

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant

v.

WASTE MANAGEMENT OF
WASHINGTON, INC., d/b/a WASTE
MANAGEMENT – NORTHWEST,

Respondent.

.....
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant

v.

WASTE MANAGEMENT OF
WASHINGTON, INC, d/b/a WASTE
MANAGEMENT – SNO-KING,

Respondent.

.....
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

WASTE MANAGEMENT OF
WASHINGTON, INC., d/b/a WASTE
MANAGEMENT – SOUTH SOUND,
WASTE MANAGEMENT OF SEATTLE,

Respondent.

DOCKETS TG-101220, TG-101221
and TG-101222 (consolidated)

COMMISSION STAFF ANSWER
TO PETITION FOR
ADMINISTRATIVE REVIEW BY
WASTE MANAGEMENT OF
WASHINGTON OF ORDER 09

1 Waste Management’s Petition for Administrative Review of Order 09 relies on hypothetical facts, goes beyond the issues in this case, and seeks an improper advisory opinion.¹ The Washington Utilities and Transportation Commission (“Commission”) should reject Waste Management’s arguments, and should adopt the Initial Order (Order 09) as a final order, with one exception. The Commission should delete Paragraph 41 (Ordering Paragraph (2)) and permit Waste Management to file new tariffs in accordance with the process authorized by Orders 06 and 08 previously entered in these dockets.

I. ARGUMENT

A. Waste Management Seeks an Improper Advisory Opinion.

2 Waste Management’s Petition for Administrative Review of Order 09 presents interesting philosophical questions, but they are not issues in this case. Order 09 answered a narrow question, framed as follows in the Second Prehearing Conference Order:²

SCOPE OF ISSUES. The Commission must determine whether the recycling plans Waste Management has submitted demonstrate that the revenues the Company retains will be used to increase recycling as required under RCW 81.77.185. The parties having previously agreed to be bound by the Commission’s decision in Dockets TG-101542, TG-101545 & TG-101548 (consolidated), the primary, if not sole, issue in this proceeding is whether using a portion of the recycling revenues to provide Waste Management with a rate of return on its expenditures under the plans is a “use[] to increase recycling” within the meaning of the statute. The Commission expects the parties to address this issue and to raise any other issues only as necessary to enable the Commission to determine whether the plans make the requisite demonstration.

3 Order 09 answered that question “no” because Waste Management failed to meet its

¹ As used herein, the term “Waste Management” means all three respondents companies, collectively, in these consolidated dockets.

² *In re Waste Management of Washington, Inc., d/b/a Waste Management-Northwest, G-237*, Docket TG-101220/*In re Waste Management of Washington, Inc., d/b/a Waste Management-Sno-King, G-237*, Docket TG-101221/*In re Waste Management of Washington, Inc., d/b/a Waste Management-South Sound and Waste Management of Seattle, G-237*, Docket TG-101222, [Order 07](#) ¶ 5 (June 7, 2011).

burden of proof under RCW 81.77.185 to demonstrate “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.”³ Order 09 did not say that profit can never be an element in a recycling plan. Nor did Order 09 say that any other element in Waste Management’s 2010-11 recycling plans failed to demonstrate how the revenues will be used to increase recycling. It decided only that the profit element in the particular plans that Waste Management submitted *in this case* did not demonstrate how the revenues will be used to increase recycling under RCW 81.77.185. Order 09 decided a specific question based on “the circumstances presented.”⁴

4 Waste Management now asks the Commission to go beyond that specific question, and to “articulate policies . . . identifying the circumstances and criteria by which a private company performing under a budget-based Revenue Sharing Agreement (‘RSA’) entered into with its partner Counties can be rewarded financially.”⁵

5 This is an adjudicative proceeding. Administrative “[a]djudication is the *applying* of policy” to specific facts.⁶ It resembles what courts do.⁷ In its petition, Waste Management seeks an advisory opinion on theoretical policy questions unrelated to the specific facts of

³ Dockets TG-101220/TG-101221/TG-101222, [Order 09](#) ¶ 34 (Aug. 26, 2011); *see id.* ¶¶ 30, 38, 40(b).

⁴ Dockets TG-101220/TG-101221/TG-101222, [Order 09](#) ¶ 16 (Aug. 26, 2011); *see id.* at 10 n.13.

⁵ Dockets TG-101220/TG-101221/TG-101222, [Petition for Administrative Review by Waste Management of Washington of Order 09](#) ¶¶ 1, 2 (Sept. 15, 2011).

⁶ William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 789 (1989) (emphasis in original); *see id.* at 805; *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 902, 64 P.3d 606, 614 (2003) (policies of general applicability should be adopted through rule-making procedures; rejecting argument that UTC should have used adjudication rather than rule making).

⁷ Andersen, 64 Wash. L. Rev. at 789, 805.

this case. Washington courts do not issue advisory opinions.⁸ Nor does the Commission issue advisory opinions in adjudicative proceedings.⁹ It should decline to do so in this one, and should reject Waste Management’s petition for administrative review.

6 Waste Management poses a factual context, but it is not the one in this case. According to Waste Management, “in the context of the programs in King and Snohomish Counties, this Petition presents the issue of whether a regulated company may retain a percentage of recycling revenues as a financial reward for successfully performing under a revenue-sharing agreement.”¹⁰ Waste Management argues it “is only entitled to the revenue if it actually accomplishes the program activities and invests capital as required under the RSAs.”¹¹ The problem with that argument is that the 2010-11 Revenue Sharing Agreements do not say that. Here is what the King County agreement actually says:

If all program components specified in this plan are achieved, and if the County is satisfied with the progress WM has made toward achieving numerical goals, the County agrees to provide a written recommendation to the WUTC that WM will retain 50% of commodity values, for the September 2010 – August 2011 period. If the Data Reporting requirement of this Agreement is not met the parties agree that WM will retain no more than 25% of the total commodity values during this period and a revenue sharing agreement for September 2011 – August 2012 will not be signed until all required data is submitted.¹²

7 As Order 09 correctly observes, the Revenue Sharing Agreements in this case

⁸ *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920, 927 (1994). *Accord United States v. Washington*, 759 F.2d 1353, 1356-57 (9th Cir. 1985) (*en banc*) (court should not declare legal rules without a factual context).

⁹ See RCW 34.05.240(1)(b); WAC 480-07-930(1)(a).

¹⁰ Dockets TG-101220/TG-101221/TG-101222, [Petition for Administrative Review by Waste Management of Washington of Order 09](#) ¶ 4 (Sept. 15, 2011).

¹¹ Dockets TG-101220/TG-101221/TG-101222, [Petition for Administrative Review by Waste Management of Washington of Order 09](#) ¶ 30 (Sept. 15, 2011); *see id.* ¶ 31.

¹² Docket TG-101221, [Waste Management Recycling and Commodity Revenue Sharing Plan for King County, September 1, 2010 – August 31, 2011](#) at 6 (filed Nov. 1, 2010); Docket TG-101222, [Waste Management Recycling and Commodity Revenue Sharing Plan for King County, September 1, 2010 – August 31, 2011](#) at 6 (filed Nov. 1, 2010). The language in the Snohomish County agreement is very similar. Docket TG-101220, [Waste Management Recycling and Commodity Revenue Sharing Plan for Snohomish County, September 1, 2010 – August 31, 2011](#) at 9 (filed Nov. 1, 2010).

“include no express condition that the Company is entitled to eight percent of the retained revenues only if it complies with the plans.”¹³ They do not tie financial reward to successful performance. The issue Waste Management identifies is a hypothetical one not supported by the facts.

8 The Commission should reject Waste Management’s arguments, and should adopt the Initial Order as a final order, with one exception described in the following section.¹⁴

B. The Commission Should Delete Paragraph 41 of the Initial Order.

9 Footnote 3 of Waste Management’s petition observes that Paragraph 41 (Ordering Paragraph (2)) of Order 09 overlooks the Partial Settlement Agreement that the Commission approved on February 28, 2011. Commission Staff agrees.

10 On November 1, 2010, Waste Management submitted three categories of items in these dockets: (1) Recycling plans for 2010-11, under which Waste Management proposed to keep as profit some revenue it expected to receive from the sale of recyclable materials; (2) a Revenue Sharing Report for July 2009-August 2010, under which Waste Management proposed to keep as profit some revenue it had received from the sale of recyclable materials during that period and to return remaining unspent revenues to customers through commodity credits; and (3) revised tariffs showing the commodity credits proposed to be in effect from December 1, 2010, through August 31, 2011. The Commission suspended the tariffs on November 24, 2010, in Orders 02 in these dockets.¹⁵

11 Waste Management and Commission Staff negotiated a partial settlement to address

¹³ Dockets TG-101220/TG-101221/TG-101222, [Order 09](#) ¶ 25 (Aug. 26, 2011).

¹⁴ See WAC 480-07-825(9).

¹⁵ Docket TG-101220, [Order 02](#) (Wash. Utils. & Transp. Comm’n, Nov. 24, 2010); Docket TG-101221, [Order 02](#) (Wash. Utils. & Transp. Comm’n, Nov. 24, 2010); Docket TG-101222, [Order 02](#) (Wash. Utils. & Transp. Comm’n, Nov. 24, 2010). These dockets were consolidated in [Order 03](#), issued December 1, 2010.

the unspent revenues from the 2009-10 plan period. Waste Management agreed to pass all of the unspent revenues from 2009-10 to customers through commodity credits and not retain any as profit. The Commission approved the partial settlement on February 28, 2011, and lifted the suspension. Waste Management submitted revised tariffs, which were put into effect with an expiration date of August 31, 2011.¹⁶

12 In July 2011, Waste Management filed a petition to extend the expiration date of its tariffs until November 30, 2011, to allow time for the completion of this proceeding. The Commission granted the extension.¹⁷ Should the Commission issue a final order requiring Waste Management to pass to residential customers revenues that Waste Management has retained as profit during the 2010-11 recycling plan period, the mechanism for accomplishing that is an adjustment to recycling commodity credits when Waste Management files its next recycling commodity credit price adjustment under WAC 480-70-351(2). Because Waste Management's tariffs are currently set to expire on November 30, 2011, the statutory deadline for Waste Management to file its next commodity credit price adjustment is October 15, 2011.¹⁸

13 In its final order, the Commission should delete Paragraph 41 (Ordering Paragraph (2)) of Order 09 and allow the process set up under Orders 06 and 08 to proceed.

¹⁶ Dockets TG-101220/TG-101221/TG-101222, [Order 06](#) ¶¶ 1, 25, 33 (Feb. 28, 2011), [Notice of Finality](#) (Feb. 28, 2011), [Correction Notice](#) (March 1, 2011).

¹⁷ Dockets TG-101220/TG-101221/TG-101222, [Order 08](#) (July 14, 2011), [Notice of Finality](#) (July 14, 2011).

¹⁸ See [RCW 81.28.050](#); Dockets TG-101220/TG-101221/TG-101222, [Waste Management Petition for Leave to Extend Revenue Sharing Programs and Recycling Commodity Credit Price Adjustments](#) ¶ 17 (July 13, 2011); Dockets TG-101220/TG-101221/TG-101222, [Petition for Administrative Review by Waste Management of Washington of Order 09](#) at 19 n.3 (Sept. 15, 2011).

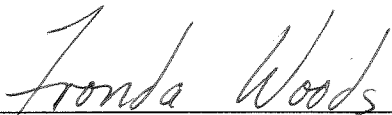
II. CONCLUSION

14 The Initial Order (Order 09) correctly concluded that the recycling plans that Waste Management submitted in this case do not demonstrate that the proposed profit under the plan budget is a “use[] to increase recycling” within the meaning of RCW 81.77.185. Waste Management has identified no error in that conclusion, and instead asks the Commission to issue an advisory opinion based on facts not in the record. The Commission should reject the arguments in Waste Management’s Petition for Administrative Review of Order 09, delete Paragraph 41 of Order 09, and adopt the remainder of Order 09 as its own final order.

DATED this 23rd day of September, 2011.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General of Washington


FRONDA WOODS, WSBA #18728
Assistant Attorney General
Counsel for Washington Utilities
and Transportation Commission Staff