

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET TG-111672
TRANSPORTATION COMMISSION,	)	
	)	ORDER 07
Complainant,	)	
	)	
v.	)	ORDER DENYING PETITION FOR
	)	RECONSIDERATION
MURREY’S DISPOSAL COMPANY,	)	
INC., G-9,	)	
	)	
Respondent.	)	
.....	)	
	)	
WASHINGTON UTILITIES AND	)	DOCKET TG-111674
TRANSPORTATION COMMISSION,	)	
	)	ORDER 07
Complainant,	)	
	)	
v.	)	ORDER DENYING PETITION FOR
	)	RECONSIDERATION
AMERICAN DISPOSAL COMPANY,	)	
INC., G-87,	)	
	)	
Respondent.	)	
.....	)	
	)	
WASHINGTON UTILITIES AND	)	DOCKET TG-120073
TRANSPORTATION COMMISSION,	)	
	)	ORDER 05
Complainant,	)	
	)	
v.	)	ORDER DENYING PETITION FOR
	)	RECONSIDERATION
HAROLD LEMAY ENTERPRISES,	)	
INC., d/b/a PIERCE COUNTY	)	
REFUSE, G-98,	)	
	)	
Respondent.	)	
.....	)	

## BACKGROUND

- 1 On December 28, 2012, the Commission entered Order 06/04 in these consolidated dockets (Final Order) which (1) permits Murrey's Disposal Company, Inc. (Murrey's), American Disposal Company, Inc. (American), and Harold LeMay Enterprises, Inc., d/b/a Pierce County Refuse (LeMay and collectively Companies) to keep all unspent retained revenues from the sale of recyclable materials during the period covered by the Companies' 2010-11 recycling revenue sharing plan (Plan) periods; and (2) rejects the Companies' commodity credit tariff filings made pursuant to their 2011-12 Plans for failure to demonstrate that the retained revenues will be used to increase recycling as required by RCW 81.77.185.<sup>1</sup>
- 2 On January 7, 2013, the Companies filed a Petition for Reconsideration of Portion of Order Nos. 06 and 04 Rejecting Tariff Filings (Petition). The Companies assert that the Final Order "err[s] in concluding that the Pierce County Share Planning expenditures by the Companies failed to meet the statutory standard" and by "deny[ing] retention of all of the 2011-12 commodity sale revenues to the Companies."<sup>2</sup> Stated differently, the Companies contend that they are not asking the Commission "to reconsider its mandate that all unspent revenue share for 2011-12 be refunded to Pierce County ratepayers," but "only the denial of the expenditures associated therewith is being challenged in this submission."<sup>3</sup> The Companies make the following claims in support of their Petition:
- The Commission unlawfully relied on the Interpretive and Policy Statement issued in Docket TG-112162 (IPS), issued over eight months after Murrey's and American made their initial filings in these dockets, as well as the Commission's tariff suspension procedures, to impose budgeting requirements retroactively on the Companies without prior notice.

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<sup>1</sup> The Final Order also made the same conclusions with respect to Mason County Garbage Co., Inc. d/b/a Mason County Garbage (Mason County Garbage) in Docket TG-111681. Mason County Garbage, however, does not seek reconsideration of the Final Order.

<sup>2</sup> Petition ¶ 7.

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

- The Commission erred in denying the Companies' ability to retain sufficient revenues to cover their 2011-12 Plan expenditures when those expenditures were substantially similar to the expenditures in Plans that the Commission had approved in prior years.
- The Commission failed to give sufficient weight to evidence of updated Plans, actions the Companies intended to take to increase recycling, and the Pierce County Solid Waste Administrator support and anticipated review and evaluation of Plan performance, all of which supplied sufficient detail to make the requisite demonstration in RCW 81.77.185 consistent with the Commission's historic practice and policy.

### DISCUSSION

- 3 The Petition provides no basis on which the Commission should reconsider the Final Order. The Companies continue to misconstrue RCW 81.77.185 and the Commission's interpretation of that statute, as well as to ignore the Companies' role in creating the circumstances about which they now complain.
- 4 The primary thrust of the Petition is the Companies' claim that the Commission retroactively applied the IPS to disallow the entirety of the Companies' retained recycling revenues during the 2011-12 Plan periods. The Companies argue that interpretive and policy statements are advisory and only should be used as guidance *after* the Commission issues them. The findings and rationale of the IPS, in the Companies' view, cannot be used to make determinations on Plans designed and implemented months *before* the Commission issued the IPS.
- 5 As a preliminary matter, the Commission observes that the Companies' advocacy is inconsistent with their prior position in this proceeding. The Companies, along with Commission Staff, repeatedly requested extensions of the procedural schedule to incorporate the discussions and results of the workshops in Docket TG-112162 – *i.e.*, the IPS – into this proceeding.<sup>4</sup> The Companies cannot reasonably argue that the Commission should *exclude* the IPS from these dockets when the Companies have

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<sup>4</sup> Notice of Revised Hearing Dates (Dec. 28, 2011); Notice of Revised Hearing Dates (Feb. 6, 2012); Notice Revising Procedural Schedule (April 2, 2012); Notice Revising Procedural Schedule and Canceling Evidentiary Hearings (May 17, 2012); Third Notice Revising Procedural Schedule (July 9, 2012); Fourth Notice Revising Procedural Schedule (Sept. 4, 2012).

consistently represented to the Commission that they needed more time to *include* the Commission guidance in the IPS in these dockets.

- 6 More substantively, the Companies misunderstand the IPS and its relationship to the Final Order. The Commission issued the IPS pursuant to the Administrative Procedures Act (APA) “to advise the public of its current opinions, approaches, and likely courses of action”<sup>5</sup> on issues arising out of implementation of RCW 81.77.185. The Commission did not rely on the IPS as binding legal precedent in these dockets. Rather, the Commission independently reviewed the Companies’ 2011-12 Plans to determine whether they made the requisite demonstration under the statute. In both the IPS and this proceeding, the Commission concurrently interpreted the same statute to resolve the same issues and reached the same conclusion.<sup>6</sup> That approach and its results are fully consistent with the APA.
- 7 Nor has the Commission improperly applied its tariff suspension procedures to recycling revenue sharing under RCW 81.77.185 as the Companies suggest. The statute requires a company to pass to its residential customers all recycling revenues the Commission does not authorize the company to retain. The Companies filed tariffs establishing the commodity credits by which those revenues are passed to their customers. The Commission suspended those tariffs for investigation under the same authority it has to suspend and investigate any other tariff,<sup>7</sup> and nothing in RCW 81.77.185 negates or otherwise alters that authority.
- 8 The Companies also allege that the Commission erred by rejecting the Plans when they are substantially similar to Plans the Commission approved in prior years, which did not include a budget or otherwise quantify the anticipated costs of Plan activities. The record in this proceeding contains no evidence to support that factual assertion.<sup>8</sup> However, even if the Companies’ facts are correct, such past approvals would be irrelevant. Nothing in the statute, case law, or Commission practice and procedures

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<sup>5</sup> RCW 34.05.230(1).

<sup>6</sup> Indeed, entry of the Final Order seven months after the Commission issued the IPS is the result of the Companies’ repeated requests to extend the procedural schedule. The original schedule in the Murrey’s and American dockets would have resulted in entry of at least an initial order contemporaneously with issuance of the IPS. *See* Order 03, Appendix B.

<sup>7</sup> RCW 81.04.130.

<sup>8</sup> Only the 2011-12 Plans have been filed in these dockets. Prior Plans, moreover, were not part of the record in the dockets in which the Commission approved the corresponding commodity credits, and thus the Commission cannot compare the 2011-12 Plans with previous Plans.

requires the Commission to approve a Plan simply because the Commission has approved a similar Plan in the past. Rather, as RCW 81.77.185 requires, the Commission reviewed the 2011-12 Plans, along with the record evidence, and found on the basis of that review that the Plans failed to demonstrate how the retained revenues will be used to increase recycling.<sup>9</sup> The Commission did not err in undertaking that review or reaching that conclusion.

9 In addition to errors of law, the Companies contend that contrary to the Commission’s factual findings, evidence of the activities the Companies planned to undertake and Pierce County’s endorsement of those activities demonstrate how the Plans will increase recycling.<sup>10</sup> As we explained in the Final Order, however, RCW 81.77.185 “requires the Plan to demonstrate how the *revenues* will be used to increase recycling.”<sup>11</sup> The statute is not reasonably susceptible to the Companies’ view that the Commission must approve an indefinite amount of retained revenues as long as the Plan contains activities that are designed to increase recycling. We continue to reject that interpretation.

10 Alternatively, the Companies claim that they are entitled to sufficient retained revenues to compensate them for their expenditures to undertake Plan activities. The Plans, however, do not provide for such cost recovery. Rather, they simply assign arbitrary percentages of retained revenues to Plan activities and, as the Companies concede, do “not include any projection of anticipated retained revenues or ballpark, extrapolate or otherwise [quantify] costs.”<sup>12</sup> Authorizing retention of actual expenditures, as the Companies request, would require the Commission to revise the Plans unilaterally to incorporate such cost recovery and then to determine how the retained revenues *were* used to fund tasks designed to increase recycling. Again as we previously explained, the plain language of RCW 81.77.185 requires a prospective

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<sup>9</sup> Final Order ¶¶ 24-29.

<sup>10</sup> The Companies also contend that we did not give sufficient weight to Commission Staff’s opinion that “the Companies have demonstrated how the retained revenues expended on plan activities will be used to increase recycling.” Staff Position Statement (Nov. 28, 2011). Staff also opined that the Commission has the authority to reach back to the 2010-11 plan period and require the Companies to refund retained revenues in excess of those expended on plan activities with a small incentive bonus. The Commission, however, must make its own determinations, particularly with respect to legal interpretation and the application of law to fact. We carefully considered Staff’s positions but ultimately did not adopt them for the reasons set forth in the Final Order.

<sup>11</sup> Final Order ¶ 28 (emphasis in original).

<sup>12</sup> Petition ¶ 10.

demonstration of how “revenues *will be* used to increase recycling.” The legislature thus has precluded the post hoc Plan revision and determination the Companies advocate.<sup>13</sup>

- 11 Finally, the Companies argue that “[t]he detrimental effect of this ruling will surely be to discourage any increased expenditure or innovation of any performance-based plan elements and proportionately increase unspent revenue retention which the Commission so harshly criticizes in the [Final Order].”<sup>14</sup> We do not foresee any such effect. The Final Order simply requires Plans to specify and quantify how the revenues they retain will be used on activities to increase recycling. If a Plan fails to do so, all recycling revenues must be passed on to the ratepayers. The language of RCW 81.77.185 requires no less.
- 12 Like the Companies, we are concerned that the statute mandates the results in the Final Order – both that the Companies are not entitled to any recycling revenue sharing during the 2011-12 Plan periods, despite expenditures on Plan activities, and that the Companies are entitled to keep all retained revenues during the 2010-11 Plan periods, even though the Companies actually spent less than half those amounts. For better or worse, however, we must follow the law as it currently exists. We continue to encourage all solid waste companies and local governments to consult with the Commission and its Staff on Plan provisions prior to seeking Plan approval.<sup>15</sup> Such consultation should minimize the recurrence of unintended consequences in the future.

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<sup>13</sup> Final Order ¶ 20 (emphasis in original). We note that the Companies do not challenge our application of this interpretation to the 2010-11 Plans, pursuant to which the Commission has allowed the Companies to keep all retained revenues, even though only a small fraction of those revenues were actually used to fund Plan activities. The Companies cannot have it both ways. Accepting their position and applying it consistently to both the 2010-11 and 2011-12 Plans would result in the Companies refunding even more of the total recycling revenues they retained during those Plan periods than the Final Order requires. While that outcome would be more equitable and more beneficial to ratepayers, we continue to believe that RCW 81.77.185 mandates the conclusions we reached in the Final Order.

<sup>14</sup> Petition ¶ 35.

<sup>15</sup> See IPS ¶ 43.

**ORDER**

13 THE COMMISSION ORDERS that the Petition for Reconsideration of Portion of Order Nos. 06 and 04 Rejecting Tariff Filings is DENIED.

Dated at Olympia, Washington, and effective January 25, 2013.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PHILIP B. JONES, Commissioner