewide authority as means of evening the playing field. It questions Waste Management’s fitness. It urges the Commission to find abandonment. None of these claims are susceptible to relief, even if the Commission assumes all facts in Stericycle’s Complaint are true. The desire for a competitor to undertake a fishing expedition to investigate the financial and operational wherewithal of a potential entrant before the competition even begins is not a claim upon which relief can be – or should be – granted.

### Hypothetical Future Injury Does Not Authorize Any Relief Here.

1. Stericycle misleadingly suggests that Waste Management bears a burden of proof to “establish affirmatively” that its proposed rates are proper, but when a regulated company files a tariff to start a new service option or service level that has not been previously included in its tariff, no such burden exists.
2. The Legislature plainly intended a distinction between filings for tariff rates to initiate new services and those intended to make changes to existing tariff rates, a distinction lost in the frenzy of citations in the Complaint. Stericycle requests that the Commission suspend Waste Management’s rates but the Commission’s authority to suspend is limited to a filing which seeks to change rates.[[55]](#footnote-55) The Commission has indicated by rule that new service filings take effect by operation of law.[[56]](#footnote-56) Thus, under RCW 81.28.040, a company is required only to file its rates with proper notice, which Waste Management has already done.[[57]](#footnote-57)
3. In starting a new service, all Waste Management can do is project expected costs and anticipated revenues to the best of its ability.[[58]](#footnote-58)
4. Waste Management is a sophisticated company.[[59]](#footnote-59) It has many years of experience in designing and calculating tariff rates.[[60]](#footnote-60) It has both legal and business motivations to make good faith efforts to calculate rates as accurately as possible. However, until it has actually developed a history of service, the amounts can only be estimated. Stericycle attempts to refashion the statutory burdens by suggesting that there is a burden of proof on a hauler filing a tariff for a new service option, but the business risks are squarely placed on Waste Management’s ability to accurately estimate its earnings and costs. Too high, and it will lose business; too low, and it will lose profits.
5. Of course, the Commission itself has ample authority to investigate Waste Management’s rates.[[61]](#footnote-61) But the Commission did not initiate this action and no facts have been alleged that would justify the Commission’s prosecutorial authority.

### No Claim for Relief Has Been Stated Regarding the Propriety of Waste Management’s Rates for New Services.

1. There is no reason to believe the tariff rates proposed by Waste Management for biomedical waste collection services are anything other than just, fair and reasonable. Stericycle’s Complaint is rife with requests for the Commission to instigate a rate hearing under a panoply of statutes, but mere allegations by a company trying to protect its monopoly are not sufficient grounds for the Commission to initiate a rate hearing.
2. Stericycle has peppered its Complaint with suspicions about possible future injury to its monopoly. Stericycle alleges that Waste Management might violate RCW 81.28.190 (prohibiting unreasonable preferences) and RCW 81.28.180 (prohibiting unequal charges for similar services), but it does so in the context of complaining about the geographic extent of Waste Management’s certificated territories, even though the statute applies to rate charges instead of certificate rights. Stericycle fails to mention that a complainant challenging a carrier’s rates for violation of these laws has the burden of demonstrating that a violation occurred.[[62]](#footnote-62) It is impossible to state a claim for rate discrimination or preference before Waste Management has even processed an invoice.
3. Other than unfounded speculation about the possible future effect of Waste Management’s rates, however, Stericycle has not even tried to meet that burden. It argues instead that Waste Management’s obligation to provide the new service in the territory authorized by Certificate G-237 would “both prefer and disadvantage different localities and generators.”[[63]](#footnote-63) This argument obfuscates the effect of the statutes, which guard against preferential and discriminatory pricing, and have nothing to do with limitations of certificated territory.
4. Regulated solid waste collection companies must provide collection without discrimination.[[64]](#footnote-64) They must operate under rates that are just, fair and reasonable and that do not discriminate or provide unreasonable preferences.[[65]](#footnote-65) Waste Management’s tariff rates for performing biomedical waste collection must meet these standards. Stericycle’s pleas for an investigation of Waste Management’s rates for the sake of protecting its monopoly are grounded only on fearful speculation – not on any allegations of current fact – and must be dismissed.

### Stericycle Has Failed to State a Claim for “Cream Skimming.”

1. Waste Management or its predecessor companies have performed solid waste collection in the State of Washington territories since before 1961, when the statutory scheme established under Ch. 81.77 RCW was first created.[[66]](#footnote-66) Waste Management operates – and may only operate – solid waste collection services in specified territories under authority of Certificate G-237.[[67]](#footnote-67) Certificate rights previously operated under various trade names and subsidiaries were consolidated into Certificate G-237 in the late 1990s.[[68]](#footnote-68) Waste Management’s original territories have since been expanded through acquisitions of control and transfers, as appropriately reviewed and approved by the Commission.[[69]](#footnote-69)
2. Stericycle suggests that Waste Management’s obligations to serve all customers in the territory authorized by Certificate G-237 effectuate “cream skimming” from which Stericycle should be protected.[[70]](#footnote-70) Of course, the Commission has repeatedly held that “‘cream skimming’ is not in the public interest and contrary to public policy.”[[71]](#footnote-71)
3. Stericycle’s myopic view disregards the undisputed fact that Waste Management’s certificated territory evolved over time and Stericycle has not alleged *facts* which could support a finding that Waste Management strategically designed its certificated territory for optimizing profits in biomedical waste collection. Moreover, as Certificate G-237 makes plain, Waste Management’s territory includes significant areas of rural, sparsely-populated territories; and it excludes many lucrative areas.
4. In contrast, Stericycle’s certificated rights include all the urban areas of the state. Stericycle has authority to serve in dense, lucrative areas that are inside and outside of G-237. It operates biomedical waste collection services in Washington under authority of Certificate G-244 and that certificate is exactly what Stericycle requested. Stericycle applied for and was granted state-wide authority to perform biomedical waste collection in 1995 following four years of administrative litigation to obtain that certificate right.[[72]](#footnote-72) Over time, through strategic acquisitions, Stericycle has built its monopoly.
5. Having obtained the authority it sought and acquired, Stericycle is required to perform service throughout its certificated territories. While it apparently has now concluded that it wishes to service a more limited authority than that set forth in Certificate G-244, Stericycle has not taken the logical – and necessary – step of requesting that that its certificated territory be amended by the Commission.[[73]](#footnote-73)
6. The effect on customers and the public interest from Waste Management entering the market is unknown. This emphasizes the speculative nature of Stericycle’s allegations of unfair competition and underscores the Legislature’s intent to allow competing public service companies to ask for equitable relief only if they are actually experiencing demonstrable injury. RCW 81.04.110 is not intended to prevent hypothetical harms from a competitor desperate to retain its monopoly, and Stericycle’s claims under the anticompetitive statute to protect its monopoly should be dismissed.

### No Authority Justifies Stericycle’s requests that the Commission Unilaterally Award Statewide Authority to Waste Management.

1. In its obviously ironic request that the Commission unilaterally expand Waste Management’s certificated territories to provide statewide biomedical collection services, Stericycle impermissibly bootstraps the standards and procedures for issuance of new certificates into the protections against anticompetitive behavior afforded by RCW 81.04.110. Stericycle ignores the process set forth in Ch. 81.77 RCW. Putting aside the fact that Waste Management has not applied for any such authority and, thus, that RCW 81.77.040 has not been triggered, Stericycle overlooks the interests of existing traditional certificate holders besides Waste Management.[[74]](#footnote-74) Under RCW 81.77.040, if Waste Management *had* requested additional geographic authority, the Commission’s decision would involve an opportunity for hearing to make the determination that existing certificate holders will not provide service to the satisfaction of the Commission. Stericycle might not object to the expansion, but other stakeholders may.[[75]](#footnote-75)
2. Even before considering the interests of other certificate holders, however, under RCW 81.77.040, the Commission must first determine that an expansion of the territory authorized by Certificate G-237 is required by public convenience and necessity. Such a finding would be a condition precedent to Waste Management operating outside of Certificate G-237. Stericycle’s strange assertion that the protections afforded under RCW 81.04.110 require unilaterally expanding Waste Management’s territory hardly constitutes the interests of the public. It opposes Waste Management’s entry into the market and then turns the entry standard on its head by suggesting that public interest requires expansion beyond the territories of Certificate G-237.
3. Just because Stericycle posits that the public interest demands Waste Management to seek state-wide rights, of course it does not concede that the certificate holder would qualify. And thus it repeatedly couches its Complaint in terms of the standards for entry, which are not legally relevant here – even if they could be realistically doubted.[[76]](#footnote-76)
4. Waste Management may well accept Stericycle’s invitation to seek statewide authority in the future.[[77]](#footnote-77) If so, then the remedies Stericycle requested would all be subject to the adjudicative discretion of the Commission. However, it is not a proper claim for Stericycle to request such a remedy under RCW 81.04.110 at this point. It simply is not relevant to debate now the conditions under which a hypothetical application for additional authority would issue.

### Stericycle’s Requests that the Commission Take Action to Prevent Waste Management from Performing Service Fail to State a Claim for Relief.

1. Stericycle asserts claims under a statute that authorizes an enforcement action to be brought only by the Commission. RCW 81.04.510 provides in relevant part:

Whenever the commission believes that any person or corporation is engaged in operations without the necessary approval or authority required by any provision of this title, it may institute a special proceeding requiring such person or corporation to appear before the commission at a location convenient for witnesses and the production of evidence and bring with him books, records, accounts and other memoranda, and give testimony under oath as to his operations or acts …[[78]](#footnote-78)

This provision does not authorize a private party to initiate any action. Nor does it authorize the Commission to take the various actions that Stericycle demands here.

1. If the Commission believes that a company is engaged in operations without the necessary approval or authority, *the Commission* may bring a “classification” proceeding. The Commission may enter a cease and desist order under RCW 81.04.510 only when the Commission itself has initiated the proceeding. In an action instituted by Commission Staff under RCW 81.04.510, the Commission is authorized only to “issue cease and desist orders to all parties involved in the operation or acts.” Nowhere does this provision authorize the Commission to “immediately suspend[] [a] proposed tariff” or to “requir[e] [a public service company] to apply to the Commission for authority” to amend a certificate.[[79]](#footnote-79) Moreover, even the Commission cannot enter a cease and desist order in a private complaint proceeding brought under RCW 81.04.110.[[80]](#footnote-80)
2. RCW 81.04.510 also is a statute that by its terms applies to actual, not new operations. In any event, there is no dispute that Waste Management’s biomedical waste collection is “subject to the provisions of [Title 81]” and thus a classification proceeding is unnecessary, even if it were relief that could be conferred on Stericycle.
3. The other statutory provision upon which Stericycle relies is similarly unavailing. RCW 81.77.040 sets forth the bedrock principle that a solid waste collection company may not haul solid waste for compensation without a G Certificate. It then defines the circumstances under which the Commission may issue G Certificates. However, RCW 81.77.040 does not authorize any private party – least of all a competing public service company – to obtain the relief demanded here by Stericycle, that is, to repeat, “immediately suspending Waste Management’s proposed tariff,” or “requiring Waste Management to apply to the Commission for authority … to amend G-237.”[[81]](#footnote-81)
4. Waste Management is not operating without authority under RCW 81.77.040 and it violates no laws by soliciting potential customers for biomedical waste collection.[[82]](#footnote-82) It holds a certificate to perform solid waste collection in certain specific territories and, contrary to Stericycle’s protestations, it is not illegal for Waste Management to operate as a solid waste collection business.[[83]](#footnote-83)
5. Nor is it illegal for a certificate holder to explore the market for new solid waste collection services prior to commencing operations.[[84]](#footnote-84) As Stericycle correctly notes, Waste Management managers and personnel have extensive experience in the biomedical waste management field and had some reason to know that the likely rates were going to be. Solicitations for future business on the basis of an estimation of the customer’s costs are not illegal.

# CONCLUSION

1. Stericycle asserts, “Waste Management is a subsidiary of a massive corporation …. it is imperative that the Commission exercise its authority to ensure that Waste Management does not destroy its smaller competitors through unfair competition.”[[85]](#footnote-85) This David and Goliath argument is laughable. Stericycle’s aggressive and ruthless opposition to competition should not be countenanced. Its hostility to Waste Management’s commencement of biomedical collection services is obviously driven by a self-interested need to prevent competition and is not founded on any legitimate concern for the public interest. Because Stericycle has failed to state any claim for which relief may be granted, its Complaint should be dismissed.

DATED this 11th day of April, 2011.

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 12th day of April, 2011.

Kathy Moll

1. Compl. ¶¶ 1, 13. [↑](#footnote-ref-1)
2. Certificate G-237. A true and correct copy of Certificate G-237 is attached hereto. Because Stericycle repeatedly cites to and describes Certificate G-237 in its Complaint, (Compl. ¶¶ 1, 2, 3.b., 3.c, 3.d, 3.e, 5, 8, 9, 10, 14, 18), this Motion to Dismiss properly cites to Certificate G-237. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008) (“Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss.”). [↑](#footnote-ref-2)
3. Certificate G-237. [↑](#footnote-ref-3)
4. RCW 81.77.040. [↑](#footnote-ref-4)
5. Compl. ¶ 8. [↑](#footnote-ref-5)
6. Certificate G-237. [↑](#footnote-ref-6)
7. Order M.V.G. No. 1761*, In re Ryder Distrib. Res., Inc.*, App. No. GA-75154; *In re Stericycle of Wash., Inc*., App. No. GA-77539 (consolidated) (Aug. 1995). [↑](#footnote-ref-7)
8. Order M.V.G. No. 1761 at 20. [↑](#footnote-ref-8)
9. Compl. ¶ 11. [↑](#footnote-ref-9)
10. *See* WAC 480-70-176 (discontinuance of operations). [↑](#footnote-ref-10)
11. Compl*.* ¶ 6. [↑](#footnote-ref-11)
12. *Id.* ¶ 10. [↑](#footnote-ref-12)
13. *Id.* ¶ 7. [↑](#footnote-ref-13)
14. Docket No. TG-11023. The Commission “may take judicial notice of public documents if their authenticity cannot be reasonably disputed in ruling on a motion to dismiss.” *Rodriguez*, 144 Wn. App. at 725-26; *accord Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977) (“In considering a CR 12(b)(6) motion, this court may take judicial notice of matters of public record.”). [↑](#footnote-ref-14)
15. Compl. ¶ 1; Docket No. TG-110506. [↑](#footnote-ref-15)
16. Docket No. TG-110506. [↑](#footnote-ref-16)
17. Docket No. TG-110552. [↑](#footnote-ref-17)
18. Waste Management’s Answer is due on or before April 21. [↑](#footnote-ref-18)
19. Order 04 - Order Denying Motion to Dismiss and Denying Cross Motion, *WUTC v. Points Recycling and Refuse* (TG-080913, 080914) (Jan. 13, 2009) (citing *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).). [↑](#footnote-ref-19)
20. 3A Tegland, Washington Practice at 264 (5th ed. 2006). [↑](#footnote-ref-20)
21. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). [↑](#footnote-ref-21)
22. Certificate G-237. [↑](#footnote-ref-22)
23. Order M.V.G. No. 1452, *In the Matter of Am. Envtl. Mgmt. Corp*., App. No. GA-874 (Nov. 1990) at 7 (“the permanent authority of existing G-certificate holders includes the authority to collect infectious waste”)*.*  [↑](#footnote-ref-23)
24. RCW 81.77.030 (emphasis added). [↑](#footnote-ref-24)
25. Compl. ¶¶ 6, 10. [↑](#footnote-ref-25)
26. RCW 81.77.040. [↑](#footnote-ref-26)
27. Compl. ¶ 7. [↑](#footnote-ref-27)
28. *Id.* ¶ 20. [↑](#footnote-ref-28)
29. RCW 80.01.040(2). [↑](#footnote-ref-29)
30. Order M. V. G. No. 1451, *In re Sure-Way Incineration, Inc.*, Hearing No. GA-868 (Nov. 1990) at 16-17; *see also* Order M. V. G. No. 1452, *In re Am. Envtl. Mgmt. Corp.*, Hearing No. GA-874 (Nov. 1990). [↑](#footnote-ref-30)
31. 67 Wn. App. 878, 883, 841 P.2d 58 (1992) (“Even if we assume that the Commission has the authority to amend a garbage collection certificate based upon a certificate holder’s abandonment of only a portion of its authority, there has been no showing of abandonment.”) (emphasis added). [↑](#footnote-ref-31)
32. Order M. V. G. No. 1403, *Mason Cty. Garbage Co., v. Harold LeMay Enters.*, Cause No. TG-2163 (Aug. 1989) at 7 (emphasis added). [↑](#footnote-ref-32)
33. *Id*. [↑](#footnote-ref-33)
34. *See supra* n.31. [↑](#footnote-ref-34)
35. When transferring a solid waste certificate, a transferor’s fitness is not even an issue under RCW 81.77.040. Order M. V. G. No. 1772, *In re Buchmann Sanitary Serv., Inc./Browning-Ferris Indus. of Wash., Inc.* App. No. GA-78433; *In re The Disposal Group, Inc./Browning-Ferris Indus. of Wash., Inc.*, App. No. GA-78444 (Mar. 1996). [↑](#footnote-ref-35)
36. RCW 81.77.040; WAC 480-70-110; Order M. V. G. No. 1185, *In re Snoking Garbage Co., Inc./ R.S.T. Disposal Co., Inc.*, App. No. GA-788 (Nov. 1984). [↑](#footnote-ref-36)
37. *City Sanitary Serv., Inc. v. WUTC*, 64 Wn.2d 739, 393 P.2d 952 (1964). [↑](#footnote-ref-37)
38. WAC 480-70-041 (in defining a “traditional solid waste collection company,” the rule states: “Unless the company’s certificate is restricted against doing so, a traditional solid waste collection company may also perform specialized solid waste collection services.”). [↑](#footnote-ref-38)
39. Order M. V. G. No. 1452, *In re Am, Envtl. Mgmt. Corp.*, Hearing No. GA-874 (Nov. 1990). [↑](#footnote-ref-39)
40. *Id.* at 8. [↑](#footnote-ref-40)
41. *Dahl-Smyth, Inc. v. Walla Walla*, 148 Wn.2d 835, 847, 64 P.3d 15 (2003). [↑](#footnote-ref-41)
42. *See id.* at 839 n.5 (recognizing the possibility of a claim for constitutional taking in the context of an annexation cancelling certificate rights). [↑](#footnote-ref-42)
43. Compl. ¶ 8. [↑](#footnote-ref-43)
44. *Id.* ¶ 18. [↑](#footnote-ref-44)
45. 67 Wn. App. at 883 (emphasis added). [↑](#footnote-ref-45)
46. State action displacing competition is immune from antitrust scrutiny when the displacement of competition is clearly articulated and affirmatively expressed as state policy. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).The state need not affirmatively state a desire to displace competition, nor must it compel the displacement; instead, the “clearly articulated” requirement is satisfied if the statute confers “express authority” to take action that could “foreseeably result” in the suppression of competition. *Snake River Valley Elec. Ass’n v. PacifiCorp*, 238 F.3d 1189, 1192 (9th Cir. 2001) (interpreting *Midcal*); *Redwood Empire Life Support v. County of Sonoma*, 190 F.3d 949, 955 (9th Cir. 1999) (California statute allowing for the creation of one or more exclusive service areas for EMS services had “the foreseeable effect of excluding some providers from a local EMS system”). [↑](#footnote-ref-46)
47. Compl. ¶ 7. [↑](#footnote-ref-47)
48. *Id*. ¶ 20. [↑](#footnote-ref-48)
49. RCW 81.04.110 (emphasis added). [↑](#footnote-ref-49)
50. *See* WAC 480-07-305(2). [↑](#footnote-ref-50)
51. *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir.1989) [↑](#footnote-ref-51)
52. The Legislature authorized the Commission, but not private parties, to seek declaratory relief. *See* RCW 81.04.510. Because the Legislature did not authorioze declaratory relief to private parties, such relief is not available here. [↑](#footnote-ref-52)
53. Compl. ¶ 20. [↑](#footnote-ref-53)
54. Of course, if these claims were brought after Waste Management has performed service long enough to demonstrate the impacts of competition, Stericycle would have the burden of proving these allegations. *See GTE NW Inc. v. Whidbey Tel. Co.*, 1996 WL 350846, Docket No. UT-950277, 5th Suppl. Order (Apr. 2, 1996) (where the Commission is merely providing a forum, any company filing a complaint against another company bears the burden of proof). [↑](#footnote-ref-54)
55. RCW 81.04.130. *See also* RCW 81.28.050 (setting the statutory notice periods for rate-change filings). [↑](#footnote-ref-55)
56. *See, e.g.,* WAC 480-70-262. [↑](#footnote-ref-56)
57. *See* TG-110552 (Waste Management’s seven-day rates became effective by operation of law on April 6, 2011. The filing is noticed on the No Action Agenda for the Commission’s Open Meeting on April 14, 2011). [↑](#footnote-ref-57)
58. *See* Order M.V.G. No. 1761, *In re Ryder Distrib. Res., Inc.*, App. No. GA-75154; *In re Stericycle of Wash., Inc.*, App. No. GA-77539 (consolidated) (Aug. 1995) (noting that a company starting a new business need not demonstrate profitability of proposed operations, albeit in the context of a prerequisite to entry). [↑](#footnote-ref-58)
59. Compl. ¶ 13 (“Waste Management is a subsidiary of a massive corporation engaged in solid waste collection and disposal within this state and throughout the United States.”) [↑](#footnote-ref-59)
60. *See* Certificate G-237. [↑](#footnote-ref-60)
61. RCW 81.28.230 (if it were to find, after hearing, that the rates Waste Management has filed are unjust, unreasonable, unjustly discriminatory, or unduly preferential, in violation of the law, or insufficient to yield a reasonable compensation, then certainly the Commission could fix the rates). [↑](#footnote-ref-61)
62. *Everett Airporter Servs. Enters., Inc. v. San Juan Airlines, Inc. d/b/a Shuttle Express*, Docket No. TC-910789 (Jan. 1993) (in a private complaint by one airport bus service against another). [↑](#footnote-ref-62)
63. Compl. ¶ 21. [↑](#footnote-ref-63)
64. RCW 81.28.010, 81.28.180, and 81.28.190. [↑](#footnote-ref-64)
65. Order M.V.G. No. 1761, *In re Ryder Distrib. Res., Inc.*, App. No. GA-75154; *In re Stericycle of Wash., Inc.*, App. No. GA-77539 (consolidated) (Aug. 1995) at 9. [↑](#footnote-ref-65)
66. Certificate G-237. [↑](#footnote-ref-66)
67. RCW 81.77.040. [↑](#footnote-ref-67)
68. Certificate G-237 (identifying various transfer approvals). [↑](#footnote-ref-68)
69. *Id*. [↑](#footnote-ref-69)
70. Compl. ¶ 19. [↑](#footnote-ref-70)
71. *See, e.g.*, *In re Superior Refuse Removal Corp.*, Order M.V.G. No. 1335 (June 1, 1988). Stericycle’s accusation that Waste Management would be “cream skimming” is ironic, given Stericycle’s familiarity with defending against such claims itself. In early proceedings involving a related company’s application for authority to collect biomedical waste, Stericycle was accused of providing service to only the most lucrative accounts and avoiding less lucrative or more expensive accounts. Order M.V.G. No. 1596, *In re Ryder Distrib. Res., Inc.*, App. No. GA-75154 (Jan. 1993) at 4. When it began services, Stericycle targeted significant generators of biomedical waste consisting principally of large hospitals along the I-5 corridor. *Id*. at 8. [↑](#footnote-ref-71)
72. Order M.V.G. No. 1761, *In re Ryder Distrib. Res., Inc.*, App. No. GA-75154; *In re Stericycle of Wash., Inc.*, App. No. GA-77539 (consolidated) (Aug. 1995). [↑](#footnote-ref-72)
73. *See* WAC 480-70-176 (discontinuance of operations). [↑](#footnote-ref-73)
74. RCW 81.77.040; WAC 480-70-091. [↑](#footnote-ref-74)
75. *Id*. (“When an applicant requests a certificate to operate in a territory already served by a certificate holder under this chapter, the commission may, after notice and an opportunity for a hearing, issue the certificate only if the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission or if the existing solid waste collection company does not object.”) [↑](#footnote-ref-75)
76. Compl. ¶ 2 (“Waste Management must be required to demonstrate that the statutory criteria specified in RCW 81.77.040 for such a grant of authority have been satisfied.”); ¶ 3(e) (“in the event that Waste Management seeks authority”); ¶ 11 (“Waste Management should be required to successfully prosecute an application for statewide biomedical waste collection authority if it wishes to enter the biomedical waste collection business….”). [↑](#footnote-ref-76)
77. Compl. ¶ 7 (“Stericycle recognizes that the Commission may welcome additional competition in biomedical waste collection and does not oppose fair competition if in the public interest and initiated in accordance with the requirements of applicable law.”) [↑](#footnote-ref-77)
78. RCW 81.04.510 (emphasis added). [↑](#footnote-ref-78)
79. Compl. ¶¶ 3.a, 3.d. [↑](#footnote-ref-79)
80. Fifth Supplemental Order, *In re San Juan Express, Inc.*, Docket No. TS-940956 (Dec. 1994). [↑](#footnote-ref-80)
81. Compl. ¶¶ 3.a, 3.d. [↑](#footnote-ref-81)
82. *Id.* ¶ 1. [↑](#footnote-ref-82)
83. RCW 81.77.040 (“Operating for the hauling of solid waste for compensation includes advertising, soliciting, offering, or entering into an agreement to provide that service.”). [↑](#footnote-ref-83)
84. Compl. ¶ 6. [↑](#footnote-ref-84)
85. *Id.* ¶ 13. [↑](#footnote-ref-85)