

No. 46100-5-II

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**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

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STERICYCLE OF WASHINGTON, INC.,  
Appellant,

v.

WASHINGTON UTILITIES & TRANSPORTATION COMMISSION  
AND WASTE MANAGEMENT OF WASHINGTON, INC.  
Respondents.

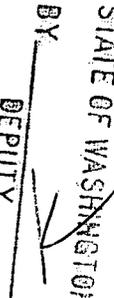
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**RESPONDENT WASTE MANAGEMENT OF WASHINGTON,  
INC.'S OPENING BRIEF**

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## I. INTRODUCTION

The Legislature created an administrative agency with specialized expertise and substantial authority to regulate the collection and transportation of solid waste in Washington. To protect the public and ensure that solid waste collection services are available throughout the State, the Legislature entrusted to the Utilities and Transportation Commission (the “Commission”) the duty of determining if incumbent medical waste service collection serves the public. Based on more than two decades of experience regulating the medical waste industry, based on the current state of that developing market, and based on the unanimous testimony of medical waste generators that they require a statewide alternative to Stericycle of Washington, Inc. (“Stericycle”), the Commission exercised its statutory discretion and granted the application of Waste Management of Washington, Inc. (“Waste Management”) to provide medical waste collection service in competition with Stericycle in those remaining areas of the State where the two companies were not already in head-to-head competition.

In this judicial appeal of the Commission’s decision, Stericycle first asked the Superior Court, and now asks this Court, to substitute its judgment for that of the Commission to preserve Stericycle’s monopoly. Because the Legislature charged the Commission with determining satisfactory service and because Stericycle has failed to demonstrate abuse

of the Commission's discretion, the Final Order of the Commission should be affirmed by this Court as it was by the Superior Court.

## II. STATEMENT OF THE CASE

### A. **The Commission Historically Has Evaluated its "Satisfaction" with Incumbent Medical Waste Service Differently Than its "Satisfaction" with Incumbent Garbage Collectors.**

In rejecting Stericycle's arguments that the Commission must guard the interests of a medical waste monopolist, the Commission found that Stericycle "loses sight of the distinction between neighborhood solid waste collection, where monopoly service is generally in the public interest, and collection of biomedical waste, which lacks the same attributes of a 'natural monopoly.'"<sup>1</sup> However, Stericycle's confusion is of relatively new vintage. Stericycle previously conceded in its never-ending litigation against Waste Management that the Commission consistently has recognized that the unique issues posed by medical waste collection and transportation require special considerations distinct from typical standard universal garbage collection.<sup>2</sup>

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<sup>1</sup> Final Order ¶ 10. The Final Order may be found at AR 2258.

<sup>2</sup> *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Stericycle's Mot. for Summ. Determination ("May 6, 2011 Motion") (May 6, 2011) ("The Commission has long recognized that biomedical waste is a specialized service that presents unique considerations for generators, the public and the Commission. This has produced a body of law that treats biomedical waste collection under unique standards, rather than as an indistinguishable part of solid waste collection under a G-certificate."); AR 2109 (Stericycle's Pet'n for [Administrative] Review) ¶ 49 (acknowledging that "*Sure-Way Incineration*" marks this shift in the Commission's 'satisfactory service' analysis from a focus on the service failures of existing solid waste carriers to a focus in the biomedical waste context on whether existing biomedical carriers' services are meeting the specialized needs of biomedical waste generators.").

In 1990, the Commission explained that “in the context of neighborhood solid waste collection,” RCW 81.77.040

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 small 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...could provide a level of service, on its own, which would satisfy the Commission and meet the needs of the waste generators. **Therefore, while sound policy and economic reasons exist in favor of exclusive authority for typical residential or commercial collection in a specific territory, those reasons are less compelling in this new, specialized area.** The Commission is not ready to say that a grant of one application for statewide authority would preclude a grant of others, and will consider this element in future proceedings.<sup>3</sup>

In 1992, despite the existence of a statewide medical waste hauler and various regional medical waste haulers, Stericycle itself requested that the Commission grant temporary authority for its contractor, Ryder Distribution Systems, to collect medical waste for Stericycle. The

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<sup>3</sup> *In re Sure-Way Incineration, Inc.*, App. No. GA-868, Order No. 1451 at 16-17 (Nov. 30, 1990) (emphasis added; citations omitted).

Commission rejected the incumbent medical waste haulers' claims that granting Stericycle's request and adding yet another choice for generators would "strike a fatal blow to the statutory plan for solid waste collection regulation."<sup>4</sup>

In 1993, when Stericycle requested permanent authority for Ryder, the Commission reiterated the difference between medical waste and garbage collection. The law "treats solid waste collection as a natural monopoly with efficiencies and public benefit gained through exclusive service."<sup>5</sup> However, the special handling needs of hazardous wastes had challenged "the usefulness of universal collection" of such wastes.<sup>6</sup> "The toxic nature of the substances, and required specialized collection and disposal, are such that the tests developed for grants of universal service may not be directly relevant to needs for collection of certain kinds of waste."<sup>7</sup>

In late 1993, the Commission again explained that to accomplish the statutory goal of providing proper collection services to all waste generators in the state, medical waste collection must be regulated distinctly from universal garbage collection.

Beginning in the 1970s, the Commission recognized a public need for specialized carriers who will provide universal collection of wastes requiring specialized services, such as hazardous waste, in

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<sup>4</sup> *Ryder Distrib. Sys., Inc.*, App. No. GA-75563, Order M.V.G. No. 1536 at 6 (Jan. 30, 1992).

<sup>5</sup> *In re Ryder Distrib. Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1596 at 5 (Jan. 25, 1993).

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.*

specified service territories. In subsequent adjudicative decisions, the Commission recognized that the objectives of Chapter 81.77 RCW are not necessarily best achieved by strict adherence to the same tests applied to grants of typical residential or commercial collection service. It has applied standards for grants of overlapping specialized biohazardous waste collection and disposal that are consistent with the nature of the service.<sup>8</sup>

The Commission recognized then that the nature of the medical waste market means that applicants “usually wish to serve the entire state or large portions of the state. The needs of specialized market segments are an important factor in evaluating the adequacy of existing service.”<sup>9</sup>

Consequently,

[t]he Commission continues to believe that the objectives of RCW 81.77.040 are not necessarily best achieved for specialized services by the tests applied to determine grants of neighborhood garbage collection service, particularly when the service territory is large or is the entire state. In evaluating applications for overlapping specialized biomedical waste authority, the Commission will continue to follow the approach set out in Sure-Way Incineration and Ryder. It will apply provisions of Chapter 81.77 RCW consistently with the unique requirements and attributes of the specialized service.

In evaluating whether existing companies will provide service to the satisfaction of the Commission, the Commission will not limit its consideration to evidence of service failures of the sort that usually are significant in neighborhood garbage collection service, such as service refusals, missed pickups or garbage strewn about. Rather, it will broaden the satisfactory service inquiry to include need-related sufficiency of service considerations – whether the

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<sup>8</sup> *In re Sureway Med. Servs., Inc.*, App. No. GA-75968, Order M.V.G. No. 1663 at 9 (Nov. 19, 1993) (citation omitted).

<sup>9</sup> *Id.* n.10.

existing service reasonably serves the needs of the specialized market.<sup>10</sup>

The Commission has given great weight to the judgments of medical waste generators regarding the sufficiency of the existing service options and their needs for alternatives.<sup>11</sup>

The statutory goal of providing collection services to all garbage generators is met by authorizing a single collection service with a large enough base to ensure economic viability. This has not been true with medical waste. In 1993, the Commission rejected BFI's contention that granting Sureway a competing medical waste certificate would "cripple" BFI.<sup>12</sup> "BFI has been competing with Sureway and its predecessors in the Seattle area since the Commission granted BFI's predecessor, American Environmental, authority in 1990. Granting this application should have little effect on the viability of BFI's operations in that portion of the state."<sup>13</sup> As to the areas where BFI was then the only service provider, the Commission held that BFI had failed to show that these areas "cannot support more than one specialized biohazardous waste collector."<sup>14</sup> So, the Commission approved a second medical waste transporter for most areas of the State.

The following year, the Commission again recognized that biomedical waste service is different than universal garbage collection

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<sup>10</sup> *Id.* at 10-11.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 16-17.

<sup>13</sup> *Id.* at 17.

<sup>14</sup> *Id.*

and, thus, the former “is evaluated differently when looking at performance to the Commission’s satisfaction ....”<sup>15</sup>

In 1995, despite acknowledging the obvious fact that “carriers in an environment of controlled competition may not be able to make as much money as carriers with a monopoly franchise,” the Commission granted Stericycle leave to become a second, overlapping statewide hauler.<sup>16</sup> The Commission held that “[w]hile competition may operate in a limited market to reduce available business to uneconomic levels, it is also true that competition can bring benefits to consumers,” including an increase in the range of services offered.<sup>17</sup> Moreover, the Commission noted that granting Stericycle’s application would not render the incumbent medical waste collection company “insolvent,”<sup>18</sup> and economic damage to the incumbent is only relevant to the degree the incumbent establishes that the competition will “cause[] a reduction to unacceptable levels of available reasonably priced services to consumers.”<sup>19</sup> Consequently, at the time that Stericycle’s parent company opened a biomedical waste treatment facility in Washington and Stericycle obtained statewide authority from the Commission, there was actual and aggressive competition among medical waste haulers throughout Washington.<sup>20</sup>

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<sup>15</sup> *In re Med. Res. Recycling Sys., Inc.*, App. No. GA-76820, Order M.V.G. No. 1707 at 2 (May 25, 1994).

<sup>16</sup> *In re Ryder Distrib. Res., Inc.*, App. No. GA-75154, Order M.V.G. No. 1761 at 13 (Aug. 11, 1995).

<sup>17</sup> *Id.* at 13-14.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> *Id.* at 14.

<sup>20</sup> Ironically, the Commission’s decision to grant Stericycle **competing** statewide authority is raised now to support a reliance argument. Stericycle’s Opening Brief at 38.

In 1997, the Commission reiterated in an initial order that medical waste collection services did not operate like the garbage collection monopolies. “Although the industry historically has been characterized by monopoly service in a given territory, the Commission has granted overlapping authority for this specialized service. One result of the granting of overlapping authority is competition among carriers, a situation which did not occur in the industry prior to the 1990s.”<sup>21</sup> The order noted that the Commission has interpreted RCW 81.77.040’s requirements “consistently with the unique requirements and attributes of [medical waste] service,” and had granted statewide authority concurrently to two carriers.<sup>22</sup> The Commission recognized that there was also competition from 75 haulers providing medical waste service in limited territories.<sup>23</sup> Hence, the Commission favorably concluded that there was “competition in the market for provision of services of transportation and disposal of biomedical waste.”<sup>24</sup>

In the Commission’s final order in that action, it reiterated the different statutory treatment of universal garbage haulers and medical waste collectors.

Although the solid waste industry historically has been characterized by monopoly service in a given territory, the Commission has granted overlapping authority for this specialized service.... In applications for specialized biomedical waste

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<sup>21</sup> *In re Pet’n of Comm’n Staff for a Decl. Ruling*, Docket No. TG-970532, Decl. Order at 3 (Oct. 29, 1997) (n. omitted).

<sup>22</sup> *Id.* at 3 n.1.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.*

authority, the Commission has interpreted the statutory requirements consistently with the unique requirements and attributes of the service, giving considerable weight to testimony of waste generators regarding their service requirements.<sup>25</sup>

The Commission emphasized that medical waste collection “has evolved into a highly competitive industry as a result of the Commission interpreting RCW 81.77.040 consistently with the unique requirements and attributes of the service.”<sup>26</sup>

To the degree there was any possible doubt regarding the Commission’s long-held view, in 2011 the Commission explained: “[T]he Commission has historically found that promoting competition in this segment of the industry is in the public interest because, among other things, it promotes higher quality of service in terms of protecting the public health and safety.”<sup>27</sup> The Commission “recognized that its regulation of this specialized service is underpinned by different policies than the ones applicable to traditional solid waste collection ....”<sup>28</sup>

[W]hile the solid waste industry in general is characterized by monopoly service providers in given territories, the Commission has granted overlapping authority for the provision of biomedical waste services, including at one time statewide authority to two companies. Thus, Commission policy has historically encouraged competition in the provision of biomedical waste services.<sup>29</sup>

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<sup>25</sup> *In re Pet’n of Comm’n Staff for a Decl. Ruling*, Docket No. TG-970532, Decl. Order at 9 (Aug. 14, 1998).

<sup>26</sup> *Id.* at 10.

<sup>27</sup> *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Final Order on Cross-Mot. for Dismissal & Summ. Determination at 14-15 (July 13, 2011) (“July 13, 2011 Order”).

<sup>28</sup> *Id.* at 15.

<sup>29</sup> *Id.* at 15-16.

Notwithstanding – and, in fact, because of – Stericycle’s present “dominance” in providing medical waste service, the Commission emphasized its desire to make opportunities “readily available” for traditional solid waste collection companies to compete with Stericycle.<sup>30</sup> So, the Commission rejected “significant barriers to entry” to this “highly competitive industry.”<sup>31</sup>

Stericycle’s contention that the decision below “is a radical reversal of established precedent”<sup>32</sup> is absurd. Having more recently enjoyed the monopoly that evolved from its acquisitions and transfers, Stericycle now eschews the precedent it created and relied on in entering a competitive market. Indeed, it was Stericycle itself that first argued that the Commission should **require** Waste Management to obtain statewide authority.<sup>33</sup>

**B. Previously, Waste Management Provided Medical Waste Collection Services In Territory Containing Eighty Percent of the State’s Medical Waste.**

Waste Management has held general solid waste authority under Certificate No. G-237 for decades.<sup>34</sup> The G-237 service area covers major portions of the State in King, Pierce, Snohomish, Island, Kitsap, Mason, Whatcom, Benton, Chelan, Douglas, Grant, Okanogan, Lincoln, Kittitas, Spokane and Skagit Counties.<sup>35</sup> Since 2011, Waste Management has

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<sup>30</sup> *Id.* at 16.

<sup>31</sup> *Id.*

<sup>32</sup> Stericycle’s Opening Brief at 37.

<sup>33</sup> *See infra* § II.B.

<sup>34</sup> AR 2305 (Ex. JD-13).

<sup>35</sup> *Id.* Incredibly, Stericycle states that the G-237 authority covers only “limited territories within several Washington counties.” Stericycle’s Opening Brief at 4.

provided medical waste collection service throughout the G-237 territory<sup>36</sup> which, according to Stericycle, encompasses sources for 80% of Washington's medical waste.<sup>37</sup> Waste Management's medical waste service throughout its large G-237 territory is not at issue in this case. In all of this territory, Waste Management competes with Stericycle.<sup>38</sup>

Despite alternative medical waste collection companies in much of the State and the State's history of competing statewide providers, by 2011, most meaningful alternatives were gone. Stericycle had acquired much of its competition, leaving numerous medical waste generators with only one option for the collection of such waste: Stericycle.<sup>39</sup>

In unsuccessfully opposing Waste Management's right to provide medical waste collection services in the G-237 territory in 2011, Stericycle took the opposite position. It demanded that Waste Management "be required" to provide statewide service because Stericycle viewed the G-237 territory as the most profitable. Stericycle said:

Waste Management seeks to initiate biomedical waste collection services limited to relatively high-density, low cost/high profit areas of the state, while Stericycle is required to serve the whole state, including high cost/low profit generators in small towns and rural areas. The effect will be to give Waste Management an unfair cost advantage in areas of the state where both carriers compete, because only Stericycle will be required to absorb the higher costs of service to small towns and rural areas. Ultimately, Waste Management's unfair cost

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<sup>36</sup> AR 2305 (Ex. JD-1T § II; Ex. JN-4T ¶ 5).

<sup>37</sup> *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Reply in Supp. of Stericycle's Mot. for Summ. Determination at 11 at n.7 (June 1, 2011).

<sup>38</sup> AR 2305 (Ex. MP-18).

<sup>39</sup> AR 0498 ¶¶ 3-4.

advantage could adversely affect Stericycle's ability to serve its healthcare customers statewide or require it to impose drastic service cut-backs and/or rate increases on healthcare facilities in rural counties and small towns. To ensure fair competition and to preserve necessary services throughout the state, **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, rather than limiting its services to the state's higher density urban areas and transportation corridors.**<sup>40</sup>

Prompted by Stericycle's demand, Waste Management applied for authority to serve the remaining parts of Washington outside the G-237 territory. Yet, Stericycle now flip-flops. The Commission's grant of the additional authority Stericycle then advocated is now the very target of this appeal.

**C. The Evidence Demonstrated A Great Need for a Statewide Alternative to Stericycle.**

Stericycle's service has not been "exemplary."<sup>41</sup> Its customers testified about their dissatisfaction and the Commission affirmed the Administrative Law Judge's ("ALJ") ruling that the many complaints about Stericycle were "a matter of concern."<sup>42</sup> Rodger Lycan, of Pathology Associates Medical Laboratories ("PAML") testified that:

In PAML's experience, Stericycle does not have much interest in offering competitive prices or reducing its costs. Once Waste Management filed its [medical waste] tariff, PAML moved its [medical waste] business in the Waste Management territory to Waste Management because Waste Management's

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<sup>40</sup> *Id.* ¶ 11 (emphasis added).

<sup>41</sup> Stericycle's Opening Brief at 4.

<sup>42</sup> AR 2070 (Initial Order) ¶ 9; Final Order ¶ 5.

pricing was better and because Waste Management was committed to providing PAML with only the service which PAML requires, and not more at a higher price tag.<sup>43</sup>

Carla Patshkowski of Providence Medical Group (“PMG”) testified as to her facilities’ dissatisfaction with Stericycle. PMG did not have a Stericycle sales representative and when waste collection was initiated at a new PMG facility, Stericycle would deliver “quite large containers” without advising PMG that more appropriate, smaller (less expensive) containers and less frequent (and less expensive) service were available.<sup>44</sup> Only when PMG began service with Waste Management did Ms. Patshkowski learn from her Waste Management sales representative that smaller containers and less frequent service were available.<sup>45</sup> PMG also was “dissatisfied with Stericycle’s services because Stericycle charged (and still charges) a minimum monthly fee even when there is no [medical] waste collected ....”<sup>46</sup> Stericycle overbilled for its services at all PMG’s facilities.<sup>47</sup>

Julie Sell of Olympic Medical Center (“OMC”) testified that her hospital and clinics have:

[B]een dissatisfied with Stericycle’s process for scheduling collection. [OMC] has no local Stericycle contact to arrange for scheduling but must make arrangements with employees of Stericycle’s corporate parent on the east coast. This commonly results in the need to make follow up requests before

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<sup>43</sup> AR 2305 (Ex. RL-1T at 3).

<sup>44</sup> AR (Hrg. Tr. Vol. VI at 470:16-471:3, 471:12-472:2, 477:9-12, 484:23-485:1); AR 2305 (Ex. CP-1T at 3-4).

<sup>45</sup> AR (Hrg. Tr. Vol. VI at 487:11-20).

<sup>46</sup> AR 2305 (Ex. CP-1T at 3-4).

<sup>47</sup> AR (Hrg. Tr. Vol. VI at 478:14-18).

Stericycle will make a requested collection. On a couple occasions, Stericycle did not make the requested [medical] waste collection which created a significant problem and concern for [OMC] as it had to maintain the [medical] waste on site.<sup>48</sup>

When Ms. Sell complained to Stericycle about missed pick-ups, Stericycle always blamed OMC.<sup>49</sup> The missed pick-ups create safety concerns because some of the clinics have very limited space to store the waste.<sup>50</sup> OMC also objected to Stericycle's mandatory monthly fee even in those months where there is no collection service needed.<sup>51</sup>

Other generators also testified as to their lack of satisfaction with Stericycle's services. For example, Jean Longhenry of Wendel Family Dental Centre testified that her facilities "have experienced on-going, monthly errors in Stericycle's bills."<sup>52</sup> She "was constantly calling to correct the billing on [the statements]."<sup>53</sup>

The medical waste generators unanimously testified of their need for an alternative to Stericycle. Each had the benefit of two alternative medical waste service providers for more than five years, until Stericycle acquired the competition.<sup>54</sup> Mr. Lycan of PAML attested to his need for a choice to ensure the best quality of service and competitive pricing for his statewide facilities and for a single contract with one service provider.<sup>55</sup>

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<sup>48</sup> AR 2305 (Ex. JS-1T at 3).

<sup>49</sup> AR (Hrg. Tr. Vol. V at 226:17-21).

<sup>50</sup> *Id.* at 226:22-25.

<sup>51</sup> *Id.* at 217:7-9, 227:23-228:14.

<sup>52</sup> AR 2305 (Ex. JL-1T at 3).

<sup>53</sup> AR (Hrg. Tr. Vol. V at 316:7-12).

<sup>54</sup> *In re Pet'n of Comm'n Staff for Declaratory Ruling*, Docket No. TG-970532, Decl. Order ¶¶ 4-5 (Aug. 14, 1998).

<sup>55</sup> AR 2305 (Ex. RL-1T at 3-4).

Stericycle ignored PAML's request for assistance reducing PAML's medical waste costs "until [PAML] notified [Stericycle] that we were transitioning some of our facilities over to Waste Management."<sup>56</sup> In contrast, as soon as Waste Management began providing service to some PAML facilities, Waste Management worked with Mr. Lycan to determine if Stericycle's service was too frequent and its containers too large for PAML's actual needs.<sup>57</sup> In switching to Waste Management, PAML obtained a reduction in its medical waste costs.<sup>58</sup>

Ray Moore of PeaceHealth testified that his hospitals require a statewide alternative to provide the leverage to obtain the best possible service and pricing to help mitigate their risk of residual liability arising from the transportation and handling of their medical waste by third parties.<sup>59</sup> For PeaceHealth, "[c]hoice and competition allow flexibility to meet whatever needs there are [and] helps strengthen what different companies will bring to the table."<sup>60</sup>

Terry Johnson of Chelan Community Hospital testified that he needs an alternative to ensure high quality service, leverage to obtain a market price, and a backup service provider in the event of a work stoppage or natural disaster.<sup>61</sup> "Having a single source for such a critical

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<sup>56</sup> AR (Hrg. Tr. Vol. VI at 438:18-439:4).

<sup>57</sup> *Id.* at 450:13-451:1.

<sup>58</sup> *Id.* at 452:20-453:19.

<sup>59</sup> AR 2305 (Ex. RM-1T at 4).

<sup>60</sup> AR (Hrg. Tr. Vol. VI at 395:19-22).

<sup>61</sup> AR 2305 (Ex. TJ-1T at 3); AR (Hrg. Tr. Vol. V at 239:19-20).

service increases the risk assessment in the event of a major catastrophe like a forest fire closing roads or an earthquake.”<sup>62</sup>

The other waste generators agreed. Ms. Longhenry, Ms. Patshkowski, Emily Newcomer of the University of Washington, Ms. Sell, and Dr. Danny Warner of the Washington State Dental Association each testified of their need for an alternative to Stericycle to obtain good service, fair pricing, and proper handling of their sensitive waste.<sup>63</sup>

The evidence before the Commission also established that competition from Waste Management in the G-237 territory **already** had caused a marked improvement in **Stericycle’s** service quality and prices. Jeff Norton worked for Stericycle from 1998 through 2008.<sup>64</sup> Many Stericycle customers complained to him about Stericycle’s proprietary “Steritubs” because they stick together when they nest, customers in some cases could not pry them apart, and the lids rarely fit properly.<sup>65</sup> He repeatedly reported those complaints to Stericycle’s Mike Philpott.<sup>66</sup> Mr. Philpott testified he was aware customers did not like the Steritubs.<sup>67</sup> However, he advised Mr. Norton that Stericycle had too much capital invested in the Steritubs and would not change the containers.<sup>68</sup>

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<sup>62</sup> AR 2305 (Ex. TJ-1T at 3).

<sup>63</sup> AR 2305 (Ex. JL-1T at 3; Ex. CP-1T at 4; Ex. EN-1T at 4; Ex. JS-1T at 3; Ex. DW-1T at 2-3); AR (Hrg. Tr. Vol. VI at 480:23-481:3; Hrg. Tr. Vol. VII at 558:19-24; Hrg. Tr. Vol. V at 218:16-23) .

<sup>64</sup> AR 2305 (Ex. JN-1T at 2).

<sup>65</sup> AR 2305 (Ex. JN-1T at 3).

<sup>66</sup> *Id.*

<sup>67</sup> AR (Hrg. Tr. Vol. VII at 573:3-7).

<sup>68</sup> AR 2305 (Ex. JN-1T at 3).

In 2011, based on the complaints of Stericycle customers, Waste Management began offering containers manufactured by Rehrig Pacific (“Rehrig”) with a hinged lid in the G-237 territory. The Rehrig containers nest without trouble, the attached lids close easily, and the containers stack evenly and minimize the storage space needed.<sup>69</sup> On March 30, 2011, Waste Management filed its tariff with the Commission including 31-gallon and 43-gallon Rehrig containers with market pricing.<sup>70</sup>

Mr. Philpott learned that Waste Management was offering Rehrig containers to customers.<sup>71</sup> He testified that as of that time, Stericycle had not offered Rehrig containers or containers with hinged lids in Washington.<sup>72</sup> As he testified, Stericycle decided to offer Rehrig containers in Washington **because Waste Management was offering them to Stericycle customers.**<sup>73</sup>

On June 2, 2011, Stericycle amended its tariff.<sup>74</sup> The only changes Stericycle made to its preexisting tariff concerned the addition of the Rehrig containers.<sup>75</sup> This was the first time in nearly 20 years of medical waste service that Stericycle changed **any** of its prices.<sup>76</sup> Stericycle added 31-gallon and 43-gallon Rehrig containers – but only in Waste

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<sup>69</sup> *Id.*

<sup>70</sup> AR 2305 (Ex. MAW-25 at 5, 7).

<sup>71</sup> AR (Hrg. Tr. Vol. VII at 574:4-7).

<sup>72</sup> *Id.* at 573:17-19; *id.* at 574:8-12.

<sup>73</sup> *Id.* at 574:22-575:13.

<sup>74</sup> AR 2305 (Ex. MP-18 at 7-10).

<sup>75</sup> *Id.* at 5-6; AR (Hrg. Tr. Vol. VII at 579:10-20; *id.* at 584:25-585:10); AR 2305 (Ex. MP-3).

<sup>76</sup> Compare AR 2305 (Ex. MP-19 at 26) (11/30/93 tariff prices) with AR 2305 (Ex. MP-18 at 5) (6/6/11 tariff prices).

Management's G-237 territory – and for these containers, alone, **lowered** its prices per gallon to match the prices in Waste Management's tariff.<sup>77</sup>

Stericycle also responded favorably in other ways to competition from Waste Management. For example, only then did Stericycle assign a representative to customers OMC and Lake Chelan Community Hospital.<sup>78</sup> Similarly, Stericycle ignored PAML's request for assistance reducing PAML's medical waste costs "until [PAML] notified [Stericycle] that [it was] transitioning some of [its] facilities over to Waste Management."<sup>79</sup>

**D. The Commission Exercised its Statutory Authority and Granted Waste Management's Application.**

On July 10, 2013, the Commission granted Waste Management's application, extending its authority into the incremental territories needed to provide a statewide alternative to medical waste generators again.<sup>80</sup> The Commission rejected Stericycle's contention that RCW 81.77.040 "establishes a **legislative** presumption in favor of exclusive service territories,' the purpose of which 'is to protect existing certificate holders from competition' unless 'the services offered by the incumbent carrier are

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<sup>77</sup> AR 2305 (Ex. MP-18 at 5-6; Ex. MP-27 at 5); AR (Hrg. Tr. Vol. VII at 583:15-19; *id.* at 585:11-587:12; *id.* at 600:21-25; *id.* at 601:1-602:3; *id.* at 602:4-14; *id.* at 602:19-604:3; *id.* at 604:12-23; *id.* at 380:18-20).

<sup>78</sup> AR (Hrg. Tr. Vol. V at 225:15-19, 237:6-10).

<sup>79</sup> AR (Hrg. Tr. Vol. VI at 438:18-439:11).

<sup>80</sup> Although Stericycle criticizes at length the initial rulings of the ALJ, this Court has long recognized that it "review[s] the findings of the final agency decision maker ..., not those of the ALJ who entered the initial order." *Galvis v. State Dep't of Transp.*, 140 Wn. App. 693, 709, 167 P.3d 584 (2007).

flawed or deficient in some particular way.”<sup>81</sup> Rather, the Commission held that the Legislature “did not create a ‘presumption’ of monopoly or limit competitive entry to instances of service failures” but “has given the Commission discretion to determine the appropriate number” of medical waste collection service providers within a particular service territory consistent with the public interest.<sup>82</sup>

**E. The Superior Court Recognized the Delegation of Discretion to the Commission and Affirmed the Commission’s Decision.**

In a detailed oral ruling, the Superior Court recognized the unusually broad discretion the Legislature delegated to the Commission.<sup>83</sup> Judge Erik Price concluded that the Commission’s exercise of that discretion was “permissible under the statute,” amply explained in the Final Order, and supported by substantial evidence.<sup>84</sup>

### III. ARGUMENT

**A. The Standard of Review Is Deferential.**

Stericycle challenges the Final Order as an erroneous interpretation of the solid waste statute. Stericycle is correct that under the Administrative Procedure Act (“APA”) courts review questions of law *de novo*.<sup>85</sup> However, Stericycle neglects to explain – as it previously conceded<sup>86</sup> – that in an APA appeal “de novo review” requires the court to

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<sup>81</sup> Final Order ¶ 6 (quoting Stericycle’s Pet’n for Admin. Review; emphasis by Stericycle).

<sup>82</sup> *Id.* ¶ 8.

<sup>83</sup> RP at 89:4-13.

<sup>84</sup> RP at 62-63.

<sup>85</sup> Stericycle’s Opening Brief at 14.

<sup>86</sup> Stericycle previously acknowledged that “Washington’s courts are bound to give the Commission’s interpretation of the law substantial weight.” May 6, 2011 Motion ¶ 31.

“giv[e] substantial weight to the [agency’s] interpretation of the statute it administers.”<sup>87</sup> Moreover, where a statute expressly directs the exercise of **the agency’s** discretion, a reviewing “court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.”<sup>88</sup> Because substantial weight must be given to the Commission’s interpretation of the Act **and** because the Legislature ordained that **the Commission** determine **its** satisfaction with incumbent waste haulers, the Final Order should not be disturbed.

Stericycle further contends that the Final Order is not supported by substantial evidence and is arbitrary and capricious.<sup>89</sup> “Both the ‘substantial evidence’ and the ‘arbitrary and capricious’ standards are highly deferential” and a court “will not set aside a discretionary decision absent a clear showing of abuse.”<sup>90</sup> The evidence of the waste generators’

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<sup>87</sup> *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424, 166 P.3d 1198 (2008) (quotation marks & citation omitted); *accord Verizon NW, Inc. v. Wash. Emp’t Sec. Dep’t*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). *Quadrant Corp. v. Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005), relied upon by Stericycle, Stericycle’s Opening Brief at 14 n.41, confirms the deference typically due to agency interpretations of statutes they enforce. The Court noted that, unusually in the case of the Growth Management Act, the Legislature required that Growth Management Boards – themselves – defer to local government planning actions. Consequently, when courts review decisions of the Boards, they must enforce the statute’s directive of deference to the local government which “supersedes deference granted by the APA and courts to administrative bodies in general.” *Id.* at 238. “Thus, a board’s ruling that fails to apply this more deferential standard of review to a county’s action is not entitled to deference from this court.” *Id.* (quotation marks omitted).

<sup>88</sup> RCW 34.05.574(1). None of the cases on which Stericycle relies for its six-part approach to statutory construction, Stericycle’s Opening Brief at 15-16, concerned cases where the Legislature ordained that a regulatory agency was to exercise **its** discretion.

<sup>89</sup> Stericycle’s Opening Brief at 31.

<sup>90</sup> *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995) (quotation marks & citation omitted).

need for an alternative to Stericycle was overwhelming and amply supports the Commission's decision. There has been no showing that it abused its discretion.

**B. The Commission Neither Abused Its Discretion Nor Misconstrued the Solid Waste Act.**

**1. The Commission, Not the Courts, Determines Satisfactory Service.**

In RCW 81.77.040, the Legislature delegated to the Commission the authority to determine whether to approve an application by a solid waste service provider. The Statute directs the Commission to consider six factors where there already is an incumbent service provider: (1) “[t]he present service and the cost thereof for the contemplated area to be served”; (2) “an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal”; (3) “the assets on hand of the person, firm, association, or corporation that will be expended on the purported plant for solid waste collection and disposal”; (4) the “prior experience, if any, in such field by the petitioner”; (5) the “sentiment in the community contemplated to be served as to the necessity for such a service”; and (6) whether “the existing solid waste collection company or companies serving the territory will not provide service to the satisfaction of the commission.”<sup>91</sup> The Commission concluded, upon consideration of

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<sup>91</sup> RCW 81.77.040 (emphasis added). The authority granted under this statute is called a “certificate of convenience and necessity.” Stericycle persistently refers to “the PCN standard” as being something which does not include the statute’s “satisfaction of the commission” requirement. *See* Stericycle’s Opening Brief at 6, 18, 19, 20, 21, 26, 27, 30, & 31. However, the Court will look in vain for any reference in the statute to “the PCN standard.” Whatever “the PCN standard” is, it must include each of the elements in RCW 81.77.040 including “satisfaction of the commission.”

each of these factors, that Waste Management’s application should be granted. Stericycle contests only the determination under the sixth factor.

RCW 81.77.040 does not set forth the standard the Commission is to use in determining whether it finds incumbent service satisfactory. In considering the equivalent “satisfaction of the Commission” standard in RCW 81.68.040 governing intrastate transportation of passengers for compensation, this Court has recognized that “[t]he statute does not specify how the Commission is to make that determination.”<sup>92</sup> Hence, this Court held that the Commission may determine whether it is satisfied “in any rational way that the evidence will support.”<sup>93</sup>

The Supreme Court also requires that great deference be afforded to the Commission’s determination of issues reserved to its discretion by statute. In *Arco Products Co. v. Washington Utilities and Transportation Commission*, the Court considered RCW 80.28.200’s provision that:

[T]he commission shall have the power ... to determine whether or not [a federal refund] should be passed on, in whole or in part, to the consumers of such company and to order such company to pass such refund on to its consumers, in the manner and to the extent determined just and reasonable **by the commission**.<sup>94</sup>

The Court held that the statute “unambiguously gives the WUTC the authority and discretion to determine whether and how to allocate the

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<sup>92</sup> *Pac. NW Transp. Servs., Inc. v. Wash. Utils. & Transp. Comm’n*, 91 Wn. App. 589, 590, 959 P.2d 160 (1998).

<sup>93</sup> *Id.* at 596.

<sup>94</sup> RCW 80.28.200 (emphasis added).

refund.”<sup>95</sup> Because the Legislature did not define what it meant by “just and reasonable” and the Commission “has a special expertise in the area of regulated utilities,” the Court must show “a great deal of deference” to the Commission’s determination of what is “just and reasonable.”<sup>96</sup> Moreover, the Court explained that the statute requires the determination to be made “by the commission.”<sup>97</sup> “[T]he statute itself clearly states who is to determine what is ‘just and reasonable’ – it is the Commission, not the courts. For this reason also, we defer to the WUTC’s determination of whether the allocation of the refund is ‘just and reasonable.’”<sup>98</sup> The Commission’s discretionary decisions may not be disturbed absent a clear showing of abuse.<sup>99</sup>

Hence, Judge Price properly recognized that it was

clear [] that the Legislature said and used the phrase ‘to the satisfaction of the Commission.’ That, in my view ... is somewhat unusual. The Legislature frequently requires decisions to be made with some sort of adjective like “reasonable” or “justified” or “substantial.” It is uncommon ... to tie that adjective of “satisfactory” to the determination of the agency.<sup>100</sup>

He found that “the technical nature of the industries regulated by the Commission” justified the Legislature’s delegation of discretion to the Commission.<sup>101</sup> He explained that, to the degree legislative intent can be

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<sup>95</sup> *Arco Prods.*, 125 Wn.2d at 811.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (quoting RCW 80.28.200; emphasis by the Supreme Court).

<sup>98</sup> *Id.* at 811-12; accord *US West Commc’ns, Inc. v. Wash. Utils & Transp. Comm’n*, 134 Wn.2d 48, 86, 949 P.2d 1321 (1997).

<sup>99</sup> *Arco Prods.*, 125 Wn.2d at 812; RCW 34.05.574(1).

<sup>100</sup> RP at 89:4-13.

<sup>101</sup> RP at 89:14-17.

discerned from RCW 81.77.040, “it was to give the Commission discretion to make the decisions it made.”<sup>102</sup>

Exercising its discretion and based on its expertise, the Commission held below that RCW 81.77.040 “cannot be interpreted to establish a presumption of a single monopoly provider.”<sup>103</sup> By its very terms, the Statute contemplates the existence of multiple service providers. RCW 81.77.040 directs the Commission to determine “satisfaction of the commission” where there is already an “existing waste collection company **or companies** serving the territory.”<sup>104</sup>

As the Commission noted, RCW 81.77.040 is materially different from the provision in Chapter 81.84 RCW governing entry into the ferry market which prohibits the Commission from granting a new service provider authority “unless the existing certificate holder **has failed or refused to furnish reasonable and adequate service.**”<sup>105</sup> Consequently, the Commission

interpret[ed] as intentional the difference in the comparable language in these two sections of RCW Chapter 81 and construe[d] RCW 81.77.040 accordingly. The legislature did not create a “presumption” of monopoly or limit competitive entry to instances of service failures in that section. Rather, it has given the Commission discretion to determine the appropriate number of solid waste collection service providers who should be authorized to operate within a particular service territory consistent with the public interest.<sup>106</sup>

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<sup>102</sup> RP at 63:11-21.

<sup>103</sup> Final Order ¶ 7

<sup>104</sup> RCW 81.77.040 (emphasis added); Final Order ¶ 7.

<sup>105</sup> RCW 81.84.020 (emphasis added).

<sup>106</sup> Final Order ¶ 8.

The Commission rejected Stericycle's contention that the Commission always has stated a preference for monopoly medical waste service.<sup>107</sup> The Commission explained that while monopoly service "is generally in the public interest" in the case of **neighborhood solid waste collection**, medical waste collection "lacks the same attributes of a 'natural monopoly.'"<sup>108</sup> Therefore, "[t]he Commission has long differentiated the regulatory approaches to each of these two types of services."<sup>109</sup> The Commission pointed to its most recent prior medical waste decision, in 2011, and reiterated "that its 'policy has historically encouraged competition' in the context of biomedical waste collection ...."<sup>110</sup>

Remarkably, Stericycle dismisses the 2011 decision which arose in yet another case in which Stericycle sought unsuccessfully to prevent competition from Waste Management. Instead, as it did below, Stericycle cites to an early Commission decision from the nascent 1993 medical waste market, *Sureway Medical Services*, in which the Commission had noted that "mere preference for competition, does not demonstrate a need for an additional carrier."<sup>111</sup> The Commission's medical waste decisions have approved of competition on multiple occasions since *Sureway*<sup>112</sup> and the Commission explained below that its view had evolved in line with the

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<sup>107</sup> *Id.* ¶ 9.

<sup>108</sup> *Id.* ¶ 10.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (quoting July 13, 2011 Order at 16).

<sup>111</sup> *Sureway Med. Serv.*, Docket No. GA-75968, Order M.V.G. No. 1674 at 4-5 (Dec. 20, 1993).

<sup>112</sup> See *supra* § II.A.

present medical waste market. “[T]he development of competition in former monopoly utility markets was only just beginning in Washington in the late 1980’s and early 1990’s” and the Commission today “has greater experience and comfort in certain utility markets.”<sup>113</sup>

Biomedical waste collection has evolved into a highly competitive industry as a result of the Commission interpreting RCW 81.77.040 consistently with the unique requirements and attributes of the service. Stericycle currently competes with another certificated company to provide such service throughout the vast majority of the state – including with Waste Management for the last two years in territory that includes 80 percent of the generators in Washington – without any adverse impact on the companies’ economic viability or ability to provide service. To the contrary, Waste Management’s re-entry into the biomedical waste collection market in [Waste Management’s] existing solid waste collection service territory has resulted in demonstrated benefits to consumers without detriment to Stericycle’s revenues or customer count.<sup>114</sup>

The Commission explained that it has adapted its regulation “to the realities of the market,” and, hence, held that incumbent medical waste service would not be to its satisfaction if “(1) generators of biomedical waste have an unmet need for an effective competitive alternative to the incumbent service providers, and (2) the new entrant will enhance the effectiveness of competition in the marketplace.”<sup>115</sup> “[W]here competition can or does exist, as in the biomedical waste collection industry, regulation should ensure that consumers reap the benefits of multiple

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<sup>113</sup> Final Order ¶¶ 12-13.

<sup>114</sup> *Id.* ¶ 13 (nn. & quotation marks omitted).

<sup>115</sup> *Id.* ¶¶ 14-15.

service providers by encouraging an effectively competitive marketplace.”<sup>116</sup>

The complexity and evolution of the medical waste market and its difference from universal garbage service are precisely the reasons why the Legislature delegated to an expert regulatory agency the determination as to whether incumbent service was or was not satisfactory. That the Commission’s jurisprudence continues to evolve with the markets it regulates can be no indictment of the Commission’s application of its substantive expertise and discretion.

Stericycle points to *Superior Refuse Removal, Inc. v. Washington Utilities and Transportation Commission*, in which Division III affirmed the Commission’s satisfaction with incumbent garbage service.<sup>117</sup> According to Stericycle, that case is instructive because the court did not discuss “the possible benefits of competition.”<sup>118</sup> Stericycle neglects to explain that, while *Superior Refuse* concerned the markedly different context of universal garbage service – in which the Commission always has promoted a single-service provider model contrary to its regulation of medical waste service – the court nonetheless rejected the suggestion that RCW 81.77.040 “expresses a legislative intent to foster monopolies in the solid waste collection industry.”<sup>119</sup>

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<sup>116</sup> *Id.* ¶ 15.

<sup>117</sup> 81 Wn. App. 43, 913 P.2d 818 (1996).

<sup>118</sup> Stericycle’s Opening Brief at 22-23.

<sup>119</sup> *Superior Refuse*, 81 Wn. App. at 52.

Stericycle also argues that the “‘satisfactory service’ requirement **limits** the Commission’s authority ....”<sup>120</sup> RCW 81.77.040 and the deferential review required under the APA dictate precisely the opposite. It is for the Commission to make the discretionary determination as to whether an incumbent certificate holder will or will not provide satisfactory service under RCW 81.77.040 and no basis exists to disturb that determination here.

**2. RCW 81.77.040’s Purpose Is to Protect the Public, Not to Limit Competition.**

Stericycle wishes to avoid competition in the remaining area outside the G-237 territory because doing so would be beneficial **to Stericycle** even though it claimed precisely the opposite in its earlier case.<sup>121</sup> According to Stericycle, the purpose of the “service to the satisfaction of the commission” test is for the “protection [of] existing providers.”<sup>122</sup> But RCW 81.77.040’s purpose is to serve **the public**.<sup>123</sup> As long ago as 1959, the Supreme Court recognized that the purpose of the motor carrier statute, which then regulated solid waste companies, was not to protect incumbents from competition, nor did the statute compel the conclusion that

competition must necessarily adversely affect the interest of the public. Such an interpretation of the act would render it unconstitutional because it would then offend Art. XII, § 22, of the Washington state

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<sup>120</sup> Stericycle’s Opening Brief at 6 (emphasis added).

<sup>121</sup> *See supra* § II.B.

<sup>122</sup> Stericycle’s Opening Brief at 21.

<sup>123</sup> RCW 81.77.100 (“To protect public health and safety and to ensure solid waste collection services are provided to all areas of the state”).

constitution, which prohibits monopolies in general and transportation monopolies in particular.<sup>124</sup>

The statute prohibited “only such competitive practices as would impair the transportation service available to the public. The fact that competition might be injurious to the respondents is of no moment unless it would have that result.”<sup>125</sup> Consequently, the Commission properly held below that it would “not use the statute to shield incumbent companies from the greater service option availability and pricing discipline that such a marketplace is intended to exert.”<sup>126</sup>

To protect its turf, Stericycle advances a torturous argument that “service” to the satisfaction of the commission **only** permits the Commission to be dissatisfied with “the characteristics of [Stericycle’s] existing service” not with the market inadequacies of Stericycle’s service.<sup>127</sup> Yet, as Stericycle acknowledged in its brief to Judge Price, Chapter 81.77 RCW **does not** define what “service” means.<sup>128</sup> Hence, the Statute **does not** confine in any way the discretion the Legislature delegated to the Commission. The Statute does not suggest, let alone say, that a presumption of any sort exists in favor of monopoly service. Thus, the Commission correctly held below that “[a] plain reading of the language [] indicates that *any* lack of Commission satisfaction with how

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<sup>124</sup> *Adams Transport, Inc. v. Wash. Pub. Serv. Comm’n*, 54 Wn.2d 382, 385, 340 P.2d 784 (1959).

<sup>125</sup> *Id.*

<sup>126</sup> Final Order ¶ 15.

<sup>127</sup> Stericycle’s Opening Brief at 23.

<sup>128</sup> Dkt. 27, Stericycle’s Opening Brief at 9:10.

the incumbent company provides service – not just with ‘flawed’ or ‘deficient’ service – would justify authorizing an additional provider.”<sup>129</sup>

Moreover, to the degree that the unbridled “service to the satisfaction of the commission” standard is, in any manner, ambiguous<sup>130</sup> and **could be** interpreted to permit the Commission only “to evaluate the characteristics of the labor, equipment and other ‘organization’ and ‘apparatus’ used by existing companies,”<sup>131</sup> the APA requires that the Commission’s interpretation of the statute it is charged with administering and enforcing be “accorded great weight in determining legislative intent.”<sup>132</sup> That deference too requires affirmance of the Commission’s exercise of discretion.

Stericycle further argues that the Commission’s interpretation of “service to the satisfaction of the commission” must be rejected because it conflicts with or duplicates RCW 81.77.040’s requirement that the Commission consider the “sentiment in the community contemplated to be served as to the necessity for such a service.”<sup>133</sup> There is neither conflict nor redundancy. The fifth statutory factor requires the Commission to consider the “sentiment in the community,” not to rubber stamp community opinion. In the sixth statutory factor, the Commission

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<sup>129</sup> Final Order ¶ 7.

<sup>130</sup> “The fact that two or more interpretations are conceivable does not render a statute ambiguous.” *Dep’t of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 962, 275 P.3d 367, review denied, 175 Wn.2d 1015, 287 P.3d 10 (2012).

<sup>131</sup> Stericycle’s Opening Brief at 21-22.

<sup>132</sup> *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994).

<sup>133</sup> RCW 81.77.040 (quoted in Stericycle’s Opening Brief at 18).

determines based on its expertise whether incumbent service is satisfactory **to the Commission**. The Commission did not abdicate its decision-making to the waste generators; rather, the Commission heard all of the testimony and concluded independently that the existing service was not satisfactory “to the Commission.” Hence, Judge Price rejected Stericycle’s conflict/duplication argument and held that while there was some inherent overlap between consideration of public sentiment and the determination of satisfaction of the commission, they were “not identical.”<sup>134</sup>

Likewise, in *Superior Refuse*, the universal garbage case on which Stericycle heavily relies, Division Three affirmed the Commission’s determination that the incumbent service was satisfactory despite the fact that there was substantial sentiment in the community in favor of a new service provider due to the incumbent’s poor service quality and myriad tariff violations.<sup>135</sup> While there was substantial sentiment in the community that a new service provider was necessary, the Commission exercised its independent judgment and concluded that the incumbent service was nonetheless satisfactory.<sup>136</sup> Here, the Commission considered the sentiment in the community – along with each of the other statutory factors – and exercised its judgment in finding Stericycle’s incumbent service **not** satisfactory.

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<sup>134</sup> RP at 61:4-11.

<sup>135</sup> 81 Wn. App. at 49.

<sup>136</sup> *Id.*

None of the early 20<sup>th</sup> Century cases upon which Stericycle's labyrinthine argument hinges justify disturbing the Commission's exercise of its discretion. The 1921 statute upon which Stericycle heavily relies is today codified as RCW 81.68.040 and maintains the same "satisfaction of the commission" language found in the original.<sup>137</sup> According to Stericycle, in 1961 when the Legislature enacted Chapter 81.77 RCW, it "imported the 'satisfactory service' requirement from the 1921" statute "as understood and interpreted by the Supreme Court."<sup>138</sup> If that is the case, then *Horluck Transportation Company v. Eckright*,<sup>139</sup> decided by the Supreme Court **just one year prior** to the enactment of RCW 81.77.040, yields further support for the Commission's decision here.

In *Horluck Transportation*, a certificate holder sought to prevent competing service by a non-certificated business under the 1921 act. The Court explained that the franchises were not exclusive and emphasized that while "any **unlawful** interference" with the certificate "is actionable,"

[i]t is true the franchise **is not exclusive in the sense that the sovereign power may not grant a similar right to another**, but it is exclusive against any one who assumes to exercise the privilege of carrying passengers **in the absence of authority** or in defiance of the laws regulating the privilege.<sup>140</sup>

Noting that the 1921 act "(perhaps intentionally), offers few criteria to determine whether or not a certificate of public convenience and necessity

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<sup>137</sup> See Laws of 1921, ch. 111, § 4 & RCW 81.68.040.

<sup>138</sup> Stericycle's Opening Brief at 25, 31.

<sup>139</sup> 56 Wn.2d 218, 352 P.2d 205 (1960).

<sup>140</sup> *Id.* at 223 (emphasis added; quotation marks & citation omitted).

shall be issued,”<sup>141</sup> the Court ordered that the non-certificated defendant “should be given the opportunity to make such an application [for a certificate], and that their operation should not be enjoined pending the action of the public service commission on their application.”<sup>142</sup>

Consequently, while Stericycle is wrong that the Supreme Court viewed the 1921 act as having a “strict” satisfactory service “requirement”<sup>143</sup> at the time the Legislature enacted RCW 81.77.040, the Supreme Court’s interpretation of the 1921 statute further supports the Commission’s conclusion that the statute does not state a mandate in favor of monopoly service.

The modern case law under the 1921 act also provides strong support for the Commission’s holding. As previously discussed, this Court in 1998 upheld the Commission’s authority to determine whether it is satisfied “in any rational way that the evidence will support” given the absence of any statutory direction by the Legislature in the 1921 act.<sup>144</sup>

Moreover, deference to an agency’s interpretation of the statute it is charged with enforcing is particularly appropriate when the Legislature has amended the statute without repudiating the administrative construction. The Legislature’s silence in the light of the Commission’s long-standing preference for competition in the medical waste industry is determinative. In 1990, 1992, 1993, 1994, 1995, 1997, and 1998, the

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<sup>141</sup> *Id.* at 225.

<sup>142</sup> *Id.* at 226.

<sup>143</sup> Stericycle’s Opening Brief at 30.

<sup>144</sup> *Pac. NW Transp. Servs.*, 91 Wn. App. at 596.

Commission ruled that the exclusive service model of garbage collection is not appropriate for medical waste and that competitive medical waste service is beneficial.<sup>145</sup> During this period, the Legislature amended RCW 81.77.040 three times and did not restrict the Commission's discretion to determine its satisfaction with incumbent service.<sup>146</sup> Moreover, the Legislature has remained tellingly silent since the Commission reiterated in 2011 that "Commission policy has historically encouraged competition in the provision of biomedical waste services."<sup>147</sup>

In sum, nothing in RCW 81.77.040, other statutes, the Supreme Court's cases, or the Commission's prior decisions supports Stericycle's contention that the statute **prohibits** the Commission from concluding that incumbent medical waste service is not satisfactory due to the generators' need for a statewide competitive alternative.<sup>148</sup>

### **C. Substantial Evidence Supports the Final Order.**

The Commission held that the testimony of the waste generators of their "need for a competitive alternative to the biomedical waste collection services they" received from Stericycle and the "unrebutted evidence that since resuming biomedical waste collection service within its current solid waste collection footprint, [Waste Management] has introduced new

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<sup>145</sup> See *supra* § II.A.

<sup>146</sup> See amendments of 2005, 2007, and 2010.

<sup>147</sup> July 13, 2011 Order at 15-16.

<sup>148</sup> Stericycle's position here also is untenable given the prior position it took before the Commission. Having asserted that Waste Management "should be required" to apply for statewide authority and that drastic service cut-backs and rate increases would occur if Waste Management were permitted to only offer medical waste service in the G-237 territory, Stericycle should be judicially estopped from arguing to the contrary now. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008).

product options at lower prices, and Stericycle has responded by offering those same products and matching Waste Management's prices" demonstrated "both an unmet consumer need for a competitive alternative" and "that Waste Management has enhanced, and likely will continue to enhance, the effectiveness of competition" in the medical waste collection market.<sup>149</sup> The Commission held that, as has long been the case, the satisfactory nature of service by medical waste service providers "is measured according to the specialized needs of customers."<sup>150</sup> Customer needs may be technical or "arise out of generators' general business operations."<sup>151</sup> The Commission explained that it "give[s] substantial weight to [generator] testimony because generators are in the best position to evaluate the needs of their business, and we find no basis to depart from such deference simply because the need is for an alternative source of supply, rather than technical requirements."<sup>152</sup> However, the Commission noted that it would "not authorize additional competitors solely for the sake of competition."<sup>153</sup> Rather, "the applicant must provide substantial evidence to prove that its entry into the market will likely result in consumer benefits from more effective competition than currently exists."<sup>154</sup> "Waste Management provided such evidence, which neither Stericycle nor WRRRA contests."<sup>155</sup>

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<sup>149</sup> Final Order ¶ 16.

<sup>150</sup> *Id.* ¶ 17 (quotation marks & citation omitted).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* ¶ 18.

<sup>153</sup> *Id.* ¶ 21.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* ¶ 22.

So, the Commission's decision was not based solely on a "desire for competition" expressed by the generators, but on the tangible – un rebutted – benefits proven by Waste Management's services in its existing territories. While a new entrant into the market might not produce evidence of the effect of competition, Waste Management's application was for an expansion that was supported by evidence of how competition already had benefited the waste generators, not mere preference or desire. Stericycle's criticism of the Commission's order ignores this salient distinction which grounds speculative desire for competition in tangible evidence of improved services.

The potpourri of arguments Stericycle advances to challenge the Commission's conclusions of fact fails to come close to establishing the "clear showing of abuse" of discretion necessary to overcome the "high[] deference" due to the Commission's evaluation of the evidence.<sup>156</sup>

**1. The Commission Amply Explained the Rational Basis for its Ruling.**

Stericycle complains that the Commission's decision represents a "change to established precedent" which was "not honestly acknowledged" by the Commission and was "not based on facts and sound reasoning."<sup>157</sup> Stericycle cites to the APA which provides that a court

shall grant relief from an agency order in an adjudicative proceeding only if it determines that ... [t]he order is inconsistent with a rule of the agency

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<sup>156</sup> *ARCO Prods.* 125 Wn.2d at 812.

<sup>157</sup> Stericycle's Opening Brief at 32. Stericycle goes so far as to charge the Commission with writing a decision "drawn solely from the Commission's imagination." *Id.* at 37.

unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency.<sup>158</sup>

While “stare decisis plays only a limited role in the administrative agency context,”<sup>159</sup> the Commission amply described the rational basis for the evolution in its approach to medical waste regulation over the twenty years since it began regulating the industry and Stericycle’s argument fails.

The Final Order of the Commission specifically addressed Stericycle’s contention that the ALJ’s Initial Order “is contrary to the language and long-standing Commission interpretation of RCW 81.77.040 governing the circumstances in which the Commission may grant overlapping solid waste collection authority.”<sup>160</sup> First, the Commission explained that the statute itself does not express a presumption in favor of monopolies because the statute recognizes that there may be incumbent “companies,”<sup>161</sup> and because the Legislature did not use the language from the ferry statute which specifically prohibits competition unless the incumbent service is inadequate.<sup>162</sup> Hence, the Commission has **not** “long held that RCW 81.77.040 reflects a *legislative* preference for a ‘monopoly service’ model”<sup>163</sup> in the medical waste market.

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<sup>158</sup> RCW 34.05.570(3)(h), *quoted in* Stericycle’s Opening Brief at 32 n.97.

<sup>159</sup> *Vergeyle v. Emp’t. Sec. Dep’t*, 28 Wn. App. 399, 404, 623 P.2d 736 (1981), *overruled on other grounds in* *Davis v. Emp’t. Sec. Dep’t*, 108 Wn.2d 272, 737 P.2d 1262 (1987).

<sup>160</sup> Final Order at 2 ¶ 5.

<sup>161</sup> RCW 81.77.040, *quoted in* the Final Order at 3 ¶ 7.

<sup>162</sup> RCW 81.84.020, *quoted in* the Final Order at 3-4 ¶ 8.

<sup>163</sup> Stericycle’s Opening Brief at 34.

Moreover, the Commission readily acknowledged its statement “in the early 1990’s ‘that mere desire for a backup carrier in the event of possible discontinuance of, or deterioration in, existing service, or mere preference for competition, does not demonstrate a need for an additional carrier.’”<sup>164</sup> The Commission fully recognized that twenty years after its initial decision in the medical waste industry, it was departing from that decision and explained why.<sup>165</sup> The Commission noted that its medical waste decisions since 1993 consistently have held that: medical waste service is different from universal garbage service; the needs of medical waste generators are distinct from those of neighborhood garbage generators; the single-carrier model does not apply to medical waste; and competition in the medical waste industry is in the public interest.<sup>166</sup> The Commission explained that today it “has greater experience and comfort with competition” in the medical waste and other utility markets.<sup>167</sup> Quoting its holding from a 1998 case, the Commission stated: “Biomedical waste collection ‘has evolved into a highly competitive industry as a result of the Commission interpreting RCW 81.77.040

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<sup>164</sup> Final Order at 6 ¶ 11 (quoting *In re Sureway Med. Servs, Inc.*, Order M.V.G. No. 1674 at 4-5 (Dec. 17, 1993)).

<sup>165</sup> *Id.* (“[A]dministrative agencies can change their positions subject to explaining the reasons for a departure from prior conclusions. [The ALJ’s Order] provides just such an explanation.”) (quotation marks & citation omitted). In an exercise of advocacy totally unrestrained by the record, Stericycle now turns its acerbic tongue on the Commission and contends that it was “nonsensical,” “not truthful[],” “obfuscate[ed],” and “dissemble[d].” Stericycle’s Opening Brief at 39-40, 44.

<sup>166</sup> Final Order at 5-6 ¶ 10, at 6 ¶ 12, at 7 ¶ 13; *see also supra* § II.A.

<sup>167</sup> Final Order at 7 ¶ 13.

consistently with the unique requirements and attributes of the service.”<sup>168</sup>

Based on the undisputed evidence presented at the hearing, the Commission held that

Stericycle currently competes with another certificated company to provide such service throughout the vast majority of the state – including with Waste Management for the last two years in territory that includes 80 percent of the generators in Washington – without any adverse impact on the companies’ economic viability or ability to provide service. To the contrary, Waste Management’s re-entry into the biomedical waste collection market in [Waste Management’s] existing solid waste collection service territory has resulted in demonstrated benefits to consumers without detriment to Stericycle’s revenues or customer count.<sup>169</sup>

Hence, the Commission rejected Stericycle’s contention that the statute and Commission precedent limited the Commission to approving an additional medical waste service provider only in “circumstances of inadequate service.”<sup>170</sup> Rather, the Commission

conclude[d] that an applicant can also demonstrate that the existing companies will not provide service to the satisfaction of the Commission by proving that (1) generators of biomedical waste have an unmet need for an effective competitive alternative to the incumbent service providers, and (2) the new entrant will enhance the effectiveness of competition in the marketplace.<sup>171</sup>

The Commission viewed

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<sup>168</sup> *Id.* (quoting *In re Petition of Staff for a Declaratory Ruling*, Docket TG-970532, Decl. Order at 11 (Aug. 14, 1998)).

<sup>169</sup> *Id.* (nn. omitted).

<sup>170</sup> *Id.* at 7 ¶ 14.

<sup>171</sup> *Id.*

this conclusion as less of a change to the Commission's determinations two decades ago than as an adaptation of regulation to the realities of the market. Existing biomedical waste collection companies will not provide service to the satisfaction of the Commission if the consumers of that specialized need, and an additional company can provide, an effective competitive alternative. We continue to adhere to the statement Stericycle quotes from the Commission's 2010 report to the legislature that "[t]he rate and service regulations applicable to [ferry, garbage collection, and bus] industries are intended to provide a surrogate for the pricing discipline that would be exerted by a competitive marketplace." But where competition can or does exist, as in the biomedical waste collection industry, regulation should ensure that consumers reap the benefits of multiple service providers by encouraging an effectively competitive marketplace. We will not use the statute to shield incumbent companies from the greater service option availability and pricing discipline that such a marketplace is intended to exert.<sup>172</sup>

Despite the Final Order's more-than-rational basis, Stericycle contends the Commission's decision was surreptitious and improper because Stericycle was somehow deprived of an opportunity to demonstrate why competition from Waste Management was a disservice to the medical waste generators asking for, and not then enjoying, competition between Stericycle and Waste Management.<sup>173</sup> Tellingly, Stericycle neglects to identify what phantom evidence or phantom arguments it was deprived of presenting to the Commission. Stericycle also fails to advise the Court that **all** of Waste Management's evidence

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<sup>172</sup> *Id.* at 7-8 ¶ 15 (nn. omitted).

<sup>173</sup> Stericycle's Opening Brief at 35-36.

was presented in **pre-filed** testimony<sup>174</sup> which Stericycle uncompromisingly sought to rebut. Moreover, Stericycle left no stones unturned in arguing its case to the Commission in: (1) a 52-page Post-Hearing Brief; (2) a 15-page post-hearing Response Brief; and (3) a 47-page Petition for Administrative Review.<sup>175</sup> Stericycle's challenge to Waste Management's application was one of the most aggressively litigated solid waste proceedings ever heard by the Commission.

Judge Price properly rejected Stericycle's argument. He noted that "the law does not lock agencies into one approach"<sup>176</sup> and held that the Commission sufficiently explained its decision.

I spent some time, of course, with the decisions below, and looking at them, by my count, the Commission devoted more than five pages to explaining its decision to depart from its past decisions or its arguable departure from its past decisions that competition alone was insufficient to justify an additional provider.

I don't know that I would necessarily make the same decision if I was in the position of the Commission. I don't know that I would or that I wouldn't, but it's not this Court's job, as it sees it, to revisit that issue, if it was an exercise of discretion that was permissible under the statute and consistent with this rationale. I find that it was.<sup>177</sup>

The Commission's explanation of its ruling provided substantially more than the requisite rational basis.

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<sup>174</sup> See *supra* § II.C.

<sup>175</sup> AR 1904; AR 2014; AR 2109.

<sup>176</sup> RP at 62:3-4.

<sup>177</sup> RP at 62:14-63:2.

**2. The Commission Properly Considered Generators' Need for a Statewide Competitive Alternative to Stericycle.**

Next, Stericycle complains that the generators testified to only a “generic” need for a competitive alternative which did not, necessarily, have to be Waste Management.<sup>178</sup> According to Stericycle, the Commission “invent[ed] a broad ‘need’ for competition.”<sup>179</sup> The Commission dismissed this argument, explaining that

[g]enerator testimony establishes the need for service, not necessarily the company that they believe will satisfy that need. Even were that not the case, the fact that these witnesses testified on behalf of Waste Management is a strong indication of their belief that the Company’s expansion of services will meet their stated needs. Indeed, at least two of the witnesses testified that their organizations would switch their services to Waste Management ....<sup>180</sup>

And, every one of the medical waste generators who testified at the hearing testified to a desire for a competitive alternative to Stericycle’s monopoly, while some also testified to their need for a statewide competitive alternative.<sup>181</sup>

**3. Waste Management’s Unrebutted Evidence Established It Could Provide a Competitive Alternative to Stericycle.**

Stericycle further complains that the Commission wrongly assumed that competition would benefit generators.<sup>182</sup> The Commission held that once the need for competition was established – based on the

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<sup>178</sup> Stericycle’s Opening Brief at 46.

<sup>179</sup> *Id.*

<sup>180</sup> Final Order at 10 n.38.

<sup>181</sup> *See supra* § II.C.

<sup>182</sup> Stericycle’s Opening Brief at 47.

generators' testimony – the applicant “must provide substantial evidence to prove that its entry into the market will likely result in consumer benefits from more effective competition than currently exists.”<sup>183</sup> Waste Management provided detailed, un rebutted testimony to the Commission demonstrating that Stericycle – which had not for twenty years ever lowered its prices and had steadfastly refused to add generator requested service options – immediately lowered its prices and expanded its service options to meet those of Waste Management once Waste Management began competing with Stericycle in 80% of the State.<sup>184</sup> This fact did not go unnoticed by the waste generators who testified that Waste Management's prices were lower than Stericycle's.<sup>185</sup>

Nothing prohibited the Commission from relying on this evidence from Waste Management which the Commission specifically noted “neither Stericycle nor WRRRA contests.”<sup>186</sup>

#### **4. The Final Order Did Not Improperly Consider Waste Management's Prices.**

Finally, Stericycle argues that the Commission should not have considered Waste Management's lower prices.<sup>187</sup> The Commission correctly rejected this argument, explaining:

We do not base our decision on any prices that Waste Management proposes to charge for biomedical waste collection service. Rather, the undisputed evidence that Stericycle lowered its prices in

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<sup>183</sup> Final Order at 10 ¶ 21.

<sup>184</sup> See *supra* § II.C.

<sup>185</sup> *Id.*

<sup>186</sup> Final Order at 10 ¶ 22.

<sup>187</sup> Stericycle's Opening Brief at 46 n.146.

response to competition demonstrates that Waste Management's activities in the biomedical waste market have exerted pricing discipline, one of the benefits of effective competition the generators seek. This evidence, along with evidence that Stericycle began to offer additional service options to match Waste Management's products, demonstrates that [Waste Management] is able and willing to provide an effective alternative to the existing service providers and thus to meet generators' needs for such an alternative.<sup>188</sup>

Stericycle has failed to make a clear showing of abuse by the Commission of the broad authority and discretion which the Legislature delegated **to the Commission**.

#### IV. CONCLUSION

Stericycle is wrong in two main respects. Stericycle asks this Court to substitute its judgment for that of the Commission's. But RCW 81.77.040 dictates that the Commission must make this decision. And contrary to Stericycle's view, this statute was not intended to protect Stericycle's own interests, but to serve the public. In extending Waste Management's authority statewide, the Commission correctly recognized the strong public interest in statewide competition in medical waste collection.

Having properly exercised the discretion delegated to the Commission by the Legislature and based on more than twenty years of experience regulating the medical waste industry and the unanimous testimony of the waste generators, the Commission's ruling should be affirmed.

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<sup>188</sup> Final Order ¶ 23 (nn. omitted; emphasis added).

DATED this 3<sup>rd</sup> day of September, 2014.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

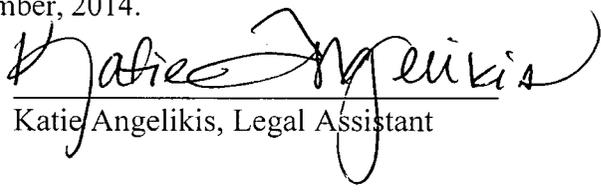
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 Katie Angelikis, Legal Assistant