



March 31, 2011

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VIA EMAIL to WUTC RECORDS CENTER/  
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David Danner, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
Attention: Records Center  
P.O. Box 47250  
1300 S. Evergreen Park Dr. SW  
Olympia, WA 98504-7250

Re: Docket T-101661, In Re Notice of Inquiry/Written Response to "Staff Recommendation for Fuel Surcharges" of March 18, 2011; Comments of Waste Connections, Inc. Companies

Dear Mr. Danner:

On behalf of the Waste Connections, Inc. ("WCI") regulated solid waste entities in Washington: Murrey's Disposal, American Disposal, Harold LeMay Enterprises, Waste Connections of Washington, Mason County Garbage, Yakima Waste Systems, Island Disposal and Empire Disposal ("WCI Companies"), this is to provide some responses to the rather lengthy Staff commentary on a proposal on fuel surcharges and other topics addressed in the "Notice of Staff Recommendation" ("the Statement") of March 18.

A. Fuel Surcharge Mechanism

The position of the WCI Companies is unchanged on fuel surcharges since their initial September 29, 2010 letter. There, we essentially advocated retaining fuel surcharges as a mechanism available to the industry and the Staff to promptly, and for limited intervals, reflect the spiking of fuel prices in regulated rates. We briefly advocated that the Commission, in its discretion, "retain the mechanism for those haulers who meet current eligibility criteria and seek adjustments in rates caused by fuel costs escalation." We have also been consistent at stakeholder sessions since the matter was first noted for Open Meeting treatment in September, 2010 in that view, and the Staff's comments of March 18 do not persuade us to abandon support for the now relatively long-standing mechanism. Indeed, even more so than in the past fall, the present volatile and increasing pressure on fuel prices would seem to militate against jettisoning such a "tool," provided criteria that protect the public interest continue in place.<sup>1</sup> We also recognize as the Commission Staff has indicated, that the current methodology has

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<sup>1</sup> While we do not necessarily support the arbitrary "dead band" 1% floor alluded to by Staff, because changes to the fuel surcharge mechanism are not being proposed now but rather wholesale elimination is at issue, we will reserve comments on other elements of the methodology here.

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David Danner, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
Attention: Records Center  
March 31, 2011  
Page 2

allowed some isolated companies to avoid general rate increases for six or more years and do not support allowing fuel surcharges for companies that have not filed a general rate case for a reasonable number of years (which is likely in the three to five year range addressed by the Staff). We also recognize that the Commission Staff is concerned with external factors affecting operating costs and revenue margin and thus understand that using fuel surcharges as proxies or substitutes for general rate filings over protracted intervals are not appropriate.

While fuel surcharges are indeed applied uniformly to all rates, this has been the norm in the transportation industry, i.e., across-the-board fuel surcharges on airline tickets, federal express delivery charges and other sectors and activities of the transportation industry. The fact that fuel surcharges are uniform across all service levels does not seem particularly unfair nor is there an alternative rate design suggested by the Staff that would be as efficient or simple in application as the fuel surcharge mechanism historically used by the Commission.

The WCI Companies again see no need here to address some of the other more specific lengthy critiques about the fuel surcharge mechanism set forth by the Commission Staff in pages 4 through 10 of the Statement other than to again allude to the conceptual support for the surcharge mechanism as merely one alternative that seems appropriate for the Commission to have available, particularly at times of extreme volatility and spiking prices as have occurred over the past year.

B. Deferred Accounting

The WCI Companies are far more concerned with the new Staff proposal to substitute a deferred accounting mechanism for fuel costs in lieu of a fuel surcharge. In essence, the Staff proposal threatens to usher in an unprecedentedly complicated and unconventional treatment of a basic, ongoing and unavoidable expense faced by regulated solid waste collection companies. Moreover, the Staff's explanation, and description of both the deferred accounting mechanism for fuel and its implementation are complex, appear at times internally self-contradictory and, as will be argued below, underscore concerns about initiating such a material change in ratemaking methodology through the Open Meeting process.

The Staff's "default proposal" is to implement another deferred accounting mechanism similar to the mechanism for recyclable commodities which the Commission initially adopted by rule in 1996 in the Sanitary Service filing.<sup>2</sup> It subsequently implemented the mechanism incrementally for other solid

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<sup>2</sup> Docket TG-960419, *Order Authorizing Carrier to Institute a Deferred Accounting Mechanism for Multi-Family Recycling* (Apr. 1996).

David Danner, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
Attention: Records Center  
March 31, 2011  
Page 3

waste collection companies whose counties enacted service level ordinances for curbside residential recycling. The Commission ultimately adopted a rule, WAC 480-70-351(2), in 2001 which codified portions of the accounting treatment of those plans. Now the Staff reasons that to eliminate risk and to mitigate price volatility, it should implement an ostensibly optional<sup>3</sup> program by which fuel costs are recovered through a retrospective examination of fuel costs over a test period of six months to a year and then “trued up” through the deferred accounting mechanism to zero out any profit or loss to the hauler.

In ultimately reaching broad implementation of deferred accounting for fuel, Staff also proposes an interim measure labeled “temporary index fuel surcharge” at pages 11 and 12 and illustrated at Attachment C, which for the first time, provides for mandatory surcharge adjustments for decreases. It also redefines “Base Period Revenue” to mean either the last rate case or the most recent disposal fee rate case. “Base Fuel Cost” is no longer that currently defined by rule at WAC 480-70-346 as comprising the average actual cost from the company’s last general rate case that has been updated for the most recent twelve-month period, but now you must select “a twelve-month index average from six months previous, whichever is greater” according to the Staff recommendation.<sup>4</sup>

Aside from what appears to be (at best, “the fluid” and at worst, “the cumbersome”) nature of the temporary/transitional index surcharge, one can also question the end goal of the “transition.” Is

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<sup>3</sup> We say “ostensibly optional” because the Statement is less than clear on this point. While at page 2 of the submission the Staff says “[n]o company will be required to implement deferred accounting,” at page 11, they also say “. . . staff recommends that the Company not earn any profit on fuel expenses and the commission should remove fuel expense from the LG calculation of the Company’s revenue requirement, which includes profit, and add the fuel expense back to the revised calculated revenue requirement.” The latter appears to indicate that even if deferred accounting is not elected, the Staff wants to isolate and treat fuel differently than other routine expenses upon which a return is allowed in a general rate filing under the Lurito-Gallagher (“LG”) methodology. While admittedly we are not certain this is what the Staff actually proposes at page 11, this typifies some of the ambiguity contained in the Statement.

<sup>4</sup> In so doing, the Statement appears unilaterally to institute three “rule revisions” by way of the temporary index proposal. One, in the mandate of fuel surcharge adjustments for decreases, second, in their definition of “disposal fee rate cases” as an alternative for Base Period Revenue and third, in their redefinition of “Base Fuel Cost” implicitly revising WAC 480-70-346 to add a “twelve-month index average from six months previous whichever is greater” and to require that be used as “Base Fuel Costs” in the “temporary index fuel surcharge.” The WCI Companies question whether this alteration to an existing rule can be appropriately made through action by the Commission at an Open Meeting in the first place. (See, related discussion, below).

David Danner, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
Attention: Records Center  
March 31, 2011  
Page 4

deferred accounting for fuel even appropriate? While the Staff devotes significant space in its Statement refuting the opposition by Waste Management of Washington, Inc. (which after all is the only regulated hauler with any experience in utilizing the deferred accounting mechanism for fuel), the WCI Companies are unconvinced that fuel is as appropriate or susceptible to deferred accounting in the way secondary market resale of collected recyclables may be.

Without recounting here all the variables contrasting that secondary recyclables market with fuel, suffice it to say fuel is an essential, every day, indispensable cost of providing service to customers which is incurred and consumed in every mile of service rendered to all classes of customer by all solid waste collection companies. To exclude fuel as a recoverable expense and treat it disparately in a general rate filing as part of a "basket of costs" reasonably and prudently incurred by a regulated company seems, at a minimum, dubious.<sup>5</sup> Decreeing a disparate treatment for fuel because of its inherent riskiness and neutralizing any recovery "above the line," is a material change in ratemaking methodology warranting much more due process than a couple stakeholder sessions, a "Staff Statement," an abbreviated period for response by affected parties and adoption in an Open Meeting session less than four weeks after a formal position of the Staff is filed and circulated. The WCI Companies believe the full ramifications of such a dramatic change in treatment of fuel as an element of cost in the 50 plus years of separate economic regulation of the solid waste industry is not something that can be meaningfully assessed in this Docket and record to date.

### C. Procedural Status of Staff Recommendation

One of the more difficult issues posed by the Staff's lengthy Statement of March 18, 2011 is its characterization under the State Administrative Procedure Act, RCW 34.05 et seq. At this juncture, it appears that the Staff might argue this is a proposed "interpretive statement" under RCW 34.05.010(8), which the Commission Staff seeks to have the Commission adopt at an Open Meeting. The problem with that characterization or assumption is that it also aspirationally may be a "policy statement" pursuant to RCW 34.05.010(15), but also clearly has results of "general applicability" which is the

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<sup>5</sup> While fuel surcharge mechanisms unquestionably "single out" fuel as a special type of expense for recovery in rates, they are by their nature, temporal and expire on the basis of objective statistical formulae adopted by the Commission. Thus while Staff may be correct in concluding that fuel has, at least for the last decade or so by rule and action, been the subject of differing treatment, it has not been subject to retrospective true up nor exclusion as a normal cost component in the fashion deferred accounting would apparently require. This recommendation posits a "slippery slope" of expense recovery ratemaking methodology that the Staff's isolated critique of Lurito-Gallagher as a "black box" (which surprisingly appears at the top of page 3 of the Staff Recommendation) seems to endorse, and which once again, the Open Meeting process is not designed to address.

David Danner, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
Attention: Records Center  
March 31, 2011  
Page 5

classic definition of a "rule" by agencies. "Rules" are separately defined at RCW 34.05.010(16), in various ways, one of which is that it "... establishes, alters or revokes any procedure, practice or requirement relating to agency hearings" RCW 34.05.010(16)(b), [rates can be adopted through the hearing or the public meeting process]. A "rule" also "... establishes, alters or revokes any qualification or requirement relating to the enjoyment of privileges or benefits conferred by law" RCW 34.05.010(16)(c), [clearly, removal of the fuel surcharge and substitution of a deferred accounting mechanism "alters" the previous treatment of fuel as an expense in the regulated rate base].

It is also questionable whether the "Notice of Staff Recommendation" is a circumvention of the Governor's Executive Order 10-06 of November 17, 2010 which suspended "Non-Critical Rule Development and Adoption" in its provisions. The Statement appears to call into question whether the staff is seeking an "end around" Executive Order 10-06 in overlooking the "non-critical" nature of the proposal. It also may ignore the separate directive, "Implementation of Executive Order 10-06," suspending non-critical rule development and adoption issued to all agency directors by Kari Burrell at that time, by omitting the threshold consideration of whether this rule is "beneficial to or requested or supported by the regulated entities, local government or small business that it affects." Under Section 3(e) of that implementation directive, the WCI Companies further question whether staff has considered the strictures of Executive Order 10-06 and the above-cited Memorandum to Agency Directors and precisely whether their Statement, in implicitly arguing that a proposal of this significance can be adopted through the agency Open Meeting process, is now appropriate.

The WCI Companies ultimately believe instead this matter should be considered in the context of a rulemaking with far broader notice to and participation by stakeholders, or an adjudicative proceeding, pursuant to RCW 34.05.410. They also believe that due to the complexity and need for full examination of due process impacts, the Open Meeting process is inappropriate for consideration of an alternative ratemaking methodology in naturally limiting evidence and arguments through a more truncated Open Meeting consideration process.

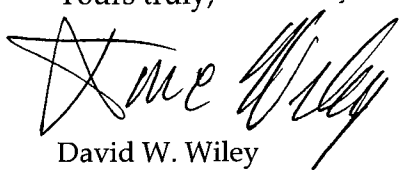
#### D. Conclusion

For all of the above reasons, pursuant to RCW 34.05.070 and WAC 480-07-940, the WCI Companies urge the Commission, should it be inclined to concur with the Staff's recommendation to eliminate the current fuel surcharge mechanism, to convert the Staff's "inquiry and/or interpretive statement" initiative into either a rulemaking or an adjudicative proceeding. While the WCI Companies recognize that RCW 34.05.070 speaks instead of conversion of "adjudicative or rulemaking proceedings" into other procedural forums, we believe the statute and the Commission's rule at WAC 480-07-940 broadly confer upon the Commission the discretion, upon application "by any person or upon its own motion"

David Danner, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
Attention: Records Center  
March 31, 2011  
Page 6

to analogously redesignate/restructure *this* proceeding. Again, for the reasons noted, the WCI Companies contend Docket T-101661 is uniquely susceptible to such conversion in the midst of a rulemaking moratorium. Due to the breadth and complexity of the proposal the Commission Staff describes in its March 18, 2011 Recommendation, if the Commission determines to advance the Staff proposal at this pivotal point, it should do so only in the context of a rulemaking or an adjudication based upon a reasoned conclusion that due process and present circumstances so warrant.

Yours truly,

A handwritten signature in black ink, appearing to read "David W. Wiley". The signature is stylized and written over a large, faint star-shaped watermark.

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cc: Waste Connections, Inc.