

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET TG-101220
TRANSPORTATION COMMISSION,	)	(<i>Consolidated</i>)
)	
Complainant,	)	ORDER 09
)	
v.)	
)	
WASTE MANAGEMENT OF)	
WASHINGTON, INC., d/b/a WASTE)	
MANAGEMENT – NORTHWEST,)	
)	
Respondent.)	
.....)	
WASHINGTON UTILITIES AND	)	DOCKET TG-101221
TRANSPORTATION COMMISSION,	)	(<i>Consolidated</i>)
)	
Complainant,	)	ORDER 09
)	
v.)	
)	
WASTE MANAGEMENT OF)	
WASHINGTON, INC, d/b/a WASTE)	
MANAGEMENT – SNO-KING,)	
)	
Respondent.)	
.....)	
WASHINGTON UTILITIES AND	)	DOCKET TG-101222
TRANSPORTATION COMMISSION,	)	(<i>Consolidated</i>)
)	
Complainant,	)	ORDER 09
)	
v.	)	INITIAL ORDER DENYING
	)	COMPANY REQUEST TO KEEP
WASTE MANAGEMENT OF	)	EIGHT PERCENT OF RETAINED
WASHINGTON, INC., d/b/a WASTE	)	RECYCLING REVENUES AS A
MANAGEMENT – SOUTH SOUND,	)	FINANCIAL INCENTIVE AND
WASTE MANAGEMENT OF	)	REWARD AND REQUIRING
SEATTLE,	)	REFILING OF TARIFFS
)	
Respondent.)	
.....)	

1 ***Synopsis.** This is an Administrative Law Judge's Initial Order that is not effective unless approved by the Commission or allowed to become effective as described in the notice at the end of this Order. If this Initial Order becomes final, Waste Management of Washington, Inc., will not be authorized to keep eight percent of the revenues it retains from the sale of recyclable materials collected from its customers as a financial incentive and reward pursuant to the 2010-11 recycling plans between the company and King and Snohomish Counties. The Company has failed to demonstrate that those revenues will be used to increase recycling as required by RCW 81.77.185 and therefore must pass the revenues to residential customers.*

2 **NATURE OF PROCEEDINGS.** These dockets arise from a petition to allow sharing of revenues from recycled materials, lift the interim status of certain tariff changes, and approve revised commodity credits.

3 **APPEARANCES.** Polly L. McNeill, Summit Law Group, Seattle, WA, represents Waste Management of Washington, Inc. (Waste Management or Company). Fronda Woods, Assistant Attorney General, Olympia, WA, represents the Commission's regulatory staff (Staff).¹

BACKGROUND

4 On July 16, 2010, Waste Management of Washington, Inc. (Waste Management or Company) filed revisions to its tariffs governing recycling commodity price adjustment rates for three of the Company's operating divisions in King and Snohomish Counties with a proposed effective date of September 1, 2010. Waste Management also filed recycling plans certified by King and Snohomish Counties (collectively Counties) for the period of September 1, 2010 through August 31, 2011, which authorize the Company to retain 50 percent of the revenue Waste Management receives from the sale of recyclable materials that it collects through its residential recycling services.

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. See RCW 34.05.455.

- 5 On August 31, 2010, the Commission issued Order 01 in each of the three dockets, allowing the requested rates to go into effect and authorizing Waste Management to retain 50 percent of the revenue from the sale of recyclable materials collected in its single-family and multi-family residential recycling programs on an interim basis, from September 1, 2010, through December 1, 2010, subject to refund. The Commission also directed Waste Management to work with the Counties to devise a budget and subsequently petition the Commission no later than November 1, 2010 to allow the requested revenue sharing through August 31, 2011.
- 6 Waste Management filed its Petition to Allow Revenue Sharing, Lift Interim Status and Approve Revised Commodity Credits (Petition) on November 1, 2010. The proposed revenue sharing plan in the Petition would permit the Company to keep eight percent of the retained recycling revenue.
- 7 On November 24, 2010, the Commission issued Order 02, Complaint and Order Suspending Tariff and Authorizing Temporary Revenue Sharing for Recyclable Commodities, Subject to Refund. The Commission suspended the tariffs, extended the 50 percent revenue sharing on a temporary basis subject to refund and other conditions established in Order 01, and set the Petition for hearing.
- 8 At the prehearing conference on December 1, 2010, the parties agreed to hold a procedural schedule in abeyance pending the outcome in Dockets TG-101542, TG-101545, and TG-101548 (consolidated), which, like this proceeding, also raised the issue of how recycling plans can demonstrate that retained revenues “will be used to increase recycling” under RCW 81.77.185.
- 9 On February 28, 2011, the Commission approved a partial settlement agreement between Waste Management and Staff. The settlement resolved issues related to the closure of the 2009-2010 plan period and established a revised recycling commodity adjustment for that period. The agreement, however, left unresolved the issue of whether the Company’s 2010-11 recycling plans demonstrate how the retained revenues will be used to increase recycling as required by RCW 81.77.185.

10 On May 6, 2011, the Commission entered its Order on Reconsideration in Consolidated Dockets TG-101542, TG-101545 & TG-101548, resolving the disputed issues over interpretation and application of RCW 81.77.185 in the context of that proceeding.

11 On June 7, 2011, the Commission issued Order 07, Second Prehearing Conference Order, establishing a schedule for cross-motions for summary determination of the remaining disputed issues in this proceeding.

12 On July 14, 2011, the Commission issued Order 08, granting the Company's petition to extend the current recycling plans and associated tariffs through November 30, 2011.

SUMMARY DETERMINATION MOTIONS

13 On June 30, 2011, Waste Management and Staff each filed a motion for summary determination. Staff responded to Waste Management's motion on July 19, 2011. On July 20, 2011, the Company filed its response to Staff's motion.

14 Waste Management makes the following arguments in its motion and in its response to Staff's motion:

- Waste Management's revenue sharing plans with the Counties provide a financial incentive for the Company to engage in recycling efforts as contemplated by the legislature in RCW 81.77.185. The plans allow, and provide a financial motivation, for experimentation with new methods of recycling education, outreach, collection, and processing with the ultimate goal of using recycling revenues to increase recycling. Without a financial reward, a publicly traded company has little incentive to experiment or otherwise participate in these programs.
- The recycling plans at issue in this proceeding are comparable to the plans the Commission found to be in compliance with RCW 81.77.185 in Dockets TG-101542, *et al.* Both sets of plans condition financial rewards on performance, but do so in different ways. Waste Management's plans tie the reward to the revenues it produces, thus encouraging the Company to increase that reward

by generating greater volumes of recycled materials, increasing customer participation in recycling, adding higher-value commodities, or maximizing processing efficiencies.

- Waste Management’s recycling plans incorporate the budget-based approach the Commission required, and a budgeted line-item for an eight percent return is a reasonable financial incentive. Waste Management and the Counties negotiated that figure, which is within the range of the Company’s operating ratio in rate filings and is significantly less than the amount the Commission permitted in Dockets TG-101542, *et al.*

15 Staff makes the following points in its motion and in its response to the Company’s motion:

- The Commission has interpreted RCW 81.77.185 to allow a solid waste company to retain a portion of recycling revenues upon meeting certain performance goals, but with the exception of data reporting, Waste Management’s plans do not associate any particular portion of recycling revenue with the achievement of performance goals. The Company simply has not demonstrated how a line-item for profit “will be used to increase recycling” as the statute requires.
- The Company does not need a line-item for profit to provide an incentive to increase recycling. Waste Management has been participating in recycling revenue sharing since 2003, yet the recycling plans at issue in this proceeding are the first Waste Management plans to specifically allow for a profit margin. Rather, the Company benefits by using retained revenue to help finance equipment that will assist Waste Management to increase revenues from its recycling operations, both regulated and non-regulated.
- Even if the statute could be interpreted to authorize the Commission to permit a company to retain a portion of recycling revenues as profit, the rate Waste Management proposes in the recycling plans is well in excess of the return calculated under the Lurito-Gallagher methodology and thus is unreasonable.

DISCUSSION AND DECISION

- 16 This proceeding, like Dockets TG-101542, *et al.*, presents the issue of how to interpret the requirement in RCW 81.77.185 that recycling plans must demonstrate to the Commission how a solid waste collection company's share of the revenue generated from the sale of recyclable materials collected from its customers "will be used to increase recycling." Specifically here, the Commission must determine whether Waste Management may keep eight percent of such retained revenue under its recycling plans with the Counties as a financial reward for the Company's recycling efforts. We conclude under the circumstances presented that it may not.
- 17 We begin with the premise that the Company recovers all of its costs to collect and dispose of its customers' solid waste, including recyclable materials, through the rates it charges customers for that service. In setting those rates, the Commission takes into account not only the costs the Company incurs but other sources of revenue the Company receives in connection with the services provided. All revenue Waste Management generates from the sale of the recyclable materials it collects from its customers thus represents another form of cost recovery that should be used to reduce service rates correspondingly, and Waste Management's tariffs are structured to provide a credit to customers to account for this revenue.
- 18 The legislature, however, modified that calculus in RCW 81.77.185. The statute requires the Commission to allow a solid waste collection company to retain up to 50 percent of the revenues it generates from the sale of the recyclable materials it collects from its customers if the company submits a plan to the Commission that is certified by the local government as consistent with the local government's solid waste plan and "that demonstrates how the revenues will be used to increase recycling." The company must pass the remaining revenue to residential customers.
- 19 As an exception to well-established ratemaking principles, RCW 81.77.185 should be narrowly construed. The revenues from the sale of recyclable materials collected from customers belong to those customers. The legislature has effectively authorized solid waste companies to retain a portion of those revenues to use on their customers' behalf to further the public policy goal to increase recycling. Only if a company can

demonstrate that the retained revenues will be used to accomplish that specific goal should the company, rather than ratepayers, be entitled to those funds.

20 The Commission concluded in Dockets TG-101542, *et al.*, that the entirety of retained revenues need not necessarily be spent on recycling efforts to be “used to increase recycling.” Rather, a plan may “demonstrate that the local government or the Commission will use at least some portion of the revenue as a reward to provide an incentive to the company to develop and implement recycling efforts and thereby increase recycling.”² The plans in that proceeding tied the amount of revenue the companies were permitted to keep to achieving specified objectives to increase recycling. The Commission concluded that this revenue was “used to increase recycling” within the contemplation of RCW 81.77.185 and that the companies were entitled to keep that revenue, even though it exceeded the amount the companies actually spent to accomplish the plan goals.

21 We agree with Waste Management that those plans do not represent the only means by which a company may retain unspent revenues consistent with RCW 81.77.185 and that companies and local governments should have flexibility in using any such revenues as a financial incentive to accomplish the legislature’s goal.³ The statute nevertheless requires that a company demonstrate how the revenues it retains will be used to increase recycling. The plans at issue in this proceeding have not made that demonstration.

22 “Waste Management requests the Commission approve revenue sharing under recycling plans that allocate 8% of retained revenues to the Company as a financial incentive for performing its [Revenue Sharing Agreement] obligations and as a reward for maximizing marketing values.”⁴ Conspicuously absent from this request is any representation, much less demonstration, that these revenues will be used to increase recycling. Waste Management’s plans with the Counties authorize the Company to keep eight percent of the retained revenues without any requirement that Waste Management increase recycling as a result. To the contrary, the plans grant

² *In re Petition of Mason County Garbage Co., Inc., et al.*, Dockets TG-101542, *et al.*, Order 05 ¶ 27 (May 6, 2011).

³ See Waste Management Answer to Staff Motion for Summary Determination ¶¶ 18-19.

⁴ *Id.* ¶ 1.

Waste Management eight percent of the revenue regardless of whether the level of recycling increases, decreases, or remains the same under the plans. This revenue cannot reasonably be construed to be “used to increase recycling.”

- 23 Waste management contends that the eight percent of retained revenues provides a financial incentive to increase recycling because “Waste Management’s reward is correlated to the revenues it produces.”⁵ According to the Company, if the plan “activities are successful in generating greater volumes, in increasing participation, in adding higher-value commodities, or in maximizing processing efficiencies to generate higher marketing revenues, then Waste Management gets a share of any increased revenues that might be produced.”⁶
- 24 Granting Waste Management eight percent of the retained revenues would give the Company an incentive to increase the total revenues from the sale of recyclable materials, but the fundamental flaw in this approach is that increasing recycling *revenues* does necessarily equate to increasing *recycling*. The Company implicitly concedes as much by maintaining that revenues may increase as a result of “adding higher-value commodities” or through “maximizing processing efficiencies.”⁷ While these may be laudable objectives, they are not goals the legislature seeks to promote in RCW 81.77.185. The statute does not authorize the Company to retain recycling revenues for any purpose other than to increase recycling, and an incentive to increase recycling revenue, without more, does not demonstrably further that goal.
- 25 Waste Management also claims that its eligibility for a reward “is conditioned on its performance of the [plan] activities,”⁸ but the plans include no express condition that the Company is entitled to eight percent of the retained revenues only if it complies with the plans. Rather, the plans merely state that the Counties will recommend to the Commission that Waste Management retain 50 percent of the commodity values if the

⁵ Waste Management Motion for Summary Determination ¶ 43.

⁶ *Id.*

⁷ *Id.*; *accord id.* ¶ 25 (“The promise of earning greater revenue prompts companies like Waste Management to be more proactive about finding the most lucrative markets for the commodities customers place in the bins. It rewards the Company for improving the quality of the materials through improved sorting and processing in a direct economic fashion.”).

⁸ *Id.* ¶ 43.

“program components specified in the plan are achieved.”⁹ Staff correctly observes that the only specified opportunity to reduce that percentage is if the Company fails to comply with the plans’ data reporting requirements. Again, the plans include no connection between the eight percent profit and an increase in recycling.

26 Waste Management acknowledges that its plans with the Counties “do not link Waste Management’s performance to an increase in recycling,” but maintains that its “reward cannot reasonably be linked to proving that there has, actually, been an increase in recycling because there are too many uncontrollable factors that influence that benchmark.”¹⁰ The Company contends that “participation rates and material quantities should not be the only measures of a program’s success.”¹¹ The legislature disagrees, at least with respect to the use of recycling revenues that belong to residential ratepayers.

27 Waste Management’s entitlement to retain *any* recycling revenues under RCW 81.77.185 must be linked to “demonstrat[ing] how the revenues will be used to increase recycling.” The plain language of the statute requires that if Waste Management cannot prove that its eight percent reward or any other portion of the recycling revenues it retains will be used to increase recycling, the Company must pass those revenues to residential customers. For purposes of statutory compliance, therefore, participation rates and material quantities are the appropriate – and primary, if not sole – measures of whether Waste Management may retain any portion of the revenues it receives from the sale of recyclable materials.

28 Waste Management nevertheless argues that permitting it to keep eight percent of the retained revenues motivates the Company to be a willing participant in recycling

⁹ Waste Management Recycling and Commodity Revenue Sharing Plan for King County (King County Plan) at 6, Task 14; Waste Management Recycling and Commodity Revenue Sharing Plan for Snohomish County (Snohomish County Plan) at 9.

¹⁰ Waste Management Motion for Summary Determination ¶ 41. We note that the Company’s assertion is somewhat at odds with the plans themselves, both of which state that the plan’s goal is to increase recycling levels of Waste Management’s customers. King County Plan at 6, Task 15; Snohomish County Plan at 9. More specifically, Waste Management must “continue to target non-subscribing households to increase the number of households subscribing to curbside collection services.” King County Plan at 2, Task 3; Snohomish County Plan at 3.

¹¹ *Id.*

efforts and to use its knowledge and expertise to make such participation more meaningful.¹² As Staff correctly observes, however, Waste Management presents no evidence to prove that the Company's willingness to engage in recycling activities in a meaningful way is dependent on making a profit from those activities. The Commission is not willing to simply accept Waste Management's unsupported assertions that making a profit facilitates the Company's coordination with the Counties to develop effective recycling plans and enhances implementation of those plans.

- 29 Waste Management also ignores the practical application of RCW 81.77.185. Counties have solid waste plans and other recycling requirements with which Waste Management must comply when operating within their jurisdictions. The Company ordinarily finances the costs of such compliance and recovers those costs, including its authorized rate of return, through the rates its customers pay (to the extent the Commission finds they are necessary and prudently incurred to provide the regulated services). RCW 81.77.185 provides Waste Management with the opportunity to use ratepayer dollars to finance compliance with these requirements, as well as to pursue other business objectives, to the extent they are related to increasing recycling. As Staff suggests, the Company benefits from being allowed to use risk-free capital to meet its legal obligations, to fund related investment, and to experiment with new and innovative recycling programs and processes. Waste Management is not entitled to additional reward without a specific demonstration that granting the Company a profit for such use of ratepayer dollars will increase recycling.
- 30 Waste Management has not demonstrated that the eight percent of retained revenues that the Company is authorized to keep as a financial incentive and reward under the plans will be used to increase recycling as RCW 81.77.185 requires.¹³ The Commission, therefore, will disallow Company retention of those funds under the

¹² See *Id.* ¶ 31.

¹³ Accordingly, the Commission need not, and does not, reach the issue of whether eight percent of revenues is a reasonable amount for such a reward. We note, however, that the Declaration of Michael Weinstein in Support of Waste Management's Answer at paragraph 10 states that the eight percent includes "[t]he overhead of administering the revenue program" as well as "profit," although "those costs are not earmarked." The Commission's decision is specific to amounts that represent a reward to the Company and should not be interpreted to apply to costs and expenses Waste Management legitimately incurs to administer the plans.

2010-11 recycling plans and will require that Waste Management pass those revenues to its residential customers.

FINDINGS OF FACT

31 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

32 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including solid waste collection companies.

33 (2) Waste Management of Washington, Inc., is a “public service company” and a “solid waste collection company,” as those terms are defined in RCW 81.04.010, and as those terms otherwise are used in Title 81 RCW.

34 (3) Waste Management of Washington, Inc., has not demonstrated that the eight percent of retained revenues that the Company is authorized to keep as a financial incentive and reward under its 2010-11 Recycling and Commodity Revenue Sharing Plans with King and Snohomish Counties will be used to increase recycling.

CONCLUSIONS OF LAW

35 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

36 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding.

37 (2) RCW 81.77.185 requires the Commission to allow a solid waste collection company to retain up to 50 percent of the revenues it generates from the sale

of the recyclable materials it collects from its customers if the company submits a plan to the Commission that is certified by the local government as consistent with the local government's solid waste plan and "that demonstrates how the revenues will be used to increase recycling." The company must pass the remaining revenue to residential customers.

- 38 (3) The 2010-11 Recycling and Commodity Revenue Sharing Plans with King and Snohomish Counties do not demonstrate that the reward of eight percent of retained revenues budgeted for Waste Management of Washington, Inc., will be used to increase recycling as required by RCW 81.77.185, and therefore the Company must pass those funds to residential customers.
- 39 (4) The Commission should retain jurisdiction to effectuate the terms of this Order.

ORDER

THE COMMISSION ORDERS that

- 40 (1) The Petition to Allow Revenue Sharing, Lift Interim Status and Approve Revised Commodity Credits Waste Management of Washington, Inc., is granted in part and denied in part as follows:
- (a) The Commission grants the Company's request to lift the interim status of the 2010-11 Recycling and Commodity Revenue Sharing Plans with King and Snohomish Counties thereby allowing the Company to retain up to 50 percent of the revenues generated from the sale of recyclable materials during the plan period to the extent that the retained revenues are used to increase recycling;
 - (b) The Commission denies the Company's request to keep the eight percent of retained revenues that the Company's 2010-11 Recycling and Commodity Revenue Sharing Plans with King and Snohomish Counties authorize as a financial incentive and reward for the Company's participation in the plans because the plans do not demonstrate that those revenues will be used to increase recycling.

- 41 (2) The suspended tariffs are rejected. Within 10 days after the effective date of this Order, Waste Management of Washington, Inc., shall refile revised tariffs to reflect commodity credits that include the revenues the Company has retained as a financial incentive and reward for its participation in the 2010-11 Recycling and Commodity Revenue Sharing Plans with King and Snohomish Counties so that these revenues are passed to residential customers.
- 42 (3) The Commission shall retain jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective August 26, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

GREGORY J. KOPTA
Administrative Law Judge

NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and **seven (7)** copies of any Petition or Answer must be filed by mail delivery to:

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