

November 23, 2015

VIA E-MAIL

Steven King
Executive Director and Secretary
WUTC
Attn: Records Center
PO Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

Re: Docket No. TG-151838, Rulemaking Inquiry to Consider the Need to Develop Rules on Revenue Sharing for the Solid Waste Industry

Dear Mr. King:

On behalf of the regulated Waste Connections' solid waste collections companies in Washington, particularly Murrey's Disposal, Certificate No. G-9, Harold LeMay Enterprises, Inc., G-98 and Mason County Garbage Company, Inc., G-88, we appreciate the opportunity to briefly comment on the Commission's inquiry to consider formal rules to implement the May 30, 2012 Interpretative and Policy Statement ("I&PS"), which was a result of the culmination of a series of suspended rate proceedings involving haulers participating in recycling revenue share plans in Snohomish, King, Pierce, Kitsap and Mason Counties.¹

Without here restating and incorporating all of the voluminous arguments and records in support of then-existing revenue retention agreements set forth in its various-cited dockets, Waste Connections does however wish to caution against any attempt to codify the Interpretative and Policy Statement of May 2012 into rule. As parties are well aware, Interpretive and Policy Statements from administrative agencies are not "precedent" or in any way dispositive of developed agency case law on the treatment of issues which they encompass. "They are advisory only."² However, they unquestionably have significance as indications of the agency's relevant thinking and prospective determination of regulatory policy.

A primary concern with the Interpretative and Policy Statement by the Waste Connections Companies is to that Statement's construction of the critical statute, RCW 81.77.185, and the interpretation of the legislation and *original* Commission staff policy intent in implementing that provision. To recap, that

¹ See i.e, Docket Nos. TG-101220, 101221, 101222, (2011); TG-111813, 111814, 111815 (2012); TG-111991, 111992, 111913 (2011); and for Waste Connections companies, TG-111672, 111674, 111681, 120073 (2011-2013).

² *Washington Educ. Ass'n v. Public Disclosure Comm'n*, 150 Wn2d 612,619 (2003).

provision requires that the Commission “shall allow” participating solid waste collection companies to “retain up to fifty percent of the revenue paid to the companies for the material if the companies submit a plan to the Commission that is certified by the appropriate local government authority “as being consistent with the local government solid waste plan” and “that demonstrates how the revenues will be used to increase recycling.” The focal emphasis of the statute that directs that the Commission shall allow “up to 50%” and demonstrating “how the revenues will be used to increase recycling” were consistently the contentious points in the statutory interpretation arguments by parties in those proceedings.

As the Commission’s October 23, 2015 Notice at page 2 § b provides, however, the Commission’s Interpretative and Policy Statement ultimately construed the statute to “limit incentives or rewards to 5% of expenditures” by the haulers as part of the overall “up to” 50% retained revenue. It is **that** interpretative limitation that, in Waste Connections’ view, is the central objectionable feature of the I&PS.

The central finding of the I&PS that RCW 81.77.185 somehow is susceptible to an interpretation that limits the incentives to a company’s demonstration of increasing recycling to 5% of expenditures is, by our analysis, the most controversial and unsupportable aspect of the Statement. In so holding, in WCI’s view, it engrafts an artificial limitation on the statute pointing to criteria then being used in apparently one or two county programs and prescribing a limit on retained expenditures (not revenues) that ultimately disincentivizes participation and program expansion. This outcome was clearly not envisioned by the Legislature in the original enactment of the law or its amendment in 2010 nor in the Recycling Panel Assessment Report in February 2000 or the Climate Action Team Project report in 2009, which alternatively, precipitated both the original law and its revision. It also is directly contradictory of the Staff’s 2003 “Recycling Revenue Sharing” report to the Legislature (see link below) on the original implementation of the law which had expressly deferred to local government comprehensive solid waste plan guidance and the “experimental” nature of the legislation where the Staff took a “hands off” approach to Company Recycling Plan outcomes and advocated removal of a participating company’s net revenue for regulatory ratemaking purposes.³

At least for Waste Connections, the 2012 I&PS has had a chilling effect on its and its participating counties’ enthusiasm in continuing to explore recycling enhancement and expansion programs at the

³ [http://www.wutc.wa.gov/webdocs.nsf/b8da29aede8fdd67882571430005a9c1/f4ba8447a5c62a1688256d9f0000c0a2/\\$FILE/Recycling%20Revenue%20Sharing%20Staff%20Summary%20May%202003.pdf](http://www.wutc.wa.gov/webdocs.nsf/b8da29aede8fdd67882571430005a9c1/f4ba8447a5c62a1688256d9f0000c0a2/$FILE/Recycling%20Revenue%20Sharing%20Staff%20Summary%20May%202003.pdf)

local jurisdictional level.⁴ Indeed, Waste Connections has ceased altogether its participation in such plans and just this fall, ended its remaining revenue share plan in Mason County and simply now passes back 100% of all commodity sale revenues to customers as it did before the legislation was implemented in 2002.

In the wake of a continuing downturn in the recyclables commodity markets, being offered “a carrot” of 5% of expenditure retention is clearly outweighed by “the stick”: the risk of substantial outlays of funds to potentially increase recycling when confronted with the reality of the shortfall in revenues to recoup expenses even assuming those expenditures are worth the risk in the present severe recyclables market downturn. Unfortunately for Waste Connections, the I&PS has only accelerated this trend and contravened the mutually optimistic ideals of the original legislation to increase recycling and reward solid waste collection companies and customers alike for innovative improvisation and program expansions in increasing overall recycling participation in achieving that goal.⁵

Considering the dramatically diverging interpretations of the Revenue Share statute that emerged on instigation of the Commission Regulatory staff with the amendment of the statute in 2010 providing up to 50% recycling revenue share, the Interpretative and Policy Statement in retrospect could appear counterproductive to the increased recycling share retention objective of the 2010 legislation.

The concerns expressed by the Commission staff and the Commission in the 2011-2013 period likely may have been better addressed to the Legislature as it contemplated the increase in potential RSA retention to boost overall recycling participation rates in the state when it considered revision to the law in 2009 and 2010. However, no such concerted challenge appears to have ever been raised. Instead, some counties and participating haulers were subsequently confronted in the post-enactment period with wholesale reinterpretation of the circumstances under which the demonstration of increasing recycling was to occur, the mechanics of implementing the program and what purpose the legislation was found to accomplish.

Again, Waste Connections believes that somehow in that post-2010 legislation period the focus and instigation of recycling revenue share agreements, activities and goals was lost in the dispute. As the

⁴ Nor has it fostered expansion into previous non-participating Washington counties in which Waste Connections operates.

⁵ Many regulated Washington solid waste collection companies also have transfer, treatment and/or disposal affiliates engaged in the solid waste industry. Obviously increasing recycling revenues has a concomitant impact in diminishing disposal volume at related facilities and expansion of recycling markets and materials value with the simultaneous beneficial impact of increasing recycling is not only an environmental benefit but a commercial enterprise opportunity which legislative study groups on revenue share addressed.

2003 WUTC Staff Recycling Assessment report reminds, counties working with their local haulers are the lynchpins of the dynamic process of expanding recycling participation and programs. Revenue share was to be in effect, the “toolbox “ for county governments to work with local haulers to inspire innovation, reduce landfill disposal, expand participation and add value to the recovered materials and thereby increasing revenues for haulers and customers alike in the process.⁶

While appreciating the recent notice of further consideration of revenue share program rules, Waste Connections nevertheless also believes that revenue share clarification is not now the priority it may have been in previous years and prefers instead this issue be considered in the larger context of the solid waste general rate case procedural rulemaking that has been pending since fall, 2013, in Docket No. A-130355.

As we understand it, only a few solid waste companies in King, Snohomish and possibly Kitsap Counties are still undertaking revenue share agreements within their respective counties and, as noted, the scope of such programs has been substantially curtailed and/or eliminated in other counties.

We believe most stakeholders would like to see that trend reversed. We look forward to working with the Commission and its staff in seeking additional consensus and clarification of the Interpretive and Policy Statement, but again, believe its codification in rule now is not consistent with the public interest and not reflective of larger regulatory policy reviews in which the Commission is now engaged. Thank you again for this opportunity to comment.

Yours truly,



WSBA: 37223

For:

David W. Wiley
Attorney at Law
206-233-2895
dwiley@williamskastner.com

⁶ “The concept behind this model of revenue sharing is that if solid waste carriers are allowed to keep more recycling revenues, they will have greater financial interest in encouraging their customers to recycle more and in finding buyers for the recyclable commodities.” Recycling Revenue Sharing, A Staff Summary of the Implementation of RCW 81.77.185 (SHB 2308), May 2003, at 5.