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I. INTRODUCTION

This case is about the limits the Legislature has placed on the authority of the Washington Utilities and Transportation Commission (“Commission”) to regulate entry into the business of solid waste collection – and the Commission’s disregard for those limits. By claiming unlimited discretion to authorize new solid waste collection companies to serve areas of the state already served by existing companies, the Commission exceeded its statutory authority under RCW 81.77.040. The Commission’s Final Order must be reversed.

In its Final Order and Response, the Commission asserts that the Legislature gave it unlimited 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.”¹ The Commission and Waste Management ask the Court to agree that RCW 81.77.040’s “satisfactory service” requirement places no limits on the Commission’s authority to grant overlapping solid waste collection authority if the Commission believes additional competition is in the public interest.²

¹ Final Order, ¶8 (AR: 2261); *see also* Commission Response, p.1 (“This appeal concerns the Washington Utilities and Transportation Commission’s . . . exercise of its discretion to determine the appropriate number of biomedical waste carriers who should be authorized to operate within a particular service territory.”).

² It is uncontested that was the sole basis for the Commission’s Final Order. Commission Response, p.21 (admitting that the Commission “looked beyond the adequacy and

The Legislature never intended the Commission to have this power. The structure, language, purpose, and history of the solid waste statute are uncontested – the Legislature intended to serve the public’s interest in universal, quality services by limiting competition. The Legislature, therefore, required the Commission to find that the “service” provided by existing carriers is unsatisfactory before granting overlapping authority. Outside of this litigation, this has also been the Commission’s consistent position. This limitation has no meaning, however, if the Commission can disregard it any time the Commission concludes that competition from an additional carrier would be beneficial.

The Commission’s reasons for reversing its well established precedent recognizing the limits of its authority and granting Waste Management’s application are not supported by substantial evidence or reasoned analysis, and neither the Commission’s nor Waste Management’s Response rehabilitates these deficiencies. Rather, the Respondents simply reassert the same vague and flimsy claims and summarize testimony that played no role in the Commission’s decisions.

Stericycle is before this Court defending the Legislature’s judgment of how best to serve the public interest while the Commission

deficiencies of existing biomedical waste carrier services to consider the sufficiency of the market those services constituted.” (emphasis added)); Final Order, ¶15 (AR: 2265) (claiming that “regulation should ensure that consumers reap the benefits of multiple service providers by encouraging an effectively competitive marketplace.”).

and Waste Management improperly seek to override the Legislature's judgment. The Court must side with the Legislature, and with Stericycle.

II. ARGUMENT

A. RCW 81.77.040 Unambiguously Prevents the Commission From Granting Overlapping Solid Waste Collection Authority Absent a Finding that Existing Carriers' Services Are Deficient.

The scope of the authority conferred by the Legislature on the Commission in RCW 81.77.040 is the central question in this appeal. The Commission agrees that interpretation of RCW 81.77.040 is reviewed by this Court *de novo*.³

Washington law requires consideration of many sources to determine the plain meaning of a statute and the Legislature's intent, including the structure of the statute, the ordinary meaning of statutory terms, the statute's stated purpose, and the historical development of the statutory scheme.⁴ The Commission and Waste Management do not contest that the legislative intent behind RCW 81.77.040 is informed by all of these indicia of the statute's meaning, yet they do not address the factors that inform the proper construction of RCW 81.77.040, relying instead on inapt analogies to cases addressing other statutes.

1. The Commission's authority and discretion are limited by the structure of RCW 81.77.040.

³ Commission Response, p.14; *Waste Mgmt. of Seattle, Inc. v. Utils. and Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994) ("Construction of a statute is a question of law which we review *de novo* under the error of law standard.").

⁴ See Stericycle Opening Brief, pp.14-16.

Stericycle has shown that the structure of RCW 81.77.040 requires the Commission to satisfy two distinct requirements before granting solid waste collection authority.⁵ Under the “public convenience and necessity” (“PCN”) standard, the Commission considers all factors bearing on the harm or benefit of a proposed service, including generators’ views about whether a competing service is needed, and decides if a grant of authority is in the public’s interest. The “satisfactory service” provision is a second requirement that limits the Commission’s broad discretion under the PCN standard when an applicant seeks overlapping authority. The Commission may issue overlapping authority after an evidentiary hearing “only if the existing solid waste collection company or companies serving the territory will not provide service . . . to the satisfaction of the commission”⁶

The Commission never addresses the structure of RCW 81.77.040. Waste Management inexplicably claims that the “satisfactory service” requirement is merely one of “six factors” to be “consider[ed]” under the PCN standard, notwithstanding that the statute plainly lists only five non-exclusive PCN factors and then separately describes the “satisfactory service” requirement, which an applicant for overlapping authority must satisfy after an evidentiary hearing.⁷ The “satisfactory service”

⁵ See *id.*, pp.18-20.

⁶ RCW 81.77.040.

⁷ WM Response, p.21; see RCW 81.77.040.

requirement cannot be a broad or “unbridled” grant of discretionary authority to authorize any number of companies the Commission deems “consistent with the public interest.”⁸ Broad discretion to authorize service the Commission believes is in the public interest is already the express function of the PCN standard. To read the same or greater discretion into the limiting “satisfactory service” requirement is to render that requirement surplusage – improperly reading it out of the statute.⁹

2. Respondents ignore the Legislature’s choice to serve the public interest by limiting competition.

Stericycle has explained the historical development of the solid waste statute and its predecessors.¹⁰ The Legislature incorporated entry restrictions into the 1961 solid waste statute to curtail the open competition that had prevailed when the solid waste industry was regulated under the 1935 motor carrier act. These entry restrictions, including the “satisfactory service” requirement, were understood to favor single-carrier service unless that service was deficient.¹¹

Neither Respondent discusses this history or contests that it shows

⁸ See Final Order 10, ¶8 (AR: 2261); Commission Response, p.24 (arguing, erroneously, that “[i]t would be hard to imagine a broader conferral of discretion . . .”); WM Response, p.30.

⁹ See, e.g., *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 220, 11 P.3d 762 (2000) (“All language in a piece of legislation should be given effect, so that no provision is rendered superfluous.”); *Sacred Heart Med. Ctr. v. Dept. of Revenue*, 88 Wn.App. 632, 639, 946 P.2d 409 (1997) (“a statute must be interpreted so as to give all of its language meaning.”).

¹⁰ See Stericycle Opening Brief, pp.25-31.

¹¹ See *id.*, pp.25-29.

that the Legislature intended to limit competition by constraining the Commission's discretion to authorize overlapping solid waste collection services. The Commission merely asserts that cases interpreting the 1921 auto transportation act's "satisfactory service" requirement are "distinguishable from the case that is before this Court."¹²

The Commission's criticisms are incorrect. The Commission contends that in *North Coast Transportation Company v. Department of Public Works* the Supreme Court did not treat the application as one to provide competing service and, therefore, did not address the "satisfactory service" requirement.¹³ Even a cursory review of *North Coast Transportation* shows that the Commission is in error. The Court held that the application to provide service on a new highway would be treated as one to provide service in territory already being served because the new road was adjacent to an old highway served by an existing company.¹⁴

Contrary to the Commission's claim that it has unlimited discretion to determine the "appropriate" number of certificated carriers, the Court held that the Commission's predecessor did not have "unlimited power to grant certificates" because "its powers in this respect are governed by

¹² Commission Response, p.28.

¹³ *Id.*, p.29.

¹⁴ *N. Coast Transp. Co. v. Dep't of Pub. Works*, 157 Wash. 79, 82-83, 288 P. 245 (1930) ("Not only is the territory over the entire route served by the respondent certificate holder, but it is served for a part of its distance by a number of other certificate holders . . . [The applicant's] purpose is to serve the traffic arising at the terminals of the route, and this is territory already served.").

statute.”¹⁵ The Court correctly interpreted the “satisfactory service” requirement as a restriction on the Commission’s authority that requires an examination of the services provided by the existing carrier.¹⁶

The Commission contends that the Supreme Court decided *Yelton & McLaughlin v. Department of Public Works* under the “grandfather” provision of the auto transportation act and not the “satisfactory service” requirement.¹⁷ As Stericycle explained, however, the Court considered the act’s grandfather clause and the “satisfactory service” requirement.¹⁸ Under the grandfather clause, the existing carrier was entitled to a certificate because it had been in operation before 1921.¹⁹ However, the Court also held that it was the existing carrier’s “statutory right” to hold the certificate “to the exclusion of anyone else” when the evidence did not demonstrate that its services were deficient.²⁰

The Commission contends that *Krakenberger v. Department of Public Works* is not relevant because the Supreme Court ruled “only” that the evidence showed that existing services were satisfactory.²¹ On the

¹⁵ *Id.* at 81.

¹⁶ *Id.* at 81-82 (evaluating the existing carrier’s facilities, service frequency and convenience, and the lack of formal complaints); Stericycle Opening Brief, pp.27-28.

¹⁷ Commission Response, p.30.

¹⁸ Stericycle Opening Brief, p.28, n.84; *see also Yelton & McLaughlin v. Dep’t of Pub. Works*, 136 Wash. 445, 450-51, 240 P. 679 (1925) (quoting and relying on the “satisfactory service” requirement and the grandfather clause).

¹⁹ *Yelton & McLaughlin*, 136 Wash. at 450-51.

²⁰ *Id.* at 447, 451-52 (noting that “[n]o complaint has ever been made of the service rendered by appellants.”).

²¹ Commission Response, p.30.

contrary, that decision makes *Krakenberger* a direct parallel to this case. In *Krakenberger* the Court held that although some customers inquired about an unavailable service feature (direct transportation between two cities), there was no evidence that the existing carriers' non-direct service was inadequate.²² Similarly, it is undisputed that although some witnesses made complaints about Stericycle's rates or service, the Commission found that those complaints did not demonstrate unsatisfactory service.²³ *Krakenberger* confirms that the "satisfactory service" requirement bars overlapping authority where there is no evidence that existing carriers do not adequately meet the public's biomedical waste service needs.

Waste Management also relies on a misinterpretation of *Horluck Transportation Company v. Eckright*.²⁴ This 1960 auto transportation case supports Stericycle's position. *Horluck* was not an application case and did not interpret the "satisfactory service" requirement. The case instead addressed whether a certificate holder could exclude a company operating without a certificate. The Court found that a certificate "is exclusive against any one who assumes to exercise the privilege of carrying passengers in the absence of authority"²⁵ While the Commission allowed the uncertificated company an opportunity to apply for a

²² *Krakenberger v. Dep't of Pub. Works*, 141 Wash. 168, 170, 250 P. 1088 (1926).

²³ Initial Order 07, ¶9 (AR: 2072); Final Order 10, ¶5 (AR: 2258) (adopting Initial Order).

²⁴ WM Response, pp.32-33.

²⁵ *Horluck Transp. Co. v. Eckright*, 56 Wn.2d 218, 222-23, 352 P.2d 205 (1960).

certificate, the Court identified the “satisfactory service” provision as a requirement that must be met before additional authority could be issued.²⁶

3. Respondents ignore the ordinary meaning of the term “service” in RCW 81.77.040 and the Commission’s obligation to evaluate the quality and adequacy of existing companies’ services.

Stericycle has demonstrated that the ordinary meaning of the term “service” is “the performance of work commanded or paid for by another” and, specifically, the “provision, organization, or apparatus for conducting a public utility or meeting a general demand.”²⁷ The Legislature intended the “satisfactory service” requirement to address whether the services provided by existing carriers or their operations are deficient.²⁸

Neither the Commission nor Waste Management addresses the ordinary meaning of the term “service.” Waste Management assumes an ambiguity without first construing the statute and the Commission, rather blithely, simply asserts that the statute “does not specify . . . what the Commission should consider.”²⁹ Stericycle has shown that this is not true, and since neither Respondent supports its claim with a statutory construction, it is uncontested that the “satisfactory service” requirement

²⁶ *Id.* at 225-26.

²⁷ See Stericycle Opening Brief, pp.20-22 (*citing* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002)).

²⁸ See *id.*, pp.20-24; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992) (relying on definitions in Webster’s Third New International Dictionary because “[a]bsent a statutory definition, the term is generally accorded its plain and ordinary meaning unless a contrary legislative intent appears.”).

²⁹ WM Response, pp.29-30; Commission Response, p.3.

requires an evaluation of the actual operations of existing carriers, not the competitive characteristics of the service market.³⁰

Respondents' common refrain that the Commission has discretion to determine if service is "satisfactory" is beside the point here, where the Commission admits that its decision is based only on its view of the competitive characteristics of the "market," not the quality or adequacy of services actually provided by the existing companies.³¹

4. Respondents assiduously attempt to avoid the Legislature's intent to serve the public by limiting competition and the Commission's discretion.

Stericycle has shown that the stated purpose of chapter 81.77 RCW is "to protect public health and safety and to ensure solid waste collection services are provided to all areas of the state."³² The Commission cites an edited version of this statement of purpose, selectively omitting that the Legislature intended to "ensure solid waste collection services are provided to all areas of the state."³³ This omission is highly disingenuous because the Legislature's decision to limit overlapping service absent

³⁰ *Cowiche Canyon Conservancy*, 118 Wn.2d at 813 (rejecting an agency interpretation that "fails to analyze the words of the statute" as mere "assertions and characterizations which lack reasoning or analysis.>").

³¹ Commission Response, pp.3, 21 (admitting that the Commission "looked beyond the adequacy and deficiencies of existing biomedical waste carrier services to consider the sufficiency of the market those services constituted."). In fact, the Commission held that evidence of alleged deficiencies was not sufficient to demonstrate unsatisfactory service. Initial Order 07, ¶9 (AR: 2072); Final Order 10, ¶5 (AR: 2258) (adopting Initial Order).

³² Stericycle Opening Brief, p.23; RCW 81.77.100.

³³ Commission Response, p.27 (these words were simply replaced with an ellipsis without comment).

evidence of a service deficiency is directly related to its intent to ensure that quality services are broadly available throughout the state.

As Stericycle has shown, the Legislature understood that adequate, sustainable service requires investment by private carriers and a return on that investment.³⁴ Limiting entry and restricting overlapping service under the “satisfactory service” requirement were intended to protect existing companies’ investments in solid waste collection services.³⁵ As the Commission has acknowledged in every arena outside of this litigation, “the legislature has made a judgment that the public’s interest in reliable and affordable service is best served by a single, economically regulated provider whose owners can make the sizable investments needed to initiate and maintain service without the threat of having customers drawn away by a competing provider.”³⁶ It is, therefore, fundamentally wrong for

³⁴ *Davis & Banker, Inc. v. Nickell*, 126 Wash. 421, 423, 218 P. 198 (1923) (stating with respect to the parallel auto transportation act that “[n]o adequate service can be given without proper equipment” and that “[a]n income must be earned, which will cover operating costs and depreciation, and give some return on the investment or the service cannot be long continued.”); *see also Horluck Transp.*, 56 Wn.2d at 222 (same); Stericycle Opening Brief, pp.24-26, n.76.

³⁵ *Davis & Banker*, 126 Wash. at 423 (“The certificate, therefore, not only confers authority to operate the stage line, but it necessarily also affords him protection against any one who unlawfully interferes with the right thereby conferred. If such is not the legal effect of the certificate, then the operation of utilities may easily become detrimental rather than beneficial to the public and thus result in a farce.” (citation omitted)).

³⁶ Utilities and Transportation Commission, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan: Report to the Legislature Pursuant to ESB 5894* (hereinafter “2010 Report to the Legislature”), pp. 11-12 (Jan. 14, 2010) (discussing legislative intent in regulating commercial ferries, solid waste collection, and auto transportation). Available at <http://www.utc.wa.gov/regulatedIndustries/transportation/commercialFerries/Pages/defa>

the Commission to interpret the “satisfactory service” requirement of RCW 81.77.040, a provision intended to restrict competition, as a grant to the Commission of broad discretion to authorize overlapping service for the purpose of creating a more competitive market.³⁷

Respondents present a false dichotomy and are incorrect when they argue that the purpose of the statute “is not to protect individual companies, but rather to protect the public the companies serve.”³⁸ The purpose of the statute is to protect public health and safety and ensure that quality services are broadly available, and it is also to protect existing providers from competition absent deficient service because the Legislature determined that this was the best way to serve the public interest.³⁹ The Court must uphold the Legislature’s judgment.

ult.aspx. See also *In re Petition of Comm'n Staff for a Declaratory Ruling*, Docket No. TG-970532, Declaratory Order, p. 10, n.1 (Aug. 14, 1998) (recognizing that chapter 81.77 RCW “expresses a preference for monopoly service in the collection of solid waste”); *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1674, p.4-5, App. No. GA-75968 (Dec. 20, 1993) (stating the Commission’s “consistent view that . . . mere preference for competition does not demonstrate a need for an additional carrier.”); *In re Sureway Med. Serv., Inc.*, Order M.V.G. No. 1663, p.8, App. No. GA-75968 (Nov. 19, 1993) (finding that 81.77 RCW “follows the pattern of utility regulation, in that it treats solid waste collection as a natural monopoly with efficiencies and public benefit gained through exclusive service in a territory.”); *In re Med. Res. Recycling Sys.*, Order M.V.G. No. 1633, p.2, App. No. GA-76819 (May 28, 1993) (“The legislature has determined that a monopoly-based system for solid waste collection is consistent with the public interest.”); *In re R.S.T. Disposal Co.*, Order M.V.G. No. 1402, pp. 15-16, App. Nos. GA-845 and GA-851 (July 28, 1989) (finding that the Legislature “was reluctant to permit overlapping authorities in the collection and disposal of garbage and refuse.”).

³⁷ See *supra*, note 2.

³⁸ Commission Response, p.27; see also WM Response, p28.

³⁹ Waste Management is wrong to rely the purpose of the motor carrier act, which encouraged competition, but which the Legislature specifically rejected as the policy that

The Commission does not directly address any of its many prior acknowledgements that the Legislature intended the public's interest to be served through this single-carrier service model, inexplicably dismissing these published decisions and reports as merely an "assertion" by Stericycle.⁴⁰ Instead, the Commission and Waste Management assert that the Legislature "contemplated" that more than one company could serve the same territory because the "satisfactory service" requirement refers to the services of "the existing solid waste collection company or companies."⁴¹ Respondents contrast this language with the commercial ferry statute, which refers to the non-plural "existing certificate holder."⁴²

But this argument does not address the issue in this case. The issue is not whether the Legislature contemplated that more than one company might provide service in the same territory – it most assuredly did, for reasons discussed below. The question is whether the Legislature intended to prevent the Commission from authorizing additional competing services absent evidence that the existing companies' services are deficient.

The Legislature acknowledged that more than one company might operate in the same territory because when RCW 81.77.040 was enacted it contained a grandfather provision, granting certificates to all companies

should govern solid waste collection. WM Response, pp.28-29 (discussing *Adams Transport, Inc. v. Wash. Pub. Serv. Comm'n*, 54 Wn.2d 382, 385, 340 P.2d 784 (1959)).

⁴⁰ Commission Response, p.25.

⁴¹ *Id.*, p.26 (quoting Final Order, ¶7 (AR: 2260) (emphasis added)); WM Response, p.24.

⁴² Commission Response, p.26; WM Response, p.24; RCW 81.84.020.

that had been operating under the open competition model of the 1935 motor carrier act.⁴³ The Legislature was simply acknowledging the possibility that competition under the prior statutory scheme would carry forward. By contrast, commercial ferries have been regulated under the same limited competition model since 1927. In addition, the Legislature's use of the word "companies" is not in conflict with its intent to restrict competition. Rather, it accurately reflects that future overlapping service could be authorized, but only upon a showing that the existing companies' services are deficient under the "satisfactory service" requirement.

The Commission is disingenuous to argue that it has unlimited discretion to authorize new competition under the solid waste statute while the commercial ferry statute alone was intended to prevent competition. Outside of this litigation the Commission agrees that the commercial ferry statute and the solid waste statute operate on the same model. As the Commission reported to the Legislature in 2010, the "reasonable and adequate service" requirement applicable to commercial ferry services provides existing carriers "considerable protection from competition as long as they continue to provide satisfactory service . . ."⁴⁴ The Commission explained that the solid waste statute provides existing

⁴³ Laws of 1961, ch. 295, § 5. As discussed above, the 1921 auto transportation act from which the Legislature adopted the "satisfactory service" requirement also contained a grandfather provision that opened the possibility of more than one company operating in the same territory. *See supra*, p.7 (citing *Yelton & McLaughlin*, 136 Wash. at 450-51).

⁴⁴ 2010 Report to the Legislature, p.11 (emphasis added).

carriers the same protection based on a legislative policy judgment.

[T]he legislature has made a judgment that the public's interest in reliable and affordable service is best served by a single, economically regulated provider whose owners can make the sizable investments needed to initiate and maintain service without the threat of having customers drawn away by a competing provider. Other industries regulated under this model in Title 81 RCW are solid waste (garbage) collection companies under RCW 81.77⁴⁵

It is not for the Commission to disregard the Legislature's policy judgment of how best to serve the public interest.

Finally, Waste Management advances the novel argument that the Commission can substitute its policy judgment for the Legislature's intent in just the biomedical waste industry.⁴⁶ Specifically, Waste Management contends that the Commission has "promoted" competition in its past decisions on applications for overlapping biomedical waste authority.⁴⁷

Contrary to Waste Management's argument, RCW 81.77.040 applies equally to all solid waste collection and does not differentiate between neighborhood solid waste and biomedical waste.⁴⁸ Consistent with the statute, the Commission has never granted overlapping authority

⁴⁵ *Id.*

⁴⁶ See WM Response, pp.2-10, 25-26. Waste Management's argument is off-base because the Commission did not, in fact, limit its interpretation of the statute to biomedical waste collection. The Commission held, erroneously, that the statute gives it "discretion to determine the appropriate number of solid waste collection service providers who should be authorized . . ." Final Order, ¶8 (AR: 2260) (emphasis added).

⁴⁷ See WM Response, pp.9, 25.

⁴⁸ Indeed, RCW 81.77.040 provides that "[f]or purposes of issuing certificates under this chapter, the commission may adopt categories of solid wastes as follows: Garbage, refuse, recyclable materials, and demolition debris," but does not provide for any differentiation of biomedical waste.

for the purpose of creating a more competitive market. On a few occasions the Commission has authorized overlapping services to remedy a proven inadequacy in the services then being provided by existing companies.⁴⁹ Waste Management badly misrepresents these decisions. Although one result of these decisions was to create more competition, the Commission never considered a desire for competition alone to be a legitimate basis for authorizing overlapping service.⁵⁰ Subsequent Commission decisions readily acknowledge that “competition” is merely a result of ensuring adequate service, not a legitimate end in itself.⁵¹

⁴⁹ See *In re Ryder Distrib. Res., Inc. and Stericycle of Wash., Inc.*, Order M.V.G. No. 1761, p.12, App. Nos. GA-75154 and GA-77359 (Aug. 11, 1995) (identifying generators’ needs for custody by a single carrier, puncture-proof, reusable containers, education and training, and non-incinerative disposal); *Sureway Med. Serv.*, Order M.V.G. No. 1663, p.13 (holding that generators’ support “is not mere preference for competition.”); *In re Ryder Distrib. Res., Inc.*, Order M.V.G. No. 1596, p.11, App. Nos. GA-75154 (Jan. 25, 1993) (noting that unmet needs “may include the technology of disposal, the nature of protection afforded collected waste, and protections against statutory and civil liability.”); *In re Am. Env’tl. Mgmt. Corp.*, Order M.V.G. No. 1452, p.9, App. No. GA-874 (Nov. 30, 1990) (holding that “the [specialized biomedical waste] service proposed by the applicant was not available, in any way, shape, or form, from any of these protestants . . .”).

⁵⁰ *Sureway Med. Serv.*, Order M.V.G. No. 1674, p.4-5 (holding that “a mere preference for competition, does not demonstrate a need for an additional carrier.”).

⁵¹ *Petition of Comm’n Staff for a Declaratory Ruling*, Docket No. TG-970532, Declaratory Order, p.11 (noting that “[o]ne result of a grant of overlapping authority is competition among carriers, a situation which generally has not occurred in traditional segments of the industry. . . .”); *In re Petition of Comm’n Staff for a Declaratory Ruling*, Docket No. TG-970532, Declaratory Order (Initial Order), p.3 (Oct. 29, 1997) (noting that “[o]ne result of the granting of overlapping authority is competition . . .”). Waste Management is wrong to rely on a 2011 order in an earlier dispute between Stericycle and Waste Management that addressed the Commission’s authority under RCW 81.77.030, not the “satisfactory service” requirement of RCW 81.77.040. WM Response, pp.9-10 (discussing *Stericycle of Wash., Inc. v. Waste Mgmt. of Wash., Inc.*, Docket TG-110553, Final Order on Cross-Motions for Dismissal and Summary Determination, pp.14-16, ¶37 (July 13, 2011)). The Commission’s flippant statement that “Commission policy has historically encouraged competition in the provision of biomedical waste services” was a gross misrepresentation of its precedent and simply the opening salvo in the Commission’s effort to deregulate entry into biomedical waste collection.

B. The Commission’s Claim to Unlimited Discretion is Inconsistent with the Statute and the Legislature’s Intent and Deserves no Deference.

The Commission and Waste Management have failed to offer a complete or persuasive construction of RCW 81.77.040 and, as a result, simply ignore the Legislature’s intent as expressed in the statute.⁵² Yet Respondents demand deference to the Commission’s assertion that the “satisfactory service” requirement grants it unlimited discretion to authorize any number of solid waste collection companies it deems “consistent with the public interest.”⁵³ This approach must be rejected.

An administrative interpretation can be entitled to weight only if a statute is ambiguous, *i.e.* susceptible to more than one reasonable interpretation.⁵⁴ “Simply because the words of a statute are not defined in the statute does not make the statute ambiguous.”⁵⁵ “The fact that two or more interpretations are conceivable does not render a statute ambiguous.”⁵⁶ No deference can be given to an interpretation that conflicts

⁵² *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4, 9-10 (2002) (Holding that statutory meaning must be “discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.”).

⁵³ Final Order, ¶8 (AR: 2261).

⁵⁴ *Id.* at 12; *Waste Mgmt.*, 123 Wn.2d at 627-28 (“Absent ambiguity . . . there is no need for the agency’s expertise.”).

⁵⁵ *Cowiche Canyon Conservancy*, 118 Wn.2d at 814. Thus, Waste Management’s argument that the statute is ambiguous merely because it does not affirmatively define the term “service” is incorrect. See WM Response, pp.29-30.

⁵⁶ *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011).

with the statute.⁵⁷ Respondents have failed to articulate any alternative construction of RCW 81.77.040, let alone a construction that is reasonable in light of the statute’s structure, language, purpose, and history – all indicating the Legislature’s intent to limit the Commission’s discretion.

Regardless, the Commission’s position is not entitled to any deference because it is not a contemporaneous interpretation and is in direct conflict with the Commission’s contemporaneous and longstanding interpretation of the statute outside of this litigation. Courts give weight to contemporaneous interpretations of a statute, not recent interpretations or litigation positions.⁵⁸ “An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.”⁵⁹ “As a

⁵⁷ *San Juan Cnty. v. No New Gas Tax*, 160 Wn.2d 141, 160-61, 157 P.3d 831 (2007) (“We will not defer to [an agency’s] declaratory order that conflicts with a statute.”); *Senate Republican Campaign Comm. v. Pub. Disclosure Com’n*, 133 Wn.2d 229, 241, 943 P.2d 1358 (1997) (An “administrative determination will not be accorded deference if the agency’s interpretation conflicts with the relevant statute.”).

⁵⁸ *Griffin v. Eller*, 130 Wn.2d 58, 69, 922 P.2d 788 (1996) (rejecting as not “contemporaneous” and not entitled to deference an agency rule purporting to state the purpose of a statutory exemption adopted 33 years after the statute was enacted and nine years after it was amended); *Cowiche Canyon Conservancy*, 118 Wn.2d at 815 (rejecting “attempts to bootstrap a legal argument into the place of agency interpretation.”); *Newschwander v. Bd. of Trs. of Wash. State Teachers Ret. Sys.*, 94 Wn.2d 701, 710-11, 620 P.2d 88 (1980) (upholding agency’s consistent interpretation of a statute adopted immediately following its enactment, particularly because it “has been accompanied by silent acquiescence of the legislative body over a long period of time.”).

⁵⁹ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30, 107 S.Ct. 1207 (1987) (citation omitted) (declining to defer to an agency’s litigation position that conflicted with the agency’s prior adjudicative decisions); *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 602, 605 (9th Cir. 2008); see also *Senate Republican Campaign Comm.*, 133 Wn.2d at 240-41 (declining to give deference to an agency interpretation that was inconsistent with its prior statements to a regulated entity).

general rule, where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation or application of a statute is by amendment or revision of the statute, rather than a new agency interpretation.”⁶⁰

The Commission’s current claims that it has unlimited discretion to authorize any number of companies “consistent with the public interest” and that customers’ desire for competition can fulfill the “satisfactory service” requirement, come more than 50 years after the solid waste statute was enacted and decades after the Commission’s many decisions reaching opposite conclusions. As discussed in Stericycle’s Opening Brief and above, outside of this litigation the Commission has long recognized the Legislature’s intent to restrict competition by preventing overlapping authority absent deficient services.⁶¹ In its biomedical waste cases, the Commission held that a desire for competition is not a need that satisfies the “satisfactory service” requirement.⁶² The Commission’s conflicting interpretation, newly adopted in this case, is not entitled to any deference.

Finally, instead of construing the statute Respondents rely on flawed analogies to cases addressing other statutes in other industries.⁶³ In

⁶⁰ *Dot Foods, Inc. v. Wash. Dept. of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009).

⁶¹ See Stericycle Opening Brief, pp.6-8, nn.16-20.

⁶² See Stericycle Opening Brief, pp.7-8, nn.19-20; *Sureway Med. Serv.*, Order M.V.G. No. 1674, p.4-5 (stating that the Commission’s “consistent view that . . . mere preference for competition does not demonstrate a need for an additional carrier.”).

⁶³ Commission Response, pp.22-25; WM Response, pp.22-23.

Pacific Northwest Transportation Services v. Utilities and Transportation Commission the Court decided that the Commission could draw an inference about an incumbent carrier's future service from evidence of its past performance.⁶⁴ As Stericycle has shown, it is unremarkable that the Commission can decide how to evaluate evidence bearing on the quality of existing companies' services.⁶⁵ *Pacific Northwest Transportation* does not, however, grant the Commission discretion to authorize overlapping services based on any criteria it chooses, including the perceived advantages of a more competitive market. On the contrary, the Court held that the Commission must assess the incumbent carrier's "conduct" and "performance," based on "the service the incumbent was rendering."⁶⁶

Respondents also rely on *ARCO v. Utilities and Transportation Commission*, which addressed completely unrelated statutory language.⁶⁷ The statute in *ARCO* bears no similarity to RCW 81.77.040 and shares none of its history. Whereas RCW 81.77.040 has dual tests for authorizing solid waste collection service, and the "satisfactory service" requirement limits the Commission's discretion under the PCN standard, RCW

⁶⁴ *Pac. Nw. Transp. Servs., Inc. v. Utils. and Transp. Comm'n*, 91 Wn.App 589, 597, 959 P.2d 160 (1998).

⁶⁵ See Stericycle Opening Brief, p.23.

⁶⁶ *Pac. Nw. Transp. Servs.*, 91 Wn.App at 597 (emphasis added). This is consistent with *Superior Refuse Removal*, in which the only court to interpret RCW 81.77.040's "satisfactory service" requirement required consideration of the characteristics of the existing carriers' service. See Stericycle Opening Brief, pp.22-23.

⁶⁷ Commission Response, pp.24-25; *ARCO v. Utils. and Transp. Comm'n*, 125 Wn.2d 805, 811, 888 P.2d 728 (1995).

80.28.200, the statute in *ARCO*, is not similarly structured.⁶⁸ Whereas the history of the solid waste statute shows that the Legislature intended to curtail the Commission’s formerly broad discretion to authorize competition, the *ARCO* decision does not identify any legislative intent to limit the Commission’s authority. The *ARCO* court seemed to recognize these differences, distinguishing statutes in which the legislature “put an objective limitation on the Commission’s discretion” in a sentence the Commission omits from the paragraph it quotes.⁶⁹

RCW 81.77.040 prevents the Commission from reading the “satisfactory service” requirement as entirely redundant of the discretionary PCN standard. Of course, the Commission and Waste Management’s fundamental error is in relying on strained analogies to dissimilar cases rather than construing RCW 81.77.040 based on its structure, language, purpose, and history, as the Supreme Court requires.

C. Respondents’ Briefs Highlight the Commission’s Failure to Rely on Substantial Record Evidence or Sound Reasoning.

The Commission and Waste Management do not identify any evidentiary basis for the Final Order’s claim that the Commission formerly lacked “experience with the impacts of allowing more than one company to provide service” but now “has greater experience and comfort with

⁶⁸ Compare RCW 80.28.200 with RCW 81.77.040.

⁶⁹ Compare *ARCO*, 125 Wn.2d at 810 with Commission Response, p.24.

competition in certain utility markets,” or the Final Order’s claim that biomedical waste is now a “highly competitive industry.”⁷⁰ Stericycle has shown that these vague assertions are not supported by any evidence in the record and do not provide a rational basis for the Commission’s decision.⁷¹

The Commission belatedly attempts to bolster these claims with a bald recitation of the principle that an agency may use its “experience, technical competency, and specialized knowledge . . . in evaluation of the evidence.”⁷² But the Commission has not used, much less demonstrated the use of, any experience, technical competency, or expertise to evaluate evidence – again, the Final Order cites no record evidence in support of these claims and ignores evidence that biomedical waste collection is not “highly competitive.”⁷³ Nowhere does the Commission bother to explain the experience or expertise it is supposedly relying on. It is not sufficient to (allegedly) have expertise, the Commission must actually apply it, and cogently explain its application to the facts and issues in the case.⁷⁴

Respondents attempt to paper over the lack of substantial evidence for the Commission’s decision by improperly discussing generator

⁷⁰ See Commission Response, pp. 31-32; WM Response, pp.38-39; Final Order, ¶¶12-13 (AR: 2263-64).

⁷¹ Stericycle Opening Brief, pp. 41-45.

⁷² Commission Response, p.38 (*citing* RCW 34.05.461(5)).

⁷³ Stericycle Opening Brief, pp. 41-45, n.136.

⁷⁴ RCW 34.05.461(3) (requiring agencies to state the reasons and bases for their findings and conclusions); *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367 (1973) (“Whatever the ground for the departure from prior norms . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency’s action . . .”).

testimony that the Final Order did not rely on or that does not exist. The Commission's only salient finding of fact is that “[Waste Management] has demonstrated the consumer need for, and positive results from, its expansion into the statewide bio-hazardous collection services market.”⁷⁵

The Final Order cited the testimony of seven generators who stated a general preference for competition as the basis for the first part of this finding, but did not mention any of the extraneous generator testimony discussed by Respondents.⁷⁶

Worse, the so-called “positive results” from competition that the Final Order heavily relies on have no basis in any generator testimony, as is required under unchallenged Commission precedent.⁷⁷ Stericycle has shown that this finding is based solely on the self-serving testimony of a single Waste Management witness – who testified that Stericycle added one particular style of collection container at prices that matched Waste Management at certain volumes.⁷⁸ The Commission falsely implies that generator testimony demonstrates these “positive results.” The Commission identifies the testimony of “[m]ultiple biomedical waste generators” and then claims without citation that “[o]n this record” it

⁷⁵ Initial Order, ¶30 (AR: 2079); Final Order, ¶5 (AR: 2258) (adopting findings of fact).

⁷⁶ Final Order, ¶16, n.28 (AR: 2265); *see also* Stericycle Opening Brief, p.11, n.30-31.

⁷⁷ *Sureway Med. Serv.*, Order M.V.G. No. 1674, p.5, n.3 (“The Commission requires that need be shown through the testimony of persons who require the service.”).

⁷⁸ *See* Stericycle Opening Brief, pp.47-48; Final Order, ¶23 (AR: 2268); JN-1T, p.4 (AR: 2735).

found “positive results” from competition.⁷⁹ The Commission also alleges without citation that “some testified” that “the reentry of Waste Management . . . resulted in improved service by Stericycle” and separately that this “improvement” was “also reflected” in testimony by Waste Management’s witness.⁸⁰ These statements are misleading. In fact, no generators even mentioned the new container or lower prices that the Commission alleges are “positive results” and there is zero evidence from any witness that either was considered “positive” by any generator.

Particularly troubling is Respondents’ extensive attempt to rely on largely discredited generator testimony that was specifically rejected as a basis for finding Stericycle’s service unsatisfactory.⁸¹ The Final Order adopted the Initial Order’s finding that “the billing and customer service issues” raised by some generators “do not support Waste Management’s

⁷⁹ Commission Response, p.33 (emphasis added).

⁸⁰ *Id.*, p.37 (emphasis added).

⁸¹ Much of this testimony was deeply undermined on cross examination. *See* Stericycle Post-Hearing Brief, §§II(A)(4)-(5), II(B)(1)-(10) (AR: 1920-47). Commission Response, p.33; WM Response, pp.13-14 (*citing* testimony of Julie Sell, who expressed “dissatisfaction with Stericycle’s process for scheduling collections” and whose “primary concern” is customer service. JS-1T, p.3 (AR: 2307); Transcript, 218:20-23). This generator’s complaints were specifically rejected by the Commission. Initial Order, ¶7, n.7, ¶9 (AR: 2072). Commission Response, pp.34-35; WM Response, p.14 (*citing* testimony of Jean Longhenry, who stated she was dissatisfied with “on-going billing errors.”). Ms. Longhenry admitted that there was only a single billing error, that she had no personal knowledge of the error, and that it was resolved by Stericycle. Transcript, 317:13-318:17. Commission Response, p.36; WM Response, p.13 (*citing* testimony of Carla Patshkowski, who claimed to be “dissatisfied” with Stericycle. CP-1T, p.3. (AR: 2327) This generator’s complaints were specifically rejected by the Commission. Initial Order, ¶7, n.7, ¶9 (AR: 2072). Ms. Patshkowski acknowledged that she was not responsible for managing biomedical waste services at the clinics and has no knowledge of Stericycle’s communication with the responsible clinic managers. Transcript, 467:5-13, 472:19-473:13, 473:22-474:2, 475:1-3, 476:3-14.

contentions” and “do not reflect a pattern of poor service or systemic inadequacies that would support a finding that Stericycle will not provide service to the satisfaction of the Commission.”⁸² The Commission’s and Waste Management’s lawyers may not invent new justifications for the Commission’s decisions in briefs to this Court.⁸³

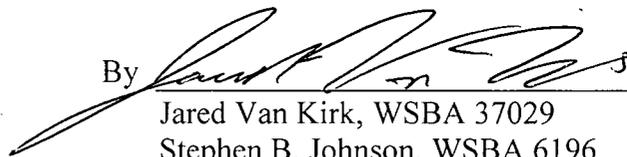
III. CONCLUSION

The Court should reverse the Final Order and remand to the Commission with instructions to deny Waste Management’s application.

DATED this 10th day of October, 2014.

GARVEY SCHUBERT BARER

By



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⁸² Initial Order 07, ¶9 (AR: 2072); Final Order 10, ¶5 (AR: 2258) (adopting Initial Order).

⁸³ *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856 (1983) (“the courts may not accept appellate counsel’s post hoc rationalizations for agency action. It is well-established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”).

CERTIFICATE OF SERVICE

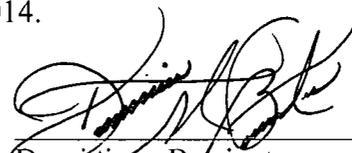
I, Dominique Barrientes, certify under penalty of perjury that, on October 10, 2014, I caused the APPELLANT'S REPLY BRIEF to be served on the persons identified below via email:

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FILED
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~~BY~~ DEPUTY

DATED this 10th day of October, 2014.



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