BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

STERICYCLE OF WASHINGTON, INC., Complainant v. WASTE MANAGEMENT OF WASHINGTON, INC. Respondent.	DOCKET TG-110553 COMMISSION STAFF RESPONSE TO STERICYCLE'S MOTION FOR SUMMARY DETERMINATION

1 Stericycle of Washington, Inc. ("Stericycle") has moved for a summary determination that Waste Management of Washington, Inc. ("Waste Management") has abandoned its biomedical waste collection authority under Certificate G-237. The Washington Utilities and Transportation Commission ("Commission") should deny Stericycle's motion because Stericycle has failed to present a prima facie case of abandonment under RCW 81.77.030.

I. ARGUMENT

A. Disuse of a Portion of a G Certificate is Not Enough to Prove Abandonment Under RCW 81.77.030.

2 As the language of the final paragraph of RCW 81.77.030 makes clear, Stericycle has the burden to prove that Waste Management has abandoned the authority to provide biomedical waste collection services under Certificate G-237:

> The commission, on complaint made on its own motion or by an aggrieved party, at any time, after providing the holder of any certificate with notice and

> an opportunity for a hearing *at which it shall be proven that the holder . . . has failed to operate* as a solid waste collection company for a period of at least one year preceding the filing of the complaint, may suspend, revoke, alter, or amend any certificate issued under the provisions of this chapter.

(Emphasis added.) The Commission has interpreted RCW 81.77.030 as providing it with discretionary authority to "alter, or amend" a G certificate by deleting a portion of a company's authority if the evidence establishes that a company has abandoned that portion.[1]

3 As described in Commission Staff's Response to Waste Management's Motion to Dismiss in this docket, the legislative history of RCW 81.77.030 sheds light on what a complainant must show in order to prove that a company has "failed to operate" or abandoned a portion of its authority. The Legislature added the "failed to operate" language in 1965. The bill that added it contained a second "failed to operate" paragraph that would have authorized the Commission to delete a portion of a company's territory from its G certificate if the company had "failed to operate" there for at least one year and "if such area or territory is being served pursuant to a certificate held by another . . . company."[2]

4 Governor Evans vetoed the second "failed to operate" paragraph, explaining:

> It is possible that a company might fail to operate in a certain territory because a competitor had all of the available customers; and a deletion of this territory would thus eliminate any chance of competition in the future.
>
> Moreover, this bill does not require a showing that the company in question had refused service to any potential customer.
>
> I have vetoed the last paragraph of Section 1 because I fear that it will have

[1] *Mason County Garbage Co. v. Harold LeMay Enters.*, Order M. V. G. No. 1403 at 7 (Wash. Utils. & Transp. Comm'n, Aug. 18, 1989) ("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"), *rev'd on other grounds*, 67 Wn. App. 878, 841 P.2d 58 (1992). A copy of Order M. V. G. No. 1403 was attached to Commission Staff Response to Waste Management of Washington, Inc's Motion to Dismiss Stericycle's Complaint and Petition, filed May 6, 2011 in this docket.

[2] 1965 Wash. Laws 1st ex. sess. ch. 105, § 1. A copy of the session law was attached to Commission Staff Response to Waste Management of Washington, Inc's Motion to Dismiss Stericycle's Complaint and Petition, filed May 6, 2011 in this docket.

> the effect of reducing competition in the garbage and refuse collection industry which would not be in the best interests of the public.[3]

5 Washington courts may consider a governor's statements on vetoing part of a bill to discern the meaning of the remaining sections.[4] Governor Evans vetoed the second "failed to operate" paragraph of RCW 81.77.030 because he thought it would reduce competition. He could not have intended that the unvetoed "failed to operate" paragraph of RCW 81.77.030 would be used as a tool to reduce competition. He wanted to avoid scenarios where a complainant could corner a particular market and then deprive other companies of the chance to compete by claiming they have abandoned the authority to serve that market. The Governor expected that proof that a company had "failed to operate" a portion of its authority would require evidence of some affirmative act, such as a refusal to serve potential customers.

6 Stericycle mistakenly relies on decisions about transfers of common carrier permits under RCW 81.80.270 to argue that mere disuse is enough to establish abandonment.[5] Most of those decisions were applying former WAC 480-12-050 or its predecessor, which required a showing that a common carrier permit had been actively used during the year preceding a transfer application before the Commission would authorize a transfer of the permit.[6] The Commission had such a rule because RCW 81.80.270 requires a "proper

---

[3] 1965 Wash. Laws 1st ex. sess. ch. 105, Note.

[4] *E.g.*, *Guillen v. Contreras*, 169 Wn.2d 769, 777 n.3, 238 P.3d 1168, 1172 n.3 (2010); *State ex rel. Royal v. Bd. of Yakima Cnty. Comm'rs*, 123 Wn.2d 451, 462-65, 869 P.2d 56, 63-64 (1994).

[5] *Stericycle of Washington, Inc. v. Waste Management of Washington, Inc.*, Docket TG-110553, Stericycle's Motion for Summary Determination and Response to Waste Management's Motion to Dismiss ¶¶ 21-25, 39, 44-47, 54, 56, 59 (May 6, 2011).

[6] *See Herrett Trucking Co. v. Pub. Serv. Comm'n*, 61 Wn.2d 234, 236-37, 377 P.2d 871, 873 (1963) (applying Rule 21(g), predecessor to WAC 480-12-050). Between 1971 and 1999, former WAC 480-12-050(4) provided substantially as follows:

> (a) If a hearing is held on the [transfer] application, the permit holder will be required to produce proof that said permit holder was ready, able and willing, and so held himself out to

showing that property rights might be affected" by a transfer of a common carrier permit.[7]

7 RCW 81.80.270 does not apply to this case, however. The Legislature separated G certificates from common carrier permits 50 years ago and enacted a separate statute for them, with different language.[8] RCW 81.77.040, which governs transfers of G certificates, does not require a showing "that property rights might be affected" by a transfer.[9] Nor do the Commission's rules governing transfers of G certificates contain requirements like those in former WAC 480-12-050 for transfers of common carrier permits.[10] In at least one prior decision, the Commission has specifically rejected the argument that it should apply to G certificates the standards for transfers of common carrier permits.[11] The common carrier decisions on which Stericycle relies have nothing to do with G certificates or this case.

8 Moreover, the Commission and the state Court of Appeals have already rejected the disuse test that Stericycle advocates for abandonment of a portion of a G certificate. In *Mason County Garbage Co. v. Harold LeMay Enterprises*, the Commission found that LeMay had abandoned a portion of its certificate, but added:

> the public to handle the traffic in question within the territory involved.
>
> . . .
>
> (c) A period of one year immediately prior to the date on which the [transfer] application was filed shall be examined for evidence of operations. . . .

Wash. St. Reg. 86-12-089. The Commission repealed WAC 480-12-050 in 1999. Wash. St. Reg. 99-01-077.

[7] 1937 Wash. Laws ch. 166, § 18 (codified as amended at RCW 81.80.270); *see Lee & Eastes, Inc. v. Pub. Serv. Comm'n*, 52 Wn.2d 701, 328 P.2d 700 (1958) ("property rights" under RCW 81.80.270 includes rights under a common carrier permit).

[8] 1961 Wash. Laws ch. 295 (codified as amended at RCW Chapter 81.77). *See generally City Sanitary Serv., Inc. v. Wash. Utils. & Transp. Comm'n*, 64 Wn.2d 739, 393 P.2d 952 (1964) (describing relationship between RCW Chapters 81.77 and 81.80); Wash. Op. Att'y Gen 61-62 No. 67 (describing relationship between RCW Chapters 81.77 and 81.80); WAC 480-70-016 (describing when common carrier permit is required and when solid waste collection certificate is required).

[9] RCW 81.77.040 provides that "Any right, privilege, certificate held, owned, or obtained by a solid waste collection company may be sold, assigned, leased, transferred, or inherited as other property, only if authorized by the commission."

[10] WAC 480-70-116 governs transfers of G certificates.

[11] *In re SnoKing Garbage Co., Inc.*, Order M. V. G. No. 1185 at 3 (Wash. Utils. & Transp. Comm'n, Nov. 8, 1984) (copy attached as Attachment A).

> The Commission recognizes that not all garbage and refuse collection services are required at all times. A certificate holder should not be required to provide services which are not required by its customers because it fears losing its authority. A certificate holder with general garbage and refuse collection authority should have some flexibility in the services it provides to allow it to meet customer/community demands.[12]

When the Court of Appeals reversed the Commission's finding of abandonment, it said:

> 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."[13]

The Court of Appeals test is similar to the common law test for abandonment or waiver of a legal right, which is an "intentional relinquishment of a known right" that must be demonstrated by "unequivocal acts or conduct."[14] Disuse, without evidence of intent to abandon, is not enough to establish abandonment.[15]

9 Here, to prove that Waste Management has "failed to operate" and abandoned the authority to collect biomedical waste under Certificate G-237 and RCW 81.77.030, Stericycle must show unequivocal acts or conduct by Waste Management demonstrating an intent to abandon. Stericycle has not made that showing.

---

[12] *Mason County Garbage Co. v. Harold LeMay Enters*., Order M. V. G. No. 1403 at 5 (Wash. Utils. & Transp. Comm'n, Aug. 18, 1989).

[13] *Harold LeMay Enters. v. Utils. & Transp. Comm'n*, 67 Wn. App. 878, 883, 841 P.2d 58, 61 (1992).

[14] *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1, 6 (1998); *White Pass Co. v. St. John*, 71 Wn.2d 156, 163-64, 427 P.2d 398, 402 (1967).

[15] *Holmes v. Border Brokerage Co.*, 51 Wn.2d 746, 751-52, 321 P.2d 898, 902 (1958) (temporary disuse of trade name while business reorganized did not establish intent to abandon); *Foss v. Culbertson*, 17 Wn.2d 610, 627-28, 136 P.2d 711, 719 (1943) (evidence that plaintiff had never lawfully operated a warehouse business, and had discontinued storage of household goods when ordered to do so, demonstrated that plaintiff intended to abandon trade names containing the words "warehouse" and "storage"); *Olympia Brewing Co. v. Nw. Brewing Co.*, 178 Wash. 533, 540-41, 35 P.2d 104, 107-08 (1934) (the fact that plaintiff could not legally sell beer during prohibition was not evidence that plaintiff had abandoned its trade names).

B. Stericycle's Evidence is Insufficient to Prove Abandonment.

10 In 1995, the Commission granted Stericycle statewide authority under RCW 81.77.040 to collect biomedical waste in Washington.[16] At that time, Waste Management had authority to collect biomedical waste as part of its general solid waste collection authority within the territory covered by its Certificate G-237.[17]

11 Stericycle says Waste Management abandoned its biomedical waste authority in 1996, when the companies executed an Asset Purchase Agreement.[18] Waste Management sold to Stericycle some of its assets, including a Washington-licensed medical waste truck and trailer, medical waste customer accounts in King County and the Tri-Cities/Prosser area, and one account in Spokane.[19] The Asset Purchase Agreement included a Covenant-Not-To-Compete in which Waste Management agreed that, for the next five years, it would not engage in the collection and transportation of medical waste anywhere within a 75-mile radius of Redmond, Renton, or Kennewick.[20]

12 Had Waste Management also sold to Stericycle its authority under Certificate G-237 to collect biomedical waste, the 1996 agreement could be evidence of abandonment. There is no evidence of any such sale, however. The companies could not legally have completed such a sale without getting approval from the Commission under RCW 81.77.040, which

---

[16] *In re Ryder Dist. Res.*, Order M. V. G. No. 1761 (Wash. Utils. & Transp. Comm'n, Aug. 11, 1995).

[17] *See In re Am. Envtl. Mgmt. Corp.*, Order M. V. G. No. 1452 at 7 (Wash. Utils. & Transp. Comm'n, Nov. 30, 1990) ("The Commission agrees that the permanent authority of existing G-certificate holders includes the authority to collect infectious waste").

[18] Stericycle's Motion for Summary Determination and Response to Waste Management's Motion to Dismiss ¶ 5.

[19] Stericycle's Motion for Summary Determination and Response to Waste Management's Motion to Dismiss ¶¶ 13, 52, 56; *Stericycle of Washington, Inc. v. Waste Management of Washington, Inc.*, Docket TG-110553, Declaration of James Polark in Support of Stericycle's Motion for Summary Determination, Exhibit 1 ¶ 1, Schedules 1 & 2 (May 6, 2011) (hereinafter "Asset Purchase Agreement").

[20] Stericycle's Motion for Summary Determination and Response to Waste Management's Motion to Dismiss ¶¶ 14, 53; Asset Purchase Agreement ¶ 12, Schedule 3.

they did not.[21] Moreover, the Asset Purchase Agreement expressly states that it is not a sale of a permit without the necessary governmental approvals.[22] The agreement did not transfer Waste Management's right to collect biomedical waste under Certificate G-237, and it is not evidence that Waste Management intended in 1996 to abandon that right.

13 Stericycle's only other evidence of abandonment is that Waste Management did not offer biomedical waste collection services in Washington for fifteen years.[23] As discussed above, evidence of disuse is not enough to prove abandonment of a portion of a G certificate.[24]

14 Because Stericycle has failed to present a prima facie case of partial abandonment under RCW 81.77.030 as properly interpreted, it has not shown that it is entitled to a judgment as a matter of law. Stericycle's Motion for Summary Determination should be denied.[25]

C. Public Policies Weigh Against An Amendment of Waste Management's Certificate on This Record.

15 The Commission exercises its discretionary authority under RCW 81.77.030 to

---

[21] RCW 81.77.040 provides that "Any right, privilege, certificate held, owned, or obtained by a solid waste collection company may be sold, assigned, leased, transferred, or inherited as other property, only if authorized by the commission."

[22] Asset Purchase Agreement ¶ 3(a) ("To the extent that any of the transactions contemplated hereby constitutes or would be deemed to be the sale, assignment, transfer, conveyance or delivery or attempted sale, assignment, transfer, conveyance or delivery to [Stericycle] of any permit, contract or agreement and such transaction would be prohibited by an applicable law or would require any governmental or third party authorizations, approvals, consents or waivers and such authorizations, approvals, consents or waivers shall not have been obtained prior to the Closing, this Agreement shall not constitute a sale, assignment, transfer, conveyance or delivery, or an attempted sale, assignment, transfer, conveyance or delivery thereof.")

[23] Stericycle's Motion for Summary Determination and Response to Waste Management's Motion to Dismiss ¶ 48-55, 60; *Stericycle of Washington, Inc. v. Waste Management of Washington, Inc.*, Docket TG-110553, Declaration of Michael Philpott in Support of Stericycle's Motion for Summary Determination (May 6, 2011).

[24] *See LeMay*, 67 Wn. App. at 883, 841 P.2d at 61 (evidence that company "did not actually serve residential customers and did not hold itself out as providing that service" not enough to show abandonment of the right to serve residential customers).

[25] *See* WAC 480-07-380(2)(a); Wash. CR 56(a), (c).

"alter, or amend" a G certificate in light of public policy.[26] Here, longstanding Commission policy weighs against the relief Stericycle requests.

16 Stericycle asks the Commission to "require a new application for authority before permitting the initiation of biomedical waste collection services by the holders of G-certificates that have either never exercised biomedical waste collection authority or discontinued providing biomedical waste collection services many years ago."[27] The Commission rejected that policy more than twenty years ago. Stericycle does not explain why the Commission should now revisit that decision.

17 The Commission has recognized that, because of the specialized handling requirements for biomedical waste, some holders of general solid waste authority do not provide biomedical waste collection services.[28] Nonetheless, the Commission ruled in 1990 that "the permanent authority of existing G-certificate holders includes the authority to collect infectious waste," even though some certificate holders had never provided that service.[29] In 2001, the Commission reaffirmed that policy by adopting WAC 480-70-041, which says "Unless the company's certificate is restricted against doing so, a traditional solid waste collection company may also perform specialized solid waste collection service." The Commission's rule-making order shows that Stericycle participated in the

---

[26] *Mason County Garbage Co. v. Harold LeMay Enters.*, Order M. V. G. No. 1403 at 7 (Wash. Utils. & Transp. Comm'n, Aug. 18, 1989) ("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"), *rev'd on other grounds*, 67 Wn. App. 878, 841 P.2d 58 (1992).

[27] Stericycle's Motion for Summary Determination and Response to Waste Management's Motion to Dismiss ¶ 38.

[28] *In re Biomedical Waste Carriers*, Docket TG-970532, Declaratory Order at 10 (Wash. Utils. & Transp. Comm'n, Aug. 14, 1998).

[29] *In re Am. Envtl. Mgmt. Corp.*, Order M. V. G. No. 1452 at 7 (Wash. Utils. & Transp. Comm'n, Nov. 30, 1990); *see In re Sureway Med. Servs.*, Order M. V. G. No. 1663 at 5 (Wash. Utils. & Transp. Comm'n, Nov. 19, 1993 ("G-12 is a general solid waste permit, and therefore includes authority to collect and transport biomedical and biohazardous waste").

rule-making process.[30] Stericycle has not explained what has changed since then.

18 Of course, as Stericycle recognizes, the Commission may bring a complaint on its own motion if it has probable cause to believe that the holder of a G certificate has violated the biomedical waste regulations in WAC Chapter 480-70.[31] That is not this case, however.

19 Finally, in exercising its discretion under RCW 81.77.030, the Commission may consider public policies favoring competition, such as those reflected in statutes that prohibit contracts in restraint of trade.[32] Historically, Commission policy has encouraged competition in the provision of biomedical waste services.[33] Effectively, Stericycle asks the Commission to extend and enforce the Covenant-Not-To-Compete that Waste Management executed in 1996, for which the companies did not get Commission approval.[34] The Commission should not accept the invitation to enforce an anti-competitive agreement it did not approve.[35]

II. CONCLUSION

20 Properly interpreted, RCW 81.77.030 requires a showing of unequivocal acts or conduct demonstrating an intent to abandon a portion of a company's authority under a G certificate. Because Stericycle has failed to present a prima facie case under that standard, it

---

[30] The Commission adopted WAC 480-70-041 in General Order No. R-479 in Docket TG-990161. The order is published in issue 01-09 of the Washington State Register as Wash. St. Reg. 01-08-012.

[31] RCW 81.77.030; *see* RCW 81.04.110.

[32] *See generally* 15 U.S.C. § 1; RCW 19.86.030.

[33] *See In re Biomedical Waste Carriers*, Docket TG-970532, Declaratory Order at 10-11 (Wash. Utils. & Transp. Comm'n, Aug. 14, 1998).

[34] Had the companies obtained the Commission's approval, they might argue that their agreement fell under the state-action exception to federal antitrust laws. *See generally Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 632-37 (1992) (describing state-action immunity); *Active Disposal, Inc. v. City of Darien*, 635 F.3d 883 (7th Cir. 2011) (because state law authorized cities to enter into exclusive solid waste contracts, state-action doctrine shielded them from federal antitrust liability).

[35] *Cf. Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994) (federal court did not have jurisdiction to enforce a settlement agreement it had not adopted).

is not entitled to a judgment as a matter of law.[36] Moreover, public policy weighs against the relief Stericycle requests. The Commission should deny Stericycle's Motion for Summary Determination.

DATED this 26th day of May 2011.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General

Fronda Woods

FRONDA WOODS, WSBA #18728
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff

[36] *See* WAC 480-07-380(2)(a); Wash. CR 56(a), (c).

DOCKET TG-110553

ATTACHMENT A

to

COMMISSION STAFF RESPONSE TO STERICYCLE'S MOTION FOR SUMMARY DETERMINATION

In re SnoKing Garbage Co., Inc.,
Order M. V. G. No. 1185, Hearing No. GA-788
(Wash. Utils. & Transp. Comm'n, Nov. 8, 1984)

SERVICE DATE

NOV 08 1984

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the matter of Joint Application GA-788 for authority to transfer a portion of the right under Certificate G-126 from:	ORDER M. V. G. NO. 1185
	HEARING NO. GA-788
SNOKING GARBAGE CO., INC.	FINAL COMMISSION ORDER AFFIRMING PROPOSED ORDER GRANTING APPLICATION
to:	
R.S.T. DISPOSAL CO., INC.	

NATURE OF PROCEEDING: This is an application for transfer of a portion of a certificate authorizing the collection of "rubbish" within a specified territory.

PROPOSED ORDER: Administrative Law Judge Rosemary Foster issued an order proposing that the application be granted.

EXCEPTIONS: Protestant excepts to the proposed order, contending that the Commission should examine whether the certificate was fully exercised and, if it was not, deny the application. Applicant and the Assistant Attorney General replied to the exceptions.

COMMISSION: The Commission denies the exceptions, ruling that there is no Commission precedent for the result here sought, that the Commission should not institute the proposal in the absence of rule, and that level of rates is not a proper consideration in an application for transfer of a garbage certificate.

APPEARANCES: Protestant is represented on the exceptions by Brian Lawler, attorney, Seattle; on the replies, applicant was represented by Jack R. Davis, attorney, Seattle; the Commission was represented by Robert D. Cedarbaum, Assistant Attorney General, Olympia.

MEMORANDUM

This is an application for transfer of a certificate authorizing the collection of "rubbish" within specified territory. The issue presented is whether the Commission should review activity under the certificate as a test to determine whether the transfer is consistent with the public interest.

Protestant argues that the authority subject to transfer has been substantially dormant for the prior three to five years, that consequently the approval of the transfer would constitute institution of a new, competitive service, and that where this is the case, the applicant should be held to proof of public convenience and necessity as though the matter were an original application of authority. Applicant responds that no rule or statute establishes this requirement, that the matter is controlled by order M. V. G. No. 1150, In re A2W Enterprises to Benco Disposal, Inc., Application GA-773 (1983, affirmed by Final Order M. V. G. No. 1153), and that the result is consistent with Black Ball Freight Service v. WUTC, 77 Wn.2d 479, 463 P.2d 169, (1969).

I. Precedent. The A2W Enterprises order, cited supra, is the proposed order of an administrative law judge. It was not the subject of exceptions by any party of record and it was affirmed without comment by the Commission. The order affirming noted that the findings and conclusions of the proposed order were accepted by the Commission "for purposes of this proceeding".

The Commission does not regard the adoption of findings or conclusions in a form final order as an indication that the Commission believes the policies stated in the proposed order have been analyzed, discussed and accepted by the Commission. Rather, the Commission may believe that the result of the proposal within acceptable bounds by any appropriate analysis. If the Commission intends to accept or adopt policies stated in a proposed order, it will review the proceeding or that relevant portion thereof on its own motion. See Order M. V. No. 126468, In re Pistorisi & Son, Inc., Application No. E-18629 (1982); Order M. V. No. 126620, In re Waggoner, Application No. E-18606 (1982); Order M. V. No. 130356, In re Continental Traffic Co., Inc., Application No. P-67117 (1984). In the absence of such a review, the affirmance without comment of an unexcepted proposed order carries no indication that the Commission accepts the logic, the findings or the conclusions of the proposed order for any other purpose. The logic of the proposed order would thus have the same precedential value as an order from another jurisdiction or other supporting legal material. Its weight will be determined by the force of its argument and its appropriateness to the matter before the Commission.

II. Standard of Review: Transfer of G Certificates. Protestant has thoroughly researched and forcefully argued its proposition that, even in the absence of specific statutory or regulatory authority to consider dormancy of a certificate in a transfer proceeding, the Commission has the discretion to do so under its charge to regulate in the public interest. Protestant argues that a foundation of the present regulatory system is the creation of a regulated monopoly so that a carrier gains

the most efficient use of its investment and the public benefits thereby; it contends that activation of an essentially dormant permit within a territory constitutes the imposition of competition, and that in that situation the Commission should apply the provisions of statute and regulation relating to applications for new service.

Applicant and Commission staff argue that the Commission should consider relevant to the public interest in authorizing a transfer only those matters which it has identified in rule, that activity under a certificate is not one of these standards and that the public need for certification is determined at the time of an orginal or extension application, rather than the time of a requested transfer.

The Commission denies the exceptions. Under the existing rules there is no indication that activity under a certificate will be an element in determining whether a transfer will be consistent with the public interest. Compare WAC 480-12-050(4)(a), which requires such a showing for transfer of motor carrier permits. In the absence of a rule or direct Commission precedent on this point, the Commission believes that it is not proper to raise dormancy as a test. Nor does the Commission believe that this case presents a sufficient basis to establish a new precedent.

The question deals with the transfer of existing rights, transferable upon meeting conditions prescribed by statute and regulation. There is no statutory or regulatory authority for requiring a showing of public need on a transfer. Black Ball Freight Service v. WUTC, 77 Wn.2d 479, 463 P.2d 169 (1969).

III. LEVEL OF RATES. Protestant contends that the applicant will be instituting a tariff containing rates at a level lower than protestant for the collection of rubbish in the affected territory, and that the proposed level of rates should be a basis for the denial of the application. The Commission disagrees.

The Commission is charged with fixing just and reasonable rates by RCW 81.28.230. This is not a proceeding under that statute and it does not determine the propriety of any rate level. The Commission has previously ruled that level of rates is not a proper inquiry in an application proceeding, and believes the arguments considered in those cases are persuasive. Level of rates is not a proper element in determining whether authority should be granted, with exceptions that are not here relevant. See, Order M. V. No. 128996, In re O. K. Distribution Application No. P-67056 (1984); Order M. V. No. 129935, In re Geer Bros. Trucking, Inc., Application P-67291 (1984).

Based upon the entire record and the file in this proceeding, the Commission hereby makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On October 19, 1983, joint application was filed seeking authority for seller Snoking Garbage Co., Inc., to transfer a portion of its Certificate No. G-126 to purchaser transferee, R.S.T. Disposal Co., Inc. The portion to be transferred consists of the following:

> RUBBISH COLLECTION SERVICE, not requiring the use of a dump truck, in that portion of King County described as follows:
>
> Commencing at the intersection of State Highway 518 and Interstate Highway 5; thence southerly along Interstate Highway 5 to its intersection with South 188th Street; thence easterly along South 188th Street extended to its projected intersection with 68th Avenue South; thence southerly along 68th Avenue South (also known as the West Valley Highway and State Highway 181) to its intersection with the King County - Pierce County line; thence westerly along said county line to its intersection with the east shore of Puget Sound; thence northerly along said shore line to its intersection with S.W. 148th Street extended; thence easterly along S.W. 148th Street extended and State Highway 518 to its intersection with Interstate Highway 5, the point of beginning.

2. On October 14, 1983, the seller and the purchaser entered into an agreement acknowledging a territorial overlap of seller's Certificate No. G-126 and the purchaser's service area. The purpose of the agreement was to sell to the purchaser the seller's overlapping certificate authority. A sale price was set at $35,000 for the authority in question. The sale was to be contingent on Commission approval of the transfer. The purchaser agreed to give the right of first refusal of sale of the permit or stock to the seller if any future sale of the authority was contemplated.

3. The territory in question concerns an area between the Pierce County line north to Highway 518, south of Tukwila and bounded on the east by Highway 181 and on the west by Puget Sound.

4. The application was protested by Rabanco, d/b/a Sea-Tac Disposal, Inc., holder of Certificate No. G-12, authorizing garbage and refuse collection service in the territory of the application.

5. The purchaser has financial resources sufficient to conduct the proposed operations in the territory in question. The purchaser is prepared to hold itself out to provide service in the area to be transferred.

6. The purchaser has equipment which is suitable for the proposed operations. The equipment is properly maintained.

7. Robert J. Schille, Vice President of Administration, Bayside Hauling and Transfer, Inc., Seattle, Washington, testified on behalf of the transferor. Snoking Garbage, Inc., Redmond, Washington, is a wholly-owned subsidiary of Bayside. Snoking is a garbage and refuse collection service. Mr. Schille testified concerning the transferor's authority, equipment, and existing customers. One of the reasons for the transfer is that the territory is situated too far away from the transferor's base of operations in Redmond for convenience of the carrier.

8. A. J. Segale, Vice President, R.S.T. Disposal Company, Inc., testified on behalf of the transferee-purchaser R.S.T. is engaged in the provision of garbage and refuse collection services pursuant to Certificate No. G-185. The area proposed for transfer is adjacent to and partially overlaps the transferee's service territory.

9. The transferee is knowledgeable concerning the laws and rules of the State of Washington regarding garbage certificate holders and has the ability to comply with them.

10. Tom C. Erath, Operation Manager, Sea-Tac Disposal, Inc., Seattle, Washington, testified in opposition to the application. Sea-Tac Disposal, Inc., provides garbage and refuse collection services under Certificate No. G-12. Sea-Tac is an operating division of Rabanco. Pursuant to Certificate No. G-12, protestant provides service in South King County including the area to be transferred.

11. Mr. Erath offered testimony regarding protestant's capacity to serve the area to be transferred, activity of the portion of the permit to be transferred and transferee's reduction in rates and charges.

12. Richard Ramsey, Vice Presient of Finances, Rabanco, Seattle, Washington, testified in opposition to the application. His company opposes the transfer because the transferee proposes

to lower garbage service rates. Protestant moved for a continuance to allow Commission personnel to appear at the hearing to explain the status of the transferee's tariffs. The motion was denied.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the persons and subject matter herein.

2. Protestant's motion to reopen the matter for receipt of evidence concerning proof that the public is adequately served by existing garbage and refuse companies and that neither the public interest nor the public convenience and necessity require approval of the transfer is denied.

4. It is in the public interest that the application to transfer be granted and that the transferor's authority be revised and reissued as set forth in Appendix A; the transferee's authority shall be revised and reissued as set forth in Appendix B.

Based on the foregoing findings of fact and conclusions of law, the Administrative Law Judge makes the following proposed order.

O R D E R

IT IS HEREBY ORDERED That Application G-788 of Snoking Garbage Co., Inc., transferor, and R.S.T. Disposal Co., Inc., transferee, for authority to transfer a portion of Certificate G-126 be, and the same is hereby, granted; and

IT IS FURTHER ORDERED That Certificate G-126 shall be reissued to Snoking Garbage Co., Inc., as set forth in Appendix A; and

IT IS FURTHER ORDERED That Certificate G-185 shall be revised and reissued to R.S.T. Disposal Co., Inc., as set forth in Appendix B, attached hereto and made a part hereof by this reference.

DATED at Olympia, Washington, and effective this 6th day of November, 1984.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ROBERT W. BRATTON, Chairman

MARY D. HALL, Commissioner

A. J. "BUD" PARDINI, Commissioner