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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re Application of
WASTE MANAGEMENT OF
WASHINGTON, INC.
d/b/a WM Healthcare Solutions
of Washington
720 4th Ave. Ste 400
Kirkland, WA 98033-8136

Docket No. TG-120033

REPLY IN SUPPORT OF OBJECTION TO
PREHEARING CONFERENCE ORDER
AND REQUEST FOR CLARIFICATION

I. Introduction

Applicant Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington (“Waste Management”) opposes protestants Stericycle of Washington, Inc.’s (“Stericycle”) and Washington Refuse & Recycling Association’s (“WRRRA”) objections to the provision of the prehearing conference order preemptively denying any discovery relevant to Waste Management’s financial or operational fitness to provide the service it proposes in its application. That an applicant would seek to avoid discovery on a statutory element of proof for which it bears the burden is in itself surprising. But what is even more surprising is that Waste Management concedes the relevance of these issues in this application proceeding, but argues that they should be decided as a factual matter without discovery and without giving the

REPLY IN SUPPORT OF STERICYCLE OF WASHINGTON,
INC.’s OBJECTION TO PREHEARING CONFERENCE ORDER
AND REQUEST FOR CLARIFICATION - 1

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1 Commission or Protestants any opportunity to examine or challenge Waste Management's
2 unsupported assertions of fitness.

3 In his prehearing conference order, the presiding officer imposed a preemptive
4 discovery restriction without request from any party, without providing respondents notice or
5 an opportunity to be heard on the issue before reaching a decision, and without acknowledging
6 what Waste Management concedes – that the discovery limitation is in effect a preemptive fact
7 finding in Waste Management's favor on the issues of its financial and operational fitness.
8 Tellingly, Waste Management argues that these factual issues require only "perfunctory
9 review" by the Commission. WM Response, p.6.

10 Nothing in the Commission's standards for evaluating fitness – as outlined in
11 Stericycle's objection – suggest that they should be subject to merely "perfunctory review."
12 Waste Management concedes, in fact, that the fitness elements are public interest elements –
13 hardly an interest subject to perfunctory review. The only mechanism under the rules for
14 satisfying these important public interest requirements is the adversarial process of an
15 adjudicative hearing on an application proceeding. The prehearing conference order's
16 discovery limitation, and Waste Management's support for that limitation, would circumvent
17 this process, shield from meaningful review important public interest considerations, and must
18 be reversed.
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22 II. Argument

23 Waste Management does not specifically dispute Stericycle's objection that the
24 Administrative Procedure Act and the Commission's rules do not afford the presiding officer
25 authority to impose a preemptive substantive discovery restriction after finding that discovery
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1 is necessary. Under the APA the Commission may determine only “by rule” whether discovery
2 is available. Commission rules allow the presiding officer to determine that the case requires
3 the methods of discovery available under Commission rules, but no rule allows a preemptive
4 limitation on the substantive scope of discovery by the presiding officer on issues that all
5 parties acknowledge are relevant to this proceeding. Waste Management argues only the APA
6 states that “[t]he presiding officer may condition use of discovery on a showing of necessity . . .
7 .” WM Response, p. 9. But this, of course, is not what the presiding officer has done.
8
9 Discovery has not been conditioned, it has been barred. Even then, RCW 34.05.446(3) is
10 addressing limitations on the methods of discovery not its substantive scope, which is more
11 properly addressed through the rules of relevance and the option of a party to move for a
12 protective order.
13

14 Waste Management repeatedly argues that it is merely applying for an “extension” of its
15 existing authority. Without citing any legal support, Waste Management appears to contend
16 that this somehow reduces its burden of demonstrating its financial and operational fitness to
17 the Commission. Waste Management does not dispute the numerous Commission decisions
18 cited by Stericycle that clearly indicate the fitness standards are applied equally to new entrants
19 and those seeking to extend or make permanent existing authority, even when those companies
20 are sizable or ostensibly well-financed.
21

22 Waste Management is also wrong about its Application. It does not seek an extension
23 of existing authority. G-237 gives Waste Management general solid waste authority in the
24 most populous parts of the state. Waste Management concedes this and concedes that it has
25 only been exercising that authority with respect to biomedical waste for approximately one
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1 year. In this Application, Waste Management does not seek to extend its existing general solid
2 waste authority. Instead it seeks new authority that would allow only collection and
3 transportation of biomedical waste in the least populous, and potentially least lucrative,
4 portions of the state. Waste Management has never demonstrated to the Commission that it is
5 financially or operationally fit to provide only biomedical waste services, without the
6 supporting infrastructure or resources that underlie its traditional general solid waste services.
7 This is new authority because it is unprecedented and untested in Waste Management's history
8 before the Commission.
9

10 Waste Management does not dispute that its fitness to provide these proposed services
11 is relevant to the application proceeding or that it bears the burden of proof. Unlike the
12 presiding officer, Waste Management recognizes that it is asking the presiding officer to make
13 a ruling on the merits, without discovery or a hearing, that Waste Management is fit. Nothing
14 could speak more loudly to this concession than Waste Management's choice to file a
15 concurrent Motion for Summary Determination expressly asking the presiding officer to enter a
16 factual finding that Waste Management is financially and operationally fit to provide
17 biomedical waste collection services in the areas of the state not covered by its existing
18 authority.¹ The issue presented for decision here is whether the presiding officer will make
19 significant factual findings in Waste Management's favor without discovery or a hearing or
20 whether, consistent with any reasonable measure of due process, he will find facts only in the
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24 ¹ Stericycle will oppose this Motion for Summary Determination and, among other arguments, seek
25 denial on grounds parallel to Civil Rule 56(f), that it has not been afforded the opportunity to pursue
26 relevant discovery on the subjects presented for summary determination. Discovery must allowed to
facilitate full and fair briefing on the factual issues raised in Waste Management's Motion for Summary
Determination.

1 course of necessary fact finding procedures after appropriate discovery is complete.

2 In support of its factual contention that it is presumptively financially and operationally
3 fit to provide biomedical waste services in areas not covered by its existing authority, Waste
4 Management proffers only the following allegations:

- 5 • That it “is the largest regulated hauler of solid waste in Washington. It holds
6 general solid waste authority under Certificate No. G-237 and has provided solid
7 waste collection services subject to the Commission’s oversight and approval for
8 decades;” (WM Response, p.1),
- 9 • That it has “been providing certificated waste collection services throughout vast
10 areas of the State of Washington for decades and, for the last year, Waste
11 Management has also been providing biomedical waste collection services
12 throughout the large Certificate No. G-237 territory,” “where the overwhelming
13 majority of the state’s biomedical waste is generated;” (WM Response, p.7-8); and
- 14 • That it “is a financially healthy corporation with substantial resources.” (WM
15 Response, p.7).

16 Again, Waste Management does not dispute that the fitness requirements have been
17 consistently addressed by the Commission, after hearing, in cases involving large companies
18 with prior experience providing regulated services. Allegations of Waste Management’s size
19 and general solid waste experience do not give it a pass on proving its fitness to provide
20 biomedical waste collection services with actual evidence.
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1 Moreover, Waste Management has failed to offer allegations of fact that it concedes are
2 essential to proving its fitness. For example, Waste Management concedes that it must
3 demonstrate “whether [it] has enough money to start and maintain operations” but does not
4 provide any evidence of the funds committed to its new service or a reasonable estimate of
5 what it will cost to start up and maintain operations. WM Response, p.5. Waste Management
6 concedes that “the Commission does need information about an applicant’s cost of providing
7 the proposed service . . . ,” but provides no evidence of the cost of providing the proposed
8 biomedical waste collection service in the less populated areas of Washington State. *Id.* Waste
9 Management asserts that it has provided biomedical waste service for one year “throughout” its
10 existing territory, but it provides no evidence concerning its operations, customers, or revenues.
11 Indeed, Waste Management obfuscates by providing only a 2010 financial report that identifies
12 no biomedical waste customers or revenues. Waste Management concedes that operational
13 fitness involves “a showing of adequate equipment and personnel” and information concerning
14 “disposal and processing infrastructure” yet provides no documentary or testimonial evidence
15 of either. WM Response, p.6. Waste Management’s application discloses that it has only one
16 long haul tractor and three collection vehicles to provide biomedical waste services to the entire
17 state. See WM Application, Attached Equipment List. Waste Management offers no evidence
18 that this will be sufficient to maintain service or of how it plans to otherwise meet customer
19 need in the proposed service territory. These unpleasant statutory requirements should not
20 apply to Waste Management, or so it contends. Denying discovery and ruling in Waste
21 Management’s favor is a ruling to absolve Waste Management of its burden of proof and to
22 deny the Commission information it “does need,” even according to Waste Management.
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1 If the presiding officer maintains the preemptive denial of discovery, he will be entering
2 a finding of fact in favor of Waste Management's financial and operational fitness based only
3 on allegations that 1) Waste Management is a big company, 2) it is "financially healthy" in
4 undisclosed ways and has "substantial" undisclosed resources, 3) it has a territorially limited
5 general solid waste certificate under which it currently conducts some minimal biomedical
6 waste collection services, 4) it does not currently conduct biomedical waste collection services
7 in areas of the state where its proposed authority would be limited to biomedical waste
8 collection, 5) it has offered general solid waste services, but not biomedical waste collection
9 services, for many years, 6) it has undisclosed customers and revenue in biomedical waste from
10 only one year of service that that have never been disclosed to the Commission. If the
11 presiding officer believes these facts sufficient to find that Waste Management is both
12 financially and operationally fit to provide only biomedical waste services in rural Washington
13 then he should so rule and certify the issue for interlocutory review. Otherwise, discovery on
14 these statutorily required factual issues must be allowed.
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17 DATED this 7th day of May, 2012.

18 Respectfully submitted,

19 GARVEY SCHUBERT BARER

20
21
22 By 

Stephen B. Johnson, WSBA #6196

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Attorneys for Protestant Stericycle of
Washington, Inc.

CERTIFICATE OF SERVICE

I, Dominique Barrientes, certify under penalty of perjury under the laws of the State of Washington that, on May 7, 2012, I caused to be served on the person(s) listed below in the manner shown a copy of STERICYCLE OF WASHINGTON, INC.'s OBJECTION TO PREHEARING CONFERENCE ORDER AND REQUEST FOR CLARIFICATION:

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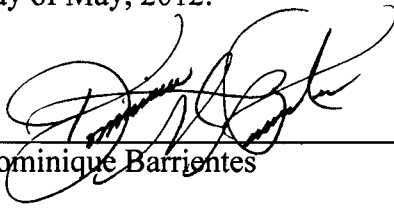
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Dated at Seattle, Washington this 7th day of May, 2012.



Dominique Barrientes