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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

STATE OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

)  
) Docket No. TG-971167

)  
) POSITION PAPER OF RECOMP OF  
) WASHINGTON, INC.

In the Matter of the Petition of Recycling and )  
Disposal Systems, Inc. for a Declaratory )  
Order )

**ORIGINAL**

Respondent Recomp of Washington, Inc. submits this Position Paper in accordance with Paragraph 2 of the Administrative Law Judge's letter to parties dated September 22, 1997.

It was not possible for Recomp to submit this Position Paper on Friday, September 25, 1997. The parties attempted during a conference call during the afternoon of September 23, 1997 to determine whether differences between them as to the content of a Statement of Facts could be resolved. By the end of that afternoon it still appeared that differences requiring argument concerning relevance and, possibly, attorney-client privilege likely would not be resolved. The undersigned counsel for Recomp left on a pre-planned trip to California on Thursday morning, and did not return to Seattle until Sunday, September 28, 1997, making it impossible to serve and file this Position Paper until the morning of Monday, September 29, 1997.

1. STATEMENT OF FACTS AND EXHIBITS:

The parties unfortunately have been unable to agree upon a single agreed Statement of Facts. Recomp therefore along with other respondents is submitting to the Commission the proposed Statement Of Facts And Exhibit List (the "Respondents' Statement) attached hereto as Exhibit A.

*Handcopy*

1 **2. EVIDENTIARY ISSUES:**

2           There appear to be little, if any, disputes between the parties as to the accuracy of the facts  
3 recited in the Respondents' Statement. Where the parties disagree as to the inclusion or exclusion  
4 of factual matters, the disagreement instead turns on issues of admissibility, most particularly  
5 relevance and/or attorney-client privilege.  
6

7           **2.1 The Factual Background Contained In The Respondents' Statement Is Relevant To This**  
8 **Proceeding.**

9           Evidence is "relevant" if it has *any* tendency to make the existence of any fact that is of  
10 consequence to the determination in a proceeding more or less probable than it would be without  
11 the evidence. ER 401; Peterson v. State, 100 Wn.2d 421, 439, 671 P.2d 230 (1983).  
12

13           The relevance of facts must be determined in relation to the issues presented by the  
14 particular case. Any circumstance which reasonably tends to establish a theory of a party is  
15 relevant evidence. Ladley v. Saint Paul Fire & Marine Ins. Co., 73 Wn.2d 928, 934, 442 P.2d  
16 982 (1968); Bloomquist v. Buffelen Manufacturing Co., 47 Wn.2d 828, 829, 289 P.2d 1041  
17 (1955); Matter of Marriage of Foran, 67 Wn.App. 242, 258, 834 P.2d 1081 (1992); Rothman v.  
18 North American Life & Casualty Co., 7 Wn.App. 453, 456, 500 P.2d 1288 (1972).  
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21           Our courts have held that all facts are admissible "which throw any light on a contested  
22 matter." Golden Gate Hop Ranch, Inc. v. Velsicol Chemical Corp., 66 Wn.2d 469, 475, 403 P.2d  
23 351 (1965), *cert. denied*, 382 U.S. 1025, 86 S.Ct. 644 (1965). The fact itself need not be  
24 contested in order to be relevant:  
25

26           Nothing in [Washington] Rule [of Evidence] 401 requires that the fact in  
27 question be disputed. Most questions of relevance will obviously concern  
28 disputed facts, but it is clear that undisputed "background information" is  
within the definition of Rule 401 as well.

1 Teglund, Washington Practice, “Evidence” (3rd. ed. 1989) § 82. Commenting upon the identical  
2 Federal Rule of Evidence 401, upon which our state’s rule is based, the 5th Circuit in Conway v.  
3 Chemical Leaman Tank Lines, Inc., 525 F.2d 927, 930 (5th Cir. 1976), stated:

4  
5 The policy of the new Rules [of Evidence] is one of broad admissibility and the  
6 generous definition of “relevant evidence” in Rule 401 was specifically intended  
7 to provide that background evidence . . . is admissible.

8 Even in cases in which background evidence does not directly bear on the issues to be  
9 resolved (as it does in this case, as more particularly discussed below), it is generally admissible:

10 Matters in the range of dispute may extend somewhat beyond the issues defined  
11 in the pleadings. . . . [C]onsiderable leeway is allowed even on direct  
12 examination for proof of facts that do not bear on the purely legal issues, but  
13 merely fill in the background of the narrative. . . .

14 1 McCormick On Evidence (4th ed. 1972) § 185.

15 The ultimate issue in this proceeding, we submit, is this: How is the Commission, in  
16 dealing with matters certain to come before it in its regulation of Sanitary Service Company, Inc.  
17 (“SSC”), going to deal with the fact that SSC is obligated by contract with the City of Bellingham  
18 (the “City”) to deliver to Recomp non-residential waste which it collects within the City? Unless  
19 this question is answered, this proceeding is a pointless waste of everyone’s time and money, since  
20 it ultimately will not resolve anything. If the Commission is to render a declaratory order, the  
21 order ought to be one which enables the entity which the Commission regulates, SSC, to know  
22 what it can or cannot do in the conduct of those aspects of its business which the Commission  
23 regulates.  
24 regulates.

25  
26 This ultimate issue itself breaks down, we submit, into two general issues:  
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1            *Issue 1: Are the charges SSC incurs in delivering to Recomp non-residential waste*  
2 *collected within the City to be included in SSC's base?* We anticipate that parties will make a  
3 number of arguments pertaining to this issue. Among those will be arguments involving the proper  
4 interpretation and application of the proviso contained in RCW 81.77.020, the pass-through  
5 provisions of RCW 81.77.160, and the general rate-setting standards of Chapter 81.77 RCW.

6  
7            *Issue 2: Do generators of non-residential waste within the City to whom SSC provides drop*  
8 *box collection service have the right as a matter of law to dictate where SSC delivers the waste it*  
9 *collects from them?*

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11            The factual history offered in the Respondents' Statement is directly relevant to the  
12 following questions which must be answered in dealing with the issues presented in this case:

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14            (1) *How much of the City's jurisdiction with respect to the administration (i.e., collection*  
15 *and disposal) of solid waste generated within the City did the City cede to the Commission, and*  
16 *how much of that jurisdiction did it retain?* Recomp will argue that the City ceded to the  
17 Commission (ironically, by contract with SSC) the right to regulate SSC's rates for non-residential  
18 waste collected by SSC within the City, but retained (also by contract) the right the City always  
19 had exercised to determine where, how, and at what price that waste was to be disposed of.

20  
21            We will argue that where, as in this case, a City continues by contract with a solid waste  
22 collection company to retain rights it had even before otherwise ceding to the Commission  
23 jurisdiction over the activities of that company, RCW 81.77.020 precludes the Commission from  
24 exercising the jurisdiction which was ceded so as to usurp or subvert the contractual rights which  
25 the City retained for itself. If (as we expect) Commission Staff argues that RCW 81.77.020 is an  
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1 “all-or-nothing” proposition--i.e., that a City under RCW 81.77.020 either cedes complete  
2 authority over a solid waste collection company’s activities (including decisions concerning  
3 disposal) to the Commission or it cedes none at all--then we will argue that the City, by failing to  
4 cede complete authority over SSC’s activities to the Commission, by Staff’s own argument did not  
5 effectively cede any jurisdiction over SSC to the Commission.<sup>1</sup>

7           These arguments cannot effectively be made unless Recomp is able to refer to the historical  
8 contractual background relevant to them. To deny Recomp the right to have facts considered  
9 which are relevant to the arguments it offers would be to deny Recomp the right to have the  
10 arguments themselves fully and fairly considered. As the authorities cited above make clear,  
11 Recomp is entitled to present and have considered any evidence which reasonably tends to establish  
12 its theory of the case.  
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15           (2) *Are the disposal charges which SSC is obligated to incur in the performance of its*  
16 *obligations under its contract with the City ones which the Commission is obliged by RCW*  
17 *81.77.160 to incorporate into SSC’s base for collection rates?*  
18

19           RCW 81.77.160(2) requires the Commission, in fixing and altering rates collected by a  
20 solid waste collection company regulated by the Commission, to “include in the base for the  
21 collection rates . . . [a]ll known and measurable costs related to implementation of the approved  
22 county or city comprehensive solid waste management plan.”  
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26 <sup>1</sup> Staff, we suspect, will contend that an attempt by a city only partially to “opt out” under RCW 81.77.020 is  
27 ineffective. We disagree; but if the contention were to be made and accepted, it must follow that a city’s attempt only  
28 partially to “opt in”--which is what occurred in this case--is similarly ineffective.

1 As the history set forth in the Respondents' Statement indicates, the 1990 Comprehensive  
2 Solid Waste Management Plan - Whatcom County, approved by the DOE pursuant to Chapter  
3 70.95 RCW, calls for continuation of "the existing solid waste collection service structure." The  
4 "structure" referenced in the plan is the one reflected by the history which the Respondents have  
5 proffered, which historically has been and remains one under which the City has assumed  
6 responsibility for residential collection service and for both residential collection and non-  
7 residential solid waste disposal (contracting out those assumed responsibilities to others, namely,  
8 SSC and Recomp), while leaving to the Commission the regulation of rates for non-residential  
9 collection service. We will argue that the disposal costs which SSC incurs in fulfilling its  
10 obligations under its collection agreement with the City--which was in existence at the time the  
11 current comprehensive plan was approved--are ones necessarily related to the implementation of  
12 the plan provision calling for retention of the structure of which that agreement was, and remains,  
13 an essential part. Being costs which are "known" and "measurable" (under any definition of those  
14 terms), they must be included under RCW 81.77.020 in the rate SSC is permitted to charge.

15 The history which has been provided is one which provides context and meaning to the  
16 1990 Plan's requirement that the "the existing solid waste collection service structure" in  
17 Bellingham be continued. It is, therefore, relevant to this issue.

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(3) *Would a rate which includes the disposal costs which SSC is required by contract to incur be one which is "fair, just, reasonable and sufficient"?*

Even if the disposal fees which SSC is required to incur by its contract with the City were not ones which the Commission is required by RCW 81.77.160 to permit SSC to include as a part

1 of its rate, they must be considered “a normal operating expense of the solid waste collection  
2 company” and must be included in SSC’s rate base to the extent necessary to provide SSC with a  
3 rate which is “fair, just, reasonable and sufficient.” RCW 81.28.010.  
4

5 The Commission has never sought by rule to establish hard and fast rules by which it is to  
6 be determined whether a proposed rate is “fair, just, reasonable and sufficient.”<sup>2</sup> It has  
7 (reasonably, we believe) left the concept of what is “fair, just, reasonable and sufficient” to be  
8 determined case-by-case, based upon *all* of the various facts and circumstances which may be  
9 germane to “fairness,” “justice,” “reasonableness” and “sufficiency.”  
10

11 The history set forth in the Respondents’ Statement--which explains how SSC came to be  
12 the collection company within the City, how SSC came to be obligated to deliver the waste it  
13 collects there to Recomp, how the Commission became involved in the regulation of SSC, how the  
14 City goes about fulfilling the responsibility which it has assumed for solid waste disposal and the  
15 relationship of its contracts with SSC and Recomp to the fulfillment of those responsibilities, how  
16 the Commission historically has dealt with requests to pass through contractually-mandated  
17 disposal costs, and how the Commission has handled the current situation with SSC--bears upon  
18 the fairness, justice, reasonableness and sufficiency of a rate incorporating the disposal charges  
19 which SSC is obligated by its contract with the City to incur. Indeed, we submit that the principal  
20 reason why the Petitioner does not wish to have that history considered is because it so plainly  
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25 <sup>2</sup> Although we respectfully submit, and will argue, that the purpose behind the statutory requirement of a rate which is  
26 “sufficient” is obvious, namely, to assure that rates set by the Commission provide solid waste collection companies  
27 with revenues sufficient to cover their necessary costs of doing business. The disposal charges which SSC pays to  
28 Recomp are not costs which SSC may elect either to incur or avoid--they are costs which SSC is (and for many years  
has been) *obliged* to incur. A rate which would deprive SSC of revenues sufficient to cover such unavoidable costs is,  
we submit, not a “sufficient” rate.

1 suggests how manifestly *unfair*, *unjust* and *unreasonable* it would be to deprive SSC of a rate  
2 which allows it include in its base the full extent of the disposal costs which SSC is obligated by its  
3 contract with the City to incur.  
4

5 (5) *Should the Commission be estopped from refusing to permit SSC to include in the base*  
6 *for its collection rates the disposal charges which it is obligated by its contract with the City to pay*  
7 *to Recomp?*  
8

9 Estoppel is assertable against the state in regulatory matters, where it is necessary to  
10 prevent a manifest injustice and the exercise of governmental powers will not be impaired.  
11 Kramarevcky v. Department of Social and Health Services, 64 Wn.App. 14, 822 P.2d 1227  
12 (1992), *reconsideration denied, affirmed after review granted*, 122 Wn.2d 738, 863 P.2d 535  
13 (1993). The history of the Commission's actions in dealing with the contractual relationships  
14 which SSC has had with the City are relevant to the respondents' contention that the Commission  
15 should be estopped to prohibit SSC from including in its base the charges it is obliged to incur in  
16 the fulfillment of its contract with the City, and should be estopped from compelling SSC to take  
17 action with respect to drop boxes which would put SSC in a "damned-if-you-do-and-damned-if-  
18 you-don't" position.  
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21 2.2. The Communications To Mr. Nikula When He Was With The Commission  
22 Referenced In The Respondents' Statement Were Not Intended To Be Confidential And Therefore  
23 Are Not Subject To Attorney-Client Privilege.

24 The attorney-client privilege is designed to enable lawyers and clients freely to  
25 communicate with each other with respect to matters pertaining to the attorneys' representation of  
26 the client, by generally protecting from disclosure and admission into evidence *confidential*  
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1 communications between them. Given the purpose of the rule, the privilege applies only to those  
2 communications which are meant to be kept confidential:

3  
4 It is the essence of the [attorney-client] privilege that it is limited to those  
5 communications which the client either expressly made confidential or which he  
6 could reasonably assume under the circumstances would be understood by the  
7 attorney as so intended.

8 1 McCormick On Evidence, *supra*, § 91. The mere fact that a communication is between lawyer  
9 and client does not make it privileged; rather, it is privileged only if the matters communicated  
10 were intended to be kept confidential. *Id.*; ); Ramsey v. Mading, 36 Wn.2d 303, 311-312, 217  
11 P.2d 1041 (1950).

12 Thus, it consistently has been held that where the matters communicated by a lawyer to the  
13 client, or by the client to the lawyer, are ones which are expected to be re-communicated by either  
14 of them to third parties, the communication is not subject to the privilege. *Id.*; U.S. v. Tellier,  
15 255 F.2d 441, 447 (2nd Cir. 1958) (attorney's advice to client is not privileged where it was  
16 expected that the advice would be communicated to third parties); Green v. Fuller, 159 Wash. 691,  
17 695, 294 Pac. 1037 (1930) (communication from client to lawyer not privileged where it is  
18 expected that the lawyer will relay it to others or make public the matters communicated). See,  
19 similarly, State v. Sullivan, 60 Wn.2d 214, 217-18, 373 P.2d 474 (1962).

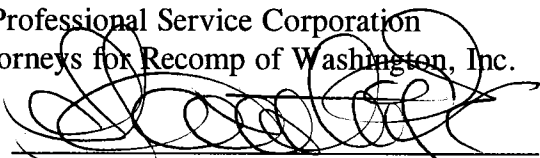
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21  
22 In this case, Mr. Nikula, while employed in a regulatory capacity by the Commission, and  
23 in connection with a matter involving the same ultimate question which is before the Commission  
24 in this proceeding, went to his superior and the Attorney General to determine whether or not he  
25 was correct in the position he was then taking, which was that SSC was not entitled to pass through  
26 the charges it incurred to Recomp by fulfilling the provisions of its contract with the City which  
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1 require it to deliver all waste, both residential and non-residential, to Recomp's facility. He was  
2 advised that the Commission was required to permit such charges to be built into SSC's base.

3  
4 Under no conceivable stretch of the imagination could that advice be said to have been  
5 intended to be kept confidential. The idea that Mr. Nikula would be given such advice with the  
6 intention that he keep it to himself is silly. The reason he sought and was given advice was so that  
7 he might in turn properly communicate the Commission's position to SSC. No privilege attaches  
8 to such a communication.

9  
10 DATED this 27<sup>th</sup> day of September, 1997.

11  
12 KARR TUTTLE CAMPBELL,  
13 A Professional Service Corporation  
14 Attorneys for Recomp of Washington, Inc.

15  
16 By:   
17 James L. Austin, Jr., WSBA #2786

18  
19 CERTIFICATE OF SERVICE

20  
21 I hereby certify that I have this day served the foregoing document upon all parties of  
22 record in this proceeding, by telecopy as permitted by prior determination of the Administrative  
23 Law Judge.

24  
25 DATED at Seattle, Washington, this 29th day of September, 1997.

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27   
28 James L. Austin, Jr.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

	)
	) Docket No. TG-971167
	)
	) STATEMENT OF FACTS
In the Matter of the Petition of Recycling and	) AND EXHIBIT LIST
Disposal Systems, Inc. for a Declaratory	)
Order	)
	)
_____	)

The parties to this proceeding submit the following Statement of Facts and Exhibit List:

STATEMENT OF FACTS

The following facts and circumstances are accepted in lieu of, and in substitution for, testimonial or documentary evidence:

1. At least as long ago as 1951, the City of Bellingham ("City") contracted with City Sanitary Service (Sanitary Service Company's predecessor in interest) for the collection of residential and commercial solid waste within the City. The agreement included a provision for rates for collection of both types of waste. The agreement was for ten years and also required operation and maintenance of a sanitary landfill on a site furnished by the City.
2. In 1959, the City and City Sanitary Service renewed their agreement for collection of both residential and commercial waste. Both this and the predecessor agreement allowed the City, upon one year's notice, to take over collection and disposal of all solid waste. The contract term was seven years.
3. In 1965, the City expanded the site for the sanitary landfill, by agreement with Georgia-Pacific Corporation, to be used for "disposal of all wastes collected in the City of Bellingham."

1 4. In 1966, the City and Sanitary Service Company ("SSC") renewed the agreement once again  
2 in a brief two-page contract. The agreement was limited to residential collection, but the disposal site  
3 was still to be operated by SSC. The term of the agreement was five years.  
4

5 5. In 1971, the City extended the existing contract for two years.

6 6. In 1973, the City by contract extended the agreement until such time as the existing disposal  
7 site could no longer be used, or, if the City found a new disposal site, until July 1974 -- whichever  
8 event came first.  
9

10 7. Then, in 1974, the City entered into an agreement with SSC and Wilder Construction  
11 Company ("Wilder")-- the predecessor in interest of Thermal Reduction Company ("TRC"), which in  
12 1990 changed its name to Recomp of Washington, Inc. ("Recomp"). Wilder and the partnership  
13 thereby formed jointly agreed not only to institute and operate "a complete collection and disposal  
14 service for all residential solid waste in the City of Bellingham and to furnish all transportation  
15 facilities and related services required therefor," but also to provide "a site for the disposal of  
16 commercial solid waste generated within the city as well as a place suitable for the disposition of  
17 stumps, demolition material and similar debris." Additionally, the City agreed to purchase and have  
18 constructed on the Wilder site six 12 1/2-ton incinerator modules., to be operated for the City by  
19 Wilder. The term of the contract was fifteen years.  
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22 8. At all times relevant hereto, both residential and commercial solid waste collected within the  
23 City has been delivered to a disposal facility specified by the City.  
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1 9. In conjunction with its 1974 agreement with SSC and Wilder, the City adopted an ordinance  
2 setting rates for residential garbage collection and restricting collection of solid waste from residences  
3 (and certain apartments) to the company having a collection contract with the City.  
4

5 10. Since 1974, collection rates for residential solid waste within the City have been determined  
6 and adjusted annually in accordance with provisions of the contracts to which the City and SSC have  
7 been parties. Rate adjustments in each case are initially reviewed by the City's Department of Public  
8 Works and then presented to the Bellingham City Council, which generally adopts them as an  
9 ordinance. Since 1974, the City on at least eleven occasions has applied the formula for residential  
10 collection rate adjustment contained in its agreements with SSC so as to adjust SSC's rates.  
11

12 11. Since 1974 at least, collection rates for commercial solid waste collected by SSC within the  
13 City have been determined by the Commission.  
14

15 12. Since 1974, the City has contracted out to Wilder and its successor in interest, Recomp,  
16 disposal service for all solid waste (both residential and commercial) generated within the City.  
17 Disposal charges for all City solid waste during this period have been established and adjusted in  
18 accordance with the terms of those contracts. Each of the disposal and collection agreements  
19 referenced in the paragraphs above were executed in the name of the City by the mayor. As a city of  
20 the first class in Washington and pursuant to Bellingham's Charter, the mayor is authorized to act on  
21 administrative matters on behalf of the City. The City administration nevertheless has submitted all  
22 disposal contracts with Wilder and Recomp to the City Council for its approval before the mayor has  
23 signed them.  
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1 13. In 1982, the City entered into separate agreements with the parties. As to Recomp the parties  
2 agreed, among other things, that the City would designate which commercial haulers could use the  
3 facility, and that the contract was restricted to typical residential and commercial solid waste. The  
4 agreement with SSC made certain rate adjustments, and it also provided as follows:  
5

6 2. DISPOSAL AT THERMAL REDUCTION FACILITY: For the term of  
7 this agreement, it shall be the obligation of the Company to exclusively use the  
8 Thermal Reduction disposal facility for disposal of all the refuse and solid waste it  
9 collects within its Bellingham/Whatcom County service area....all industrial and  
10 commercial wastes collected within the City of Bellingham and Whatcom County  
11 which is acceptable to Thermal Reduction for incineration....

12 Section 4 of the 1982 agreement, after dealing with adjustments to be made in the SSC's rate for  
13 residential collection, states that following notification to SSC by the City of a disposal rate change:

14 It shall be the obligation of the Company to seek rate adjustment as necessary for its other  
15 services with the Washington Utilities and Transportation Commission. The City agrees to  
16 assist the Company with its petition for increases if requested.

17 14. A 1984 modification to the agreement with SSC also contained the above provisions.

18 15. In July 1985, the separate agreements which the City had with SSC and Recomp were  
19 amended by a single document to which all three of them were parties. Among other things, the 1985  
20 amendments specified the price which SSC was to pay Recomp for Recomp's services and which  
21 SSC in turn was permitted to collect from the City, required Recomp to accept and process all of the  
22 City's incinerable solid waste (both residential and commercial); extended the term of the 1982  
23 Disposal Agreement until May 1, 1996; conveyed title to the City-owned incineration equipment at  
24 Recomp's facility to Recomp but gave the City the option to purchase Recomp's facility; eliminated  
25 any liability by the City on account of the diversion from the waste stream of any source-separated  
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1 household or commercial waste; and required any business replacing SSC as the collector "of the  
2 City's solid waste stream" to be added as a party to the parties' agreement.

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4 16. At the time the foregoing amendments were made, Recomp's facility provided only incineration  
5 service; Recomp in 1989-90 added to its facility a transfer station, where solid waste is dumped from  
6 collection vehicles and transferred by Recomp into containers for long-haul to landfill.

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8 17. In October 1985, SSC and the City extended their 1982 agreement until 1989. The recitals to  
9 this contract extension described the 1985 City/Recomp agreement as "a long term disposal  
10 arrangement for the City's residential and commercial refuse." Additionally, the disposal site  
11 destination for "all refuse and solid waste the Company collects within the City of Bellingham"  
12 continued to be Recomp, unless the City directed otherwise.

13  
14 18. In 1989, the City and SSC entered into another contract for collection of solid waste for a  
15 term of ten (10) years, terminating on December 31, 1999. Among other things, the contract  
16 requires SSC to provide the City with complete collection service for all residential solid waste and  
17 specifies the means by which the rate to be charged by SSC for collection of residential waste is to  
18 be established and adjusted. The contract between the City and SSC includes as Section 5.1 a  
19 provision stating:  
20

21           The City shall select and direct [SSC] to a site(s) for disposal for all solid waste  
22           collected by the Contractor in the City of Bellingham.

23 The contract includes a provision acknowledging that SSC's rates "for non-residential solid waste  
24 collected in the City . . . are under the jurisdiction of the Washington Utilities and Transportation  
25 Commission."  
26

1 19. The Commission has set rates for collection of commercial solid waste within the City since  
2 1961. The Commission has had knowledge of the contracts by which the City has established a  
3 system for managing solid waste generated within its boundaries. There is evidence at least since  
4 1979 that the Commission has in all rate filings made by SSC permitted SSC to include in its base  
5 the disposal charges incurred by SSC in delivering to Recomp commercial solid waste collected by  
6 SSC within the City.  
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9 20. In a review of a rate filing by SSC sometime around 1982, Mr. Ed Nikula was the revenue  
10 specialist at the Commission responsible for reviewing SSC's rate request. During the audit, Mr.  
11 Nikula took the position that the nonregulated City of Bellingham residential customers should  
12 absorb the difference between the higher disposal charges at the City-designated facility and the  
13 lower disposal charges at another available site; and the rates for the regulated commercial  
14 customers should include only the lower disposal charges. In other words, Mr. Nikula believed  
15 there was a difference under the contract between commercial and residential customers, and that  
16 the Commission was not bound to pass-through disposal charges at the City-designated facility to  
17 commercial rates. Mr. Nikula discussed his proposed adjustments with his supervisor and a  
18 member of the Attorney's General staff assigned to the Commission. Both the supervisor and the  
19 Assistant Attorney General informed Mr. Nikula that the Commission was required to pass-through  
20 the rate at the City-designated facility for commercial rates. However, after consulting both his  
21 supervisor and the Commission's legal counsel, it was Mr. Nikula's understanding that the  
22 Commission's position was that the Commission was required to pass through the disposal charges  
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1 for commercial solid waste incurred by SSC to the City-designated facility, and such charges were  
2 included for rate-setting purposes in SSC's base.

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4 21. The City and Whatcom County in 1989 entered into an interlocal agreement to fulfill the  
5 City's obligations under Chapter 70.95 RCW for adoption of a local solid waste management plan.  
6 That Interlocal Agreement, as amended in 1991, specifically provided that rights and obligations  
7 conferred by that agreement upon the County (including the obligation to adopt a solid waste "flow  
8 control" ordinance) were not to supersede or interfere with the City's right to administer, interpret  
9 and enforce the provisions of the City's contractual agreements with Recomp and SSC. At the time  
10 the Interlocal Agreement was signed, and since that time, the City has been financially involved in  
11 improvements to the Recomp facility and other remedial environmental measures, and has made  
12 available to its citizens educational programs, moderate and hazardous waste disposal facilities, and a  
13 site for delivery of source-separated yard waste.  
14  
15

16 22. In May 1990, the State of Washington Department of Ecology approved the 1990  
17 Comprehensive Solid Waste Management Plan Update - Whatcom County (the "1990 Plan") which  
18 had been submitted by Whatcom County and incorporated cities within that county, including the  
19 City of Bellingham. Chapter 6 of the 1990 Plan, dealing with collection, states that "[i]n the City  
20 of Bellingham, collection service has long been provided through private contracting," and  
21 included as a recommendation the continuation of "the existing solid waste collection service  
22 structure in both the incorporated and unincorporated areas of Whatcom County." The 1990 Plan  
23 is still in effect today.  
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1 23. In 1993, the City and Recomp further amended their 1982 agreement, executing an  
2 Amended And Restated Solid Waste Disposal Agreement dated December 22, 1993. By that  
3 document, the City exercised its option to extend the parties' agreement through April 30, 2006;  
4 substituted in place of the adjustable disposal fee which had been provided for by the 1989  
5 amendments a fixed disposal fee \$100.00 per ton (which included a component valued at an initial  
6 \$6.58 per ton to cover costs of landfilling ash from the incineration of residential and commercial  
7 City waste which Recomp was required to store in a permitted temporary ash storage facility on its  
8 property at a time when there was no landfill capable of accepting that ash); required Recomp as  
9 part of the services for which that fixed price was charged to provide processing for all "Clean  
10 Green" yard waste delivered to Recomp from the City's Lakeway yard waste center (which has  
11 accepted and continues to accept yard waste from both homeowners and businesses); put a cap on  
12 the tonnage of medical waste which Recomp could accept from others and incinerate; eliminated  
13 the City's option to purchase Recomp's facility. The 1993 amendments made it clear that the City  
14 is required "by ordinance, contract or other effective means" to cause all solid waste generated  
15 within the City (including both residential and commercial) to be delivered exclusively to  
16 Recomp's facility.  
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21 24. The City and Recomp have just recently further amended their contract. The disposal rate at  
22 the Recomp facility for the balance of the contract (until 2006) will now be \$69.50/ton. To this will  
23 be added a \$6.84 charge for Department of Ecology-mandated removal of incinerator ash for which  
24 the City is responsible. Recomp will continue to accept yard waste material at a \$65.00/ton rate,  
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1 unless the City decides to dispose of this material itself or contracts with another less expensive  
2 disposal facility.

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4 25. The \$6.84 per ton of solid waste delivered to Recomp pursuant to its contract with the City  
5 was intended to provide Recomp with funds sufficient to fulfill Recomp's obligation under that  
6 contract to remove incinerator ash which Recomp has stored in a temporary ash storage facility  
7 which Recomp constructed pursuant to its agreement with the City. Recomp is required both by its  
8 agreement with the City, and by separate agreement with the DOE, over time to remove and  
9 permanently dispose of the ash which it stored for the City in that temporary facility.

10  
11 26. The \$69.50/ton disposal fee provided for by the amendments to the City-Recomp contract  
12 in September 1997 is consistent with disposal fees charged for similar service by other privately  
13 owned and operated solid waste handling facilities in the Puget Sound region, taking into account  
14 relative costs of transportation to available landfills. The amendments establishing that reduced  
15 disposal fee were unanimously approved by the Bellingham City Council on September 8, 1997  
16 following a review of Recomp's financial records (including records reflecting Recomp's operating  
17 costs) by an independent certified public accountant hired by the City.

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19 27. As of September 9, 1997, the date on which Recomp and the City agreed to a new disposal  
20 price of \$69.50 per ton for all City waste delivered to Recomp's facility, all collected non-City  
21 waste within Whatcom County (both residential and commercial) was being delivered by solid  
22 waste collection companies to RDS, which was charging them a price of \$71.00 per ton.

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24 28. In the spring of 1997, RDS began soliciting waste from commercial drop box customers  
25 serviced by SSC. A number of commercial drop box customers used forms provided to them by  
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1 RDS and directed SSC to deliver their waste to RDS. RDS offered to provide disposal service for  
2 solid waste in commercial drop boxes at a price of \$65.00 per ton, and committed to maintain that  
3 price for at least a year, if the offeree would commit for at least a year to instruct SSC to deliver  
4 such drop boxes to RDS.  
5

6 29. SSC sought input informally from City staff, who relayed to SSC their opinion that SSC  
7 was obligated to deliver all waste generated in the City, including drop box waste, to the City-  
8 designated facility. Therefore, City staff was concerned that SSC would be in default of its  
9 contract with the City if it were to deliver to RDS waste collected from drop box customers who  
10 requested that it do so.  
11

12 30. SSC sought input informally from Commission staff, who relayed to SSC their opinion that  
13 SSC was not obligated to deliver commercial waste to the City-designated facility. Staff took the  
14 position that the contract between SSC and the City was for residential waste only.  
15

16 31. While the City and Recomp were in the process of negotiating amendments to their  
17 contract, however, Recomp provided the City with written notice requesting that the City defer  
18 transmittal to SSC of any written demand that SSC cease delivering solid waste from commercial  
19 drop box customers to RDS. Between March 7, 1997 and September 10, 1997, over twenty drop  
20 box customers in the City directed SSC to deliver their waste to RDS, which SSC has done. There  
21 is nothing in any agreement to which SSC is a party which requires SSC to deliver drop boxes  
22 which it collects within the City to disposal facilities specified by those to whom it provides drop  
23 box collection service.  
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1 32. At a meeting attended by the City and SSC at the Attorney General's offices in Seattle,  
2 Washington on May 7, 1997, the Secretary of the Commission, with staff present, indicated that if  
3 the City and Recomp were to amend their agreement to provide for a market rate, and the City  
4 directed SSC to take all waste to Recomp, the Commission would probably not take action against  
5 SSC if SSC thereafter were to resume delivery to Recomp of the drop boxes in question. The  
6 Secretary also suggested that the City could address the issue of historical costs (disposal of ash in  
7 the temporary ash storage facility) by means of a separate assessment or tax on the collection of all  
8 solid waste, so as to have no effect on disposal charges, rather than adding such costs to the  
9 disposal charges of the City's designated disposal facility.

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12 33. Following the approval by the City Council and execution by the City Mayor of the  
13 amendments to the contract between Bellingham and Recomp, in a letter dated September 10,  
14 1997, the City instructed SSC that it was to deliver all waste collected in the City, including drop  
15 box waste, to Recomp. (See letter from John M. Garner attached as Exhibit 11).

16  
17 34. In a recent letter, Gene Eckhardt, Assistant Director of Solid Waste for the Commission,  
18 informed SSC of staff's position: "Staff believes Sanitary Service must deliver drop box waste to  
19 RDS if the customer instructs Sanitary Service to deliver the waste to RDS."

20  
21 35. If SSC fails to resume delivery of all commercial waste to Recomp, it faces the possibility  
22 that the City may declare it to be in default under its contract with the City. Section 17.2 of the  
23 contract between the City and SSC provides that:

24  
25 Upon receipt by the Contractor [SSC] of [a] declaration of default, the Contractor agrees  
26 that it will discontinue the work hereunder, whereupon the surety on the bond [which SSC  
27 must provide] may, within ten (10) days of such declaration of default, assume the work  
28 that the Director of Public Works has ordered discontinued, and proceed to perform the

1 same at its own cost and/or the City may proceed against what other forms of financial  
2 assistance has been approved in lieu of a surety bond.

3 Section 17.4 goes on to provide that if the surety declines to take over SSC's business, then " the  
4 City shall have the right to take possession of and to use any or all of the vehicles and materials  
5 used by the Contractor in the performance of this Agreement, and to procure other vehicles and  
6 equipment necessary for completion of this Agreement, and to charge the cost of such items to the  
7 Contractor."  
8 Contractor."

9 36. The City does not have an ordinance that directs solid waste to a designated disposal  
10 facility.  
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### 12 LIST OF EXHIBITS

13  
14 In addition to the foregoing statement of facts, the following documents are included in the  
15 record as evidence to be considered by the Commission in rendering its decision in this  
16 proceeding:  
17

18 EXHIBIT 1: Contract For Residential Refuse Collection And Disposal dated as of April  
19 16, 1974 executed by the City of Bellingham, Wilder Construction Company, Inc. and Sanitary  
20 Service Company.  
21

22 EXHIBIT 2: Agreement To Provide Solid Waste Disposal Facility dated May 10, 1982  
23 executed by the City of Bellingham and Thermal Reduction Co., Inc.

24 EXHIBIT 3: Modification To Residential Refuse Collection Contract" dated June 14, 1982  
25 executed by the City of Bellingham and Sanitary Service Company.  
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1 EXHIBIT 4: Amendment To Agreement To Provide Solid Waste Disposal Facility dated  
2 October 4, 1983 executed by executed by the City of Bellingham and Thermal Reduction Co., Inc.

3 EXHIBIT 5: Third Amendment To Agreement To Provide Solid Waste Disposal Facilities  
4 dated July 9, 1985 executed by the City of Bellingham, Thermal Reduction Co., Inc. and Sanitary  
5 Service Company.  
6

7 EXHIBIT 6: Contract For Residential Refuse Collection dated October 31, 1985 executed  
8 by the City of Bellingham and Sanitary Service Company.  
9

10 EXHIBIT 7: Residential Solid Waste And Curbside Collection Of Recyclables Agreement  
11 dated February 15, 1989 executed by the City of Bellingham and Sanitary Service Company.  
12

13 EXHIBIT 8: Environmental Quality Surcharge Contract Agreement dated June 5, 1989  
14 executed by the City of Bellingham and Thermal Reduction Company, Inc.

15 EXHIBIT 9: Amended And Restated Solid Waste Disposal Agreement dated December 22,  
16 1993 executed by the City of Bellingham and Recomp of Washington, Inc. (formerly known as  
17 Thermal Reduction Company, Inc.).  
18

19 EXHIBIT 10: 1997 Amendments To Amended And Restated Solid Waste Disposal  
20 Agreement dated September 9, 1997 executed by the City of Bellingham and Recomp of  
21 Washington, Inc.  
22

23 EXHIBIT 11: Letter dated September 10, 1997 from John M. Garner, P.E., City of  
24 Bellingham Public Works Director, to Sanitary Service Company, Inc.

25 EXHIBIT 12: Undated from Gene Eckhardt of the State of Washington Utilities and  
26 Transportation Commission to Paul Razore of Sanitary Service Company, with carbon copy to Jack  
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1 Garner of the City of Bellingham, received on September 15, 1997.

2 EXHIBIT 13: Title 9.12 of the Bellingham Municipal Code (BMC 9.12.010-9.12.080).

3 EXHIBIT 14: 1990 Comprehensive Solid Waste Management Plan Update Whatcom  
4 County Solid Waste - Whatcom County, Washington (title page and Chapters 6 and 7 (entitled  
5 "Collection" and "Transfer"))).

6  
7 EXHIBIT 15: Letter dated May 3, 1990 from Julie Sellick of the State of Washington  
8 Department of Ecology to Paul Rushing, Public Works Director of Whatcom County.

9 EXHIBIT 16: Sample of agreements used by Recycling and Disposal Services, Inc. with  
10 persons within the City of Bellingham to whom Sanitary Service Company provides drop box  
11 collection service.  
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13  
14 In addition, any party may submit, as attachments to the brief that party files with the  
15 Commission in this case, any statutes, regulations, Bellingham ordinances or Commission guidance  
16 documents which the party considers to be relevant. However, no other documentary evidence  
17 will be admitted or considered by the Commission unless otherwise ordered by the Administrative  
18 Law Judge following prior notice and an opportunity on the part of all parties to be heard with  
19 respect to the admissibility of the item(s) and with respect to any supplementation of the above  
20 Statement of Facts and/or further documentary evidence which a party wishes to have considered if  
21 the Administrative Law Judge were to admit the item(s) in question into evidence.  
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