

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of:

Case No. TG-101548

Petition by American Disposal Company, Inc.
Requesting Authority to Retain Fifty Percent of
the Revenue Received From the Sale of
Recyclable Materials Collected In Residential
Recycling Service,

PETITION FOR RECONSIDERATION OF
PORTION OF ORDER NO. 1 REQUIRING
REVENUES NOT SPENT DURING PRIOR
PLAN PERIOD AND CURRENT PLAN
PERIOD BE CARRIED FORWARD TO
FOLLOWING PLAN PERIOD

Petitioner.

I. PARTIES

1 Petitioner's name and address are as follows:

American Disposal Company, Inc.
PO Box 399
Puyallup, WA 98371

2 Petitioner's attorney's name and address are as follows:

David W. Wiley
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101

II. STATUTES AND REGULATIONS AT ISSUE IN PETITION

3 RCW 34.05.470, RCW 81.77.030(5), RCW 81.77.030(6), RCW 81.77.185, WAC 480-70-351,
WAC 480-07-850.

III. PRELIMINARY STATEMENT

4 Pursuant to WAC 480-07-850 and RCW 34.05.470, Petitioner American Disposal Company,
Inc. ("American", "Petitioner" or "Company") hereby asks and respectfully requests that the
Washington Utilities and Transportation Commission ("WUTC" or "Commission"),
reconsider portions of Order No. 1 in this proceeding.

5 Order No. 1 was issued and served October 29, 2010, pursuant to a filing by American on
September 15, 2010 that sought to revise tariff No. 25 and, for the upcoming year, to retain

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50% of the revenue American receives from the sale of the recyclables it collects, transports and processes for regulated customers as more detailedly described in paragraphs 1, 2, 3, 4 and 5 of Order No. 1. In the Order, particularly the “Discussion” Section in paragraph 10 and more specifically Order Section 4, Paragraph 20, the Commission required . . .

[r]evenues retained by American Disposal Company, Inc., not spent during the previous plan period are to be carried over into the next year, and revenues from this plan period that are not spent are to be carried over to the following year, unless the Commission orders some other treatment.

6 It is this directive that American now respectfully asks that the Commission reconsider in recognizing that RCW 81.77.185 and the recent legislation increasing the revenue share percentage potential for haulers always envisioned, and indeed encouraged, solid waste collection companies to enhance and transform residential and multi-family recycling streams by providing the “carrot” of prospect of retention of some of the revenue share as reward for executing and implementing the innovative plans the legislation envisioned.¹

IV. PIERCE COUNTY’S ROLE IN REVIEWING AND APPROVING THE COMPANY RECYCLING PLAN AND THE CARRYOVER RETENTION ISSUE

7 As has been the pattern in previous years, Pierce County evaluated and duly certified the recycling program submitted by American as being consistent with the local comprehensive solid waste management plan by letter dated September 16, 2010, and provided an attached table demonstrating that the Company complied with the revenue share conditions in the approved Company Recycling Plan also submitted on that date by the Company pursuant to

¹ Chairman Goltz’s comments near the end of the Open Meeting on October 28, 2010, while acknowledging skepticism about whether RCW 81.77.185 provided “room” for some performance payment under the law, also held out the prospect “. . . of some sort of petition from the company to basically trigger the language that says unless the Commission orders some other treatment, and we have some process devoted to that.”

Upon reflection, Petitioner believes that now is an appropriate time to reconsider that element of the statute and not simply “kick over” this issue onto coming years, where the issue of retention carryover could only grow in prospective monetary significance and complication.

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RCW 81.77.185. Additionally, Steve Wamback, Pierce County Solid Waste Administrator, in a letter of October 27, 2010, recommended approval by the Commission of the past year 30% revenue share retention as well as endorsing American eligibility to retain up to 50% of revenue generated from the sale of commodities in the upcoming rate period, noting “the local government’s primary responsibility for solid waste management” in the development and implementation of aggressive and effective waste reduction and source separation strategies under RCW 70.95.010(6)(c). *See*, “Pierce County Comment on TG-10154 and TG-101548” dated October 27, 2010. Mr. Wamback also appeared in person during the October 28, 2010 Open Meeting to testify on this matter.

8 In that October 27 letter, the County advocated to the Commission a consultative approach with it for the upcoming rate period on the requested 50% maximum retention increment and alluded to RCW 81.77.185’s . . . “creation of financial incentives to optimize recycling systems” and contested the rollover of any revenue retention. This favorable recommendation for Petitioner, particularly as to the 30% County-approved retention for the 2009-2010 interval, squarely raises the “retention carryover” premise addressed by the Commission in Paragraph 20, Section 4 of its Order. That Order also suggests that the issue of permitting “some other treatment” for the 2009-2010 period is now joined, and that the issue of unspent carryover may be appropriately resolved at present, an issue which raises policy and secondary accounting treatment questions in isolation, and, in the aggregate, strategically focuses on the issue of what “revenue share” was originally intended to accomplish.

V. LEGAL ANALYSIS

A. Standards for Reconsideration

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9 Reconsidering an Order from a hearing that is convened under the Open Public Meetings Act as opposed to a full adjudicative proceeding under RCW 34.05.410 *et. seq.*, would seem significantly more feasible for the agency. Because here there is no formal administrative record, no sworn testimonial evidence and cross-examination or an initial order subject to review, and because of the highly compressed time intervals, Order No. 1 is the product of a relatively expedited and limited deliberative process. In seeking reconsideration, Petitioner is technically asking that the Commission “correct” its Order No. 1 to no longer require carryover of the approved revenue share retention increment in the 2009-2010 reporting year or otherwise restrict carryovers in future years. While Petitioner submits that even under the more limited standards of an adjudicative proceeding order, under reconsideration is generally appropriate, i.e. “. . . only where there is a showing that correction of the alleged errors would materially affect the outcome,” *In Re Kolean and Stewart d/b/a Olympic Transport*, App. P-72389 at 9, Order M.V. No. 140273 (Sept. 1989), granting reconsideration here to consider the question of revenue retention carryover and potentially to have “some process directed to that” (Fn. No. 1, *above*) seems fully consistent with that stricter standard and with the public interest. It is also consistent with the Commission’s role in articulating the jurisdictional parameters of both the counties and WUTC in authorizing revenue share retention by solid waste collection companies pursuant to RCW 81.77.030(5), 81.77.030(6) as well as RCW 81.77.185.

B. Legal Authorities Supporting Current Resolution of “Carry Forward” of Portion of Retention

1. Legislative and Regulatory Treatments of Revenue Share

10 Revenue sharing arrangements are a statutory compliment to the Commission’s deferred commodity credit regulatory program for residential and multifamily recycling rates

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established in the 1990's and set forth at WAC 480-70-351. In essence, and largely to deal with the fluctuations in secondary markets, the Commission established a program wherein participating haulers account for the sale of commodities collected from customers by reviewing the prices received for sales over the last recent 12 month period and estimating what revenues will be received over the prospective twelve months and then debiting or crediting the result of the "true up" computation on a per-month basis on the regulated customers' invoices over the next year.

11 In 2002, the counterpart to that deferred accounting treatment mechanism was created by the State Legislature largely as a result of work done by a "Recycling Assessment Panel" under the auspices of the Department of Ecology at the direction of the Senate Committee on Natural Resources, Energy & Water. That task force was created to address a diminution in statewide recycling rates in the late 1990's which had received substantial governmental attention ever since the passage of the landmark Waste Not Washington Act of 1989 (ESHB 1671). The recommendations from the Panel members, who represented a broad range of industry, non-profit, and local and state government officials presented specific alternatives to increase and improve recycling waste streams and to open up additional markets for the generated materials.

12 The enactment in 2002 of RCW 81.77.185², was the result. As the WUTC staff report the following year entitled "Recycling Revenue Sharing: A Staff Summary of the Implementation of RCW 81.77.185," noted: "[t]he legislation creates opportunities and incentives for regulated companies to experiment with offering different recycling programs." *WUTC Staff Report* at 4.

² 2002 c 299 § 6.

13 And as the WUTC staff report also identified, Section Six of SHB 2308, in codifying RCW 81.77.185, noted two discrete conditions to a regulated solid waste company's retention of up to 30% (now in 2010, 50%) of the money received from the sale of recyclable materials after it filed a plan with the Commission. The first condition was that the plan be certified by the appropriate local governmental authority and second, that it demonstrate how the revenues would be used to increase recycling. *WUTC Staff Report* at 5. As the WUTC staff there went on to suggest, "[t]he concept behind this model of revenue sharing is that if solid waste carriers are allowed to keep more recycling revenue, they will have greater financial interest in encouraging their customers to recycle more and in finding buyers for the recyclable commodities."³ [Emphasis added]. *WUTC Staff Report* at 5.

2. County and Commission Roles and Jurisdictional Intersection

14 As noted at the Open Meeting, Petitioner believes that under RCW 81.77.185, the role of the certifying county in developing, monitoring and approving creation, direction and evaluation of the various recycling programs is primary. In collaboration with the regulated hauler, the incubation of such innovation is squarely placed at the local level. The revenue share statute formula simply provides "[t]he Commission shall allow solid waste companies collecting recyclable materials to retain up to fifty (formerly thirty) percent of the revenues paid to the companies," provided the submitted plans meets the conditions, (local government certification and demonstration of how the revenues would be used to increase recycling) noted above.

³ And indeed, as witnessed by the Pierce and Mason County recycling programs' experience and the testimony of Steve Wamback and David Baker on October 28, 2010, the programs implemented an active partnership between regulated solid waste collection companies and local government and have successfully achieved materially increased recycling participation rates and transformed many recycling products and waste streams in this decade.

15 Indeed, the Commission itself has long noted the intersection of regulatory jurisdictions in the evolving recyclable commodities field. In Order MV No. 133753, *In Re: Sunshine Disposal, Inc. d/b/a Valley Transfer and Storage, App. – E19104* (Apr. 1986), the Commission observed the important interplay of municipal and state governments and acknowledged the right of a city (also implicitly, a county) to “define its watershed.” As the Commission there opined:

[i]n any event, the Commission notes that its authority is permissive and non-supercessive. In other words, a permit issued by the Commission cannot authorize an activity which is otherwise made unlawful by a valid exercise of the police power. Assuming that the City . . . has the authority lawfully to define its waste stream . . . under Chapter 70.95 RCW . . . The Commission supports the actions of the City regarding its responsibilities under Chapter 70.95 and anticipates no conflict of jurisdiction.

Order MV No. 133753 at 7, 8.

16 The local-state regulatory partnership in the achievement of RCW 81.77.185’s goals has since its inception been the hallmark of the legislation, and Petitioner respectfully believes that removes revenue share retention from traditional ratemaking analysis by the Commission and explains why “carryover” of revenue retention seems so at odds with the concept of incentivizing haulers to enthusiastically embrace optimization of solid waste streams and recycling systems.

3. Enhancements to and Motivations for Recyclables “Optimization”

17 The prospect of incentivizing haulers to increase recycling participation rates and create and transform innovative secondary markets appears to have been the undeniable reward in the legislation from the start. Indeed, the Recycling Assessment Panel, in its February, 2000 Report (Revitalizing Recycling in Washington, February 2000, Washington Department of Ecology, Publication No. 00-07-009), characterized the existing commodity credit system:

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[i]n the current system, there is no incentive for recyclers to increase the quantity or quality of materials collected, seek out the highest end use for any particular commodity, or to attempt to sell their material at the very highest market prices, since 100 percent of the revenue from the sale of the material is passed back to the customers. Creating a revenue-sharing program where recyclers are allowed to retain a certain portion of the revenue received from the sale of the recyclables would encourage recyclers to collect more, and to seek out the best and highest end uses for recyclables collected in curbside recycling collection programs in regulated areas of the state. [Emphasis added].

Ecology Publication No. 00-007-009, at 12.

18 In its subsequent 2003 Implementation Report, the WUTC staff summarized the various tasks it perceived for the Commission as a result of the 2002 legislation and highlighted in its fourth task . . .

- 4) Staff believe that the revenue kept by the Company under an approved Company Recycling Plan would be removed from the net revenue on the income statement for regulatory purposes. The statute allows companies to retain up to thirty percent of the revenue from the sale of recyclable commodities. Staff believes this means that even if a company must pay to get rid of a certain commodity, that amount will not be offset against the calculation of how much money the company gets to retain.

WUTC Staff Report at 10.

19 In noting both the antecedent impetus for the revenue sharing concept in RCW 81.77.185 and the 2010 legislative revision to increase the retention percentage to a maximum of 50% (*See* 2010 c § 3), it seems pertinent to focus on the revenue share retention increment and isolate it as a current, unresolved accounting line item which is effectively assigned a “limbo status” by Order No. 1.

20 In so focusing, it also seems worthwhile to note the operational and financial impacts of ever-increasing successes of waste diversion/recycling enhancement programs. As Mr.

Eddie Westmoreland remarked at the October 28, 2010 Open Meeting, the natural result of

the successes of these recycling enhancement programs' acceleration in the first decade of this century, is the continuing decline and potential obsolescence of a majority of volume of the traditional solid waste stream, and a consequent reduction in revenues associated with that conventional solid waste market for participants. In short, without any performance premium or incentive, why would investor-owned solid waste collection companies continue to hone and expand recycling market and product transformation programs without, in turn, being allowed to retain some of the proceeds generated by sales of collected materials in that evolving marketplace which the companies' investments have assisted in stimulating?

4. Revenue Share Retention Disposition

21 Yet Order No. 1 appears to portend a lack of resolution of that essential question by freezing the unspent line item retention on the current year revenue share income statement schedule and decreeing a carryover for an unspecified number of years.⁴ Implicit in that directive also is the prospect of offset from the following years' revenue share by the retention "carry forward/carry over" monies which Petitioner believes is contrary to the intent of RCW 81.77.185 and the antecedent Recycling Assessment Panel Report whose recommendations expressly envisioned the original 30/70 statutory revenue share formula.

22 Additionally, the retention carryover increment is *uniquely* the product of market vagaries which any participating solid waste collection company cannot "clairvoyantly" pinpoint as it estimates its revenues from the secondary sales marketplace a year in advance as it must do

⁴ WAC 480-70-351, conversely, similarly requires that any revenue share retention be currently resolved in the context of the "true up" that calibrates the amount of credits/debits to regulated recycling customers in the year to come. To simply highlight a retention carryover for an unspecified interval is in effect to establish a "suspense" account line item for regulated solid waste companies whose future accounting treatment is unknown. That amount could also be subjectively diminished by future criteria of expense reasonableness standards that clearly raise due process concerns for haulers who, if previously certified by counties in the current year, would be subject to retroactive accounting adjustments based on presently unidentifiable standards that neither the haulers nor their local governments are aware of.

under WAC 480-70-351(2). While the deferred commodity credit mechanism partially addresses that fluidity with its annual “true-up,” again, the legislative revenue share program is the complimentary flip side of that mechanism. In other words, the total revenue share portion subject to retention is a *byproduct* of that prospective look ahead element, and the retention amount calculation any participating hauler experiences at the end of the year is completely dependent upon those market pricing factors. Thus, in years like 2008, with the secondary recyclable market suffering a severe, almost catastrophic downturn, most if not all regulated haulers would have experienced a shortfall in any retention, i.e. there would not have been any or, at best, only a negligible amount of any revenue share remaining.

23 While, again, that would then be factored into the deferred commodity credit “true up” in the year ahead through the recycling commodity credit adjustment, the point here is that the revenue share “retention proceeds” remaining or fully dissipated at the close of the reporting year, are impacted and ultimately controlled by those same market forces over which the affected solid waste collection company lacks control. Thus, to suggest any remaining retention amount not fortuitously spent in that time interval be “carried over” or otherwise offset revenue share retention for the coming year, not only exploits any fortuity in secondary market savings for the participating hauler, but also effectively precludes enjoyment of any benefit by the hauler in the revenue share retention proceeds. That “up to” 30% (or now 50%) retention is thus not any form of performance benefit/premium by a ruling which isolates and freezes unspent retention revenues. At best, the Commission’s Order treats that sum as potentially a “perpetual carryover,” essentially relegated merely to an asterisk on a future financial statement and hardly encourages the statutory optimization

of any prospective waste streams by the Petitioner, or likely, most other participating solid waste collection companies.

VI. CONCLUSION/PRAAYER FOR RELIEF

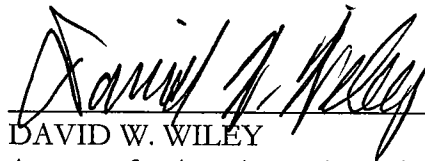
- 24 As argued above, and with additional revenue share requests by regulated solid waste collection companies related to American and American arising from previous tariff and commodity credit revisions now looming in early 2011, Petitioner believes it is wholly appropriate for the Commission to consider “alternative treatments and carryovers” for unspent revenues, now. As the Open Meetings of August 26 and October 28, 2010 have highlighted, there is now significant divergence on the accounting treatment of revenue share retention. The Open Meetings have also demonstrated the counties and participating haulers hold considerably contrasting interpretations to that of Commission staff as to the goals of the 2002 and 2010 legislation and RCW 81.77.185. Petitioner fundamentally understands the goal of the original legislation was to stimulate the active participation of regulated haulers in promoting, investing in, performing and transforming novel programs and results in improving not only basic recycling participation rates, but also in identifying additional markets and innovative end uses of collected recyclables. These goals were unquestionably articulated in the 2000 DOE Recycling Panel Assessment Report and even alluded to in the May, 2003 WUTC staff survey report on RCW 81.77.185.
- 25 With the increased retention share potential presented by the recent 2010 legislative amendment and the apparent growing uncertainty about how the perceived legislative objectives square with the Commission’s role in assessing county-certified recycling revenue share programs in the treatment of unspent retention in solid waste collection companies’

financial statements and in future program planning, regulatory resolution of this issue would seem undeniably timely.

26 Petitioner American Disposal Company, Inc., in asking the Commission to reconsider its ordering provision number four, paragraph 20 of Order No. 1, thus respectfully requests that the Commission do so, either by resolving this important issue in the context of its subsequent reconsideration here and authorizing Petitioner to retain unspent revenue in the current year, if any, and not require carryover in future year(s), or by ordering any further process it deems necessary to comprehensively and conclusively resolve this pivotal point in the statutory oversight of revenue retention recycling programs administered both by it and the counties.

Dated this 8th day of November, 2010.

Respectfully submitted,



DAVID W. WILEY

Attorney for American Disposal Company, Inc.

CERTIFICATE OF SERVICE

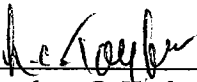
I hereby certify that on November 8, 2010, I caused to be served the original and 12 copies of the foregoing document to the following address via messenger to:

David Danner, Executive Director and Secretary
Policy and Legislative Issues
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And one copy via email and first class mail to:

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I certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to: records@utc.wa.gov.



Lyndsay C. Taylor