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April 25, 2018

Sent Via UTC Web Portal and Email

Washington Utilities and Transportation Commission
ATTN: Commission Secretary
P.O. Box 47250
Olympia, WA 98504-7250
Records@utc.wa.gov

Re: Contest to "Notice of Penalties" and Request for Hearing
Penalty Assessment: TG-180253

To the Secretary of the Utilities and Transportation Commission:

Our firm represents Harold LeMay Enterprises, Inc. ("LeMay") in the above-captioned matter. Please direct any and all communications concerning this matter to the undersigned. Pursuant to RCW 81.04.405, LeMay submits this Contest and Request for Hearing ("Contest") to the Washington Utilities and Transportation Commission's ("UTC") "Notice of Penalties" received by LeMay on April 11, 2018. For the reasons set forth below, and the attached documents, the UTC's Notice of Penalties must be rescinded. LeMay also requests a hearing before an administrative law judge to present evidence on the information below.

I. Background Summary

LeMay Enterprises Inc. has been providing recycling and refuse services to the Puget Sound region since 1942. LeMay takes pride in its excellent tradition of providing safe and effective recycling and refuse services. LeMay has fully cooperated with UTC audits and vehicle inspections, and it has promptly responded to UTC requests.

In this tradition of fully complying with the UTC, LeMay allowed five UTC inspectors to conduct an on-site inspection of 12 LeMay garbage trucks. Attachment A: Declaration of Larry Meany ("Meany Decl."), ¶3; Attachment B: Declaration of Donald Kenney ("Kenney Decl."), ¶3. One of the inspectors identified himself as a trainee. Meany Decl. ¶3. The garbage trucks were inspected on LeMay's private property after the trucks had returned to the yard. Meany Decl. ¶4.

The garbage trucks were inspected in LeMay's 7-acre paved yard. *Id.* The inspection took place before drivers conducted their post-trip safety inspection. Meany Decl. ¶4; Kenney Decl. ¶4.

While LeMay's trucks were parked in the yard, special investigator Sandi Yeomans inspected trucks driven by, among others, Ian Marsh and Nathan Molinek. Meany Decl. ¶5; Kenney Decl. ¶4. Mr. Marsh's truck was a rear-loader garbage truck (vehicle 1044). Kenney Decl. ¶4. Mr. Molinek's truck was an automated side-loader garbage truck (vehicle 3571). *Id.* Investigator Yeomans claimed that she saw paint worn off of the Pitman arm of Mr. Marsh's truck. Kenney Decl. ¶5. She said that she assumed that the paint was rubbing off of the Pitman arm due to the Pitman arm coming into contact with the front tire. *Id.* However, investigator Yeomans did not witness the Pitman arm come into contact with the front tire. In fact, she was not observed testing the turning radius at the time to determine whether the tire came into contact with the Pitman arm. *Id.* Instead, investigator Yeomans claimed there was a violation, and placed Mr. Marsh's truck out-of-service. *Id.*

Investigator Yeomans also inspected Mr. Molinek's truck. Meany Decl. ¶6; Kenney Decl. ¶6. During the inspection, she observed that the brake lights were not operational. LeMay mechanic Chris Twigg's concluded that the brake light fuse might have "popped" immediately prior to the inspection, causing the brake lights to no longer be operational. Meany Decl. ¶6. Before LeMay trucks are parked in the yard, they are required to drive over a large speed bump that could have "popped" the brake light fuse just before the inspection. *Id.* Moreover, this likely occurred just before the inspection because as part of the driver's pre-trip inspection, he is required to check to ensure the brake lights are operational. Kenney Decl. ¶6. There was no evidence cited by the driver that his brake lights were not functional. In any event, Mr. Twigg's immediately installed a new brake light fuse. Meany Decl. ¶6. The brakes lights on Mr. Molinek's truck became operational. *Id.* Despite this fact, investigator Yeomans placed Mr. Molinek's truck out-of-service even though the brake lights were immediately operational. Kenney Decl. ¶6.

As a result of the March 20, 2018 inspection, including the two out-of-service determinations, LeMay's Compliance Safety and Accountability ("CSA") score significantly increased. Meany Decl. ¶7. This increase in the CSA score will adversely impact LeMay's business operations. *Id.*

Following the inspection, UTC special investigator Wayne Gilbert commended LeMay employees for their conduct during the inspection. In an email entitled "Thank you!" to LeMay District General Manager Larry Meany, investigator Gilbert wrote that "[a]ll of your drivers and staff were very professional and we appreciate that type of support." Meany Decl. Exh. 1. Mr. Gilbert

also acknowledged that the March 20 inspection of LeMay’s garbage trucks “allow[ed] us to get the experience on looking at these vehicle types.” *Id.*

II. Analysis

The UTC’s Notice of Penalties is factually and legally deficient and must be rescinded. Under the UTC’s “Enforcement Policy” Docket A120061, penalties are not warranted in this case because the UTC’s out-of-service criteria have not been met and there were no violations.

A. The UTC erroneously reported the alleged out-of-service violations as “roadside inspections.”

Initially, LeMay notes that the inspections of Mr. Marsh’s and Mr. Molinek’s trucks were not conducted at a public “roadside.” Instead, the UTC conducted its inspection on LeMay’s private property in a 7-acre yard. Despite this fact, the Federal Motor Carrier Safety Administration’s (“FMCSA”) Safety Measurement System (“SMS”), a component of LeMay’s CSA score, lists the alleged violations at issue as “roadside” violations. Meany Decl. ¶9. This is erroneous and must be corrected immediately. This is critical because the trucks in question were not on-the-road operating at the time of the inspection.

B. Investigator Yeomans’ decision to place LeMay vehicles out-of-service was not supported by evidence.

Under Washington law, in order for the UTC to place a vehicle out-of-service, the alleged safety defects of the vehicle must be “identified in the *North American Uniform Out-of-Service Criteria*” published by the Commercial Vehicle Safety Alliance (“CVSA”). WAC 480-70-201(3). Washington has adopted the April 1, 2016 version of the *North American Uniform Out-of-Service Criteria*. WAC 480-70-999(1). Pursuant to Washington law, a “company must not operate any vehicle placed out-of-service until after proper repairs have been completed.” WAC 480-70-201(3).

Mr. Marsh’s truck did not meet the *North American Uniform Out-of-Service Criteria* when investigator Yeomans placed it out-of-service. Investigator Yeomans claimed that the Pitman arm was rubbing against the front tire of Mr. Marsh’s truck. Investigator Yeomans claimed this violated 49 C.F.R. §396.3(a)(1). Under this regulation, the *North American Uniform Out-of-Service Criteria* specifically provides that “[a]n out-of-service condition exists only if the tire can be made to contact another component at the time of the inspection.” *Id.*, p. 61 (emphasis added). Investigator Yeomans did not test to determine if the Pitman arm came into contact with the front tire of Mr. Marsh’s truck. Kenney Decl. ¶5. Instead, investigator Yeomans said she observed that some paint rubbed off the Pitman arm and assumed the paint was rubbing off from contact with the tire. Mr. Marsh’s truck did

not meet the out-of-service conditions under Washington law at the time investigator Yeomans placed the vehicle out-of-service. Assumptions and guesses don't meet the necessary legal standard.

Mr. Molinek's truck did not meet the *North American Uniform Out-of-Service Criteria* when investigator Yeomans placed it out-of-service. After it was observed that the brake lights on Mr. Molinek's truck were not operational, the fuse was immediately replaced. The brake lights were operational. Despite this fact, investigator Yeomans placed an out-of-service sticker on Mr. Molinek's truck after the brake lights were operational. At the time the out-of-service sticker was placed on the truck, the *North American Uniform Out-of-Service Criteria* were not met.

III. Conclusion

Based on the above, the UTC's "Notice of Penalties" must be rescinded. LeMay requests a hearing before an administrative law judge to present evidence in support of the information provided above.

Sincerely,



John M. Payne
Erik M. Laiho

Enclosures:

- Attachment A: Declaration of Larry Meany, Exhibits 1 and 2
- Attachment B: Declaration of Donald Kenney

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ATTACHMENT A

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

IN RE: HAROLD LEMAY ENTERPRISES, INC.	PENALTY ASSESSMENT TG-180253 DECLARATION OF LARRY MEANY
------------------------------------------------------------	------------------------------------------------------------------------------

I, Larry Meany, being over the age of 18 and having personal knowledge of the same, declare as follows:

1. I make this Declaration of my own personal knowledge.
2. I am currently employed as a District General Manager for LeMay Pierce County Refuse & LeMay Transportation Services ("LeMay"). I have been employed in an administrative and supervisory capacity at LeMay and its related companies since 2002. I am responsible for overseeing and managing LeMay operations at its various locations. One of my duties is to assist LeMay in responding to audits and inspections by the Washington State Utilities and Transportation Commission ("UTC").
3. On March 20, 2018 I was present when five UTC inspectors conducted an on-site inspection of 12 LeMay garbage trucks. One of the inspectors identified himself as a trainee.
4. The garbage trucks were inspected on LeMay's private property after the trucks had returned to the yard. The garbage trucks were inspected in LeMay's 7-acre paved yard. The inspection took place before drivers conducted their post-trip safety inspection.

5. While LeMay's trucks were parked in the yard, special investigator Sandi Yeomans inspected trucks driven by, among others, Ian Marsh and Nathan Molinek.

6. Investigator Yeomans also inspected Mr. Molinek's truck. LeMay mechanic Chris Twiggs concluded that the brake light fuse might have "popped" immediately prior to the inspection, causing the brake lights to no longer be operational. Before LeMay trucks are parked in the yard, they are required to drive over a large speed bump that could have "popped" the brake light fuse just before the inspection. Mr. Twiggs immediately installed a new brake light fuse. The brakes lights on Mr. Molinek's truck became operational.

7. As a result of the March 20, 2018 inspection, including the two out-of-service determinations, LeMay's Compliance Safety and Accountability ("CSA") score significantly increased. The increase in the CSA score will adversely impact LeMay's business operations.

8. On March 23, 2018, UTC special investigator Wayne Gilbert commended LeMay employees for their conduct during the inspection. A true and correct copy of this email is attached hereto as **Exhibit 1**.

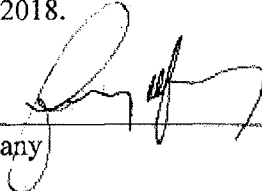
9. The Federal Motor Carrier Safety Administration's ("FMCSA") Safety Measurement System ("SMS"), a component of LeMay's CSA score, lists the alleged violations at issue as "roadside" violations.

10. I received the UTC's "Notice of Penalties" TG-180253 on April 11, 2018. I am submitting the form requested by the UTC. A true and correct copy of this signed form is attached hereto as **Exhibit 2**.

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I have read the foregoing 3 pages and declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington, this 25th day of April, 2018.



Larry Meany

EXHIBIT 1

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From: Gilbert, Wayne (UTC) [mailto:wayne.gilbert@utc.wa.gov]
Sent: Friday, March 23, 2018 9:22 AM
To: Larry Meany
Subject: Thank you!

Hello Larry,

Wanted to do one more follow-up to say thank you for allowing us to come down to your location and conduct vehicle inspections earlier this week. Your organization assisted us in conducting 12 CVSA Federal-level vehicle inspections on numerous solid waste vehicles along with allowing us to get the experience on looking at these vehicle types.

All of your drivers and staff were very professional and we appreciate that type of support.

We look forward to having this opportunity again as some point in the future.

Thank you for your support.

Wayne

Wayne Gilbert
Motor Carrier Safety Investigator
Washington Utilities & Transportation Commission
(360) 664-1232 (office)
(360) 481-2017 (cell)
Email: wayne.gilbert@utc.wa.gov
(360) 586-1150 (Fax)

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EXHIBIT 2

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Service Date: April 10, 2018

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

**NOTICE OF PENALTIES INCURRED AND DUE
FOR VIOLATIONS OF LAWS AND RULES**

**PENALTY ASSESSMENT: TG-180253
PENALTY AMOUNT: \$200**

HAROLD LEMAY ENTERPRISES, INC.
4111 192nd ST E
Tacoma, WA 98446

The Washington Utilities and Transportation Commission (Commission) believes that Harold LeMay Enterprises, Inc. (LeMay or Company) has committed violations of Washington Administrative Code (WAC) 480-70-201 Vehicle and Driver Safety Requirements, which adopts Title 49 Code of Federal Regulations (CFR) Part 396 – Inspection, Repair, and Maintenance, and Part 393 – Parts and Accessories Necessary for Safe Operation.

Revised Code of Washington (RCW) 81.04.405 allows penalties of one hundred dollars for each violation. In the case of an ongoing violation, every day's continuance is considered a separate and distinct violation.

In March 2018, Commission Motor Carrier Investigator Sandra Yeomans completed a vehicle inspection of two LeMay vehicles, numbers 1044 and 3571, during a destination check and documented the following violations:

- **One violation of Title 49 CFR Part 396.3(a)(1) – Inspection, repair, and maintenance – tires (general).** Commission staff (Staff) discovered a tire rubbing against the Pitman arm on the front left steering axle of vehicle 1044.
- **One violation of Title 49 CFR Part 393.11 – Lamps and reflective devices.** Staff discovered the brake lights on vehicle 3571 were inoperable.

The Commission considered the following factors in determining the appropriate penalties for these violations:

1. **How serious or harmful the violations is to the public.** The violations noted are serious and potentially harmful to the public. Companies that fail to maintain critical vehicle safety components such as tires and brake lights put the traveling public at risk. A poorly maintained vehicle presents serious safety concerns.
2. **Whether the violations were intentional.** Considerations include:
 - Whether the company ignored Staff's previous technical assistance; and
 - Whether there is clear evidence through documentation or other means that shows the company knew of and failed to correct the violations.

Staff has conducted several routine safety investigations of LeMay since January 1996, with the most recent safety investigation dating back to August 2011. The company

knew, or should have known about these requirements, however there is no evidence that the company disregarded Staff's previous technical assistance.

3. **Whether the company self-reported the violations.** The Company did not self-report the violations.
4. **Whether the company was cooperative and responsive.** The drivers were cooperative and responsive throughout the inspection.
5. **Whether the company promptly corrected the violations and remedied the impacts.** Staff placed both vehicles out of service and directed the Company to correct the violations. The Company corrected one violation upon discovery.
6. **The number of violations.** Staff identified two violation types, one occurrence on each vehicle, and placed the vehicles out of service.
7. **The number of customers affected.** The Company reported 6,634,546 miles traveled in 2016. A significant number of customers, as well as members of the traveling public, were potentially affected by these safety violations.
8. **The likelihood of recurrence.** The Commission does not know if the Company is likely to repeat these safety violations, however the drivers were cooperative with Staff during the inspection.
9. **The company's past performance regarding compliance, violations, and penalties.** The Company has no prior violations of these types.
10. **The company's existing compliance program.** Mr. Shawn Mandel (Vice President, Safety and Risk Management) is responsible for the carrier's safety and compliance program.
11. **The size of the company.** LeMay is a large company with 268 drivers operating in multiple counties of Washington. The Company reported \$75,659,299 in gross revenue for 2016.

The Commission's Enforcement Policy provides that some Commission requirements are so fundamental to safe operations that the Commission will issue mandatory penalties for each occurrence of a first-time violation.¹ The Commission generally will assess penalties per type of violation, rather than per occurrence, for first-time violations of those critical regulations that do not meet the requirements for mandatory penalties. The Commission will assess penalties for any equipment violation meeting the Federal Motor Carrier Safety Administration's "out-of-service" criteria and also for repeat violations of critical regulations found in future compliance investigations, including each occurrence of a repeat violation.

¹ Docket A-120061 – Enforcement Policy of the Washington Utilities & Transportation Commission – Section V.

The Commission has considered these factors and determined that it should penalize LeMay \$200 for violations of WAC 480-70-201 Vehicle and Driver Safety Requirements, which adopts Title 49 CFR Parts 393 and 396, calculated as follows:

- One violation of Title 49 CFR Part 396.3(a)(1) – Inspection, repair, and maintenance – tires (general) – tire rubbing against the Pitman arm on the front left steering axle.
- One violation of Title 49 CFR Part 393.11 – Lamps and reflective devices – brake lights inoperable.

This information, if proven at a hearing and not rebutted or explained, is sufficient to support the penalty assessment.

Your penalty is due and payable now. If you believe either or both of the violations did not occur, you may deny committing the violation(s) and contest the penalty assessment through evidence presented at a hearing or in writing. The Commission will grant a request for hearing only if material issues of law or fact concerning the violation(s) require consideration of evidence and resolution in a hearing. Any contest of the penalty assessment must include a written statement of the reasons supporting that contest. Failure to provide such a statement will result in denial of the contest.

If there is a reason for either or both of the violations that you believe should excuse you from the penalty, you may ask for mitigation (reduction) of this penalty through evidence presented at a hearing or in writing. The Commission will grant a request for hearing only if material issues of law or fact require consideration of evidence and resolution in a hearing. Any request for mitigation must include a written statement of the reasons supporting that request. Failure to provide such a statement will result in denial of the request. *See* RCW 81.04.405.

If you properly present your request for a hearing and the Commission grants that request, the Commission will review the evidence supporting your dispute of the violation or application for mitigation in a Brief Adjudicative Proceeding before an administrative law judge. The administrative law judge will consider the evidence and will notify you of his or her decision.

You must act within 15 days after receiving this notice to do one of the following:

- Pay the amount due.
- Contest the occurrence of the violation.
- Request mitigation to contest the amount of the penalty.

Please indicate your selection on the enclosed form and submit it electronically through the Commission's web portal **within FIFTEEN (15) days** after you receive this notice. If you are unable to use the web portal, you may submit it via email to records@utc.wa.gov. If you are unable to submit the form electronically, you may send a paper copy to the Washington Utilities and Transportation Commission, Post Office Box 47250, Olympia, Washington 98504-7250.

If you do not act within 15 days, the Commission may take additional enforcement action, including but not necessarily limited to suspending or revoking your certificate to provide

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PENALTY ASSESSMENT TG-180253

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regulated service, assessing additional penalties, or referring this matter to the Office of the Attorney General for collection.

DATED at Olympia, Washington, and effective April 10, 2018.

/s/ Rayne Pearson
RAYNE PEARSON
Director, Administrative Law Division

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
PENALTY ASSESSMENT TG-180253

PLEASE NOTE: You must complete and sign this document, and send it to the Commission within 15 days after you receive the penalty assessment. Use additional paper if needed. I have read and understand RCW 9A.72.020 (printed below), which states that making false statements under oath is a class B felony. I am over the age of 18, am competent to testify to the matters set forth below and I have personal knowledge of those matters. I hereby make, under oath, the following statements.

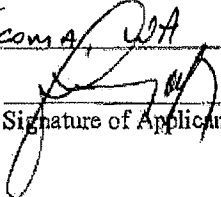
- 1. **Payment of penalty.** I admit that the violations occurred and enclose \$200 in payment of the penalty.
- 2. **Contest the violation.** I believe that the alleged violations did not occur for the reasons I describe below (if you do not include reasons supporting your contest here, your request will be denied): *See April 25, 2018 Contest to "Notice of Penalties" and Request for Hearing and Attached Declarations*
 - a) I ask for a hearing to present evidence on the information I provide above to an administrative law judge for a decision
 - OR b) I ask for a Commission decision based solely on the information I provide above.
- 3. **Application for mitigation.** I admit the violations, but I believe that the penalty should be reduced for the reasons set out below (if you do not include reasons supporting your application here, your request will be denied):
 - a) I ask for a hearing to present evidence on the information I provide above to an administrative law judge for a decision
 - OR b) I ask for a Commission decision based solely on the information I provide above.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing, including information I have presented on any attachments, is true and correct.

Dated: 04/25/18 [month/day/year], at TACOMA, WA [city, state]

HAROLD LARRY ENTERPRISES, INC.
Name of Respondent (company) - please print

LARRY MEANY


Signature of Applicant

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RCW 9A.72.020:

"Perjury in the first degree. (1) A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law. (2) Knowledge of the materiality of the statement is not an element of this crime, and the actor's mistaken belief that his statement was not material is not a defense to a prosecution under this section. (3) Perjury in the first degree is a class B felony."

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ATTACHMENT B

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

IN RE:	PENALTY ASSESSMENT TG-180253
HAROLD LEMAY ENTERPRISES, INC.	DECLARATION OF DONALD KENNEY

I, Donald Kenney, being over the age of 18 and having personal knowledge of the same, declare as follows:

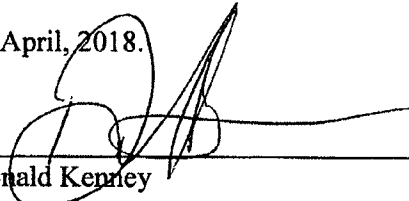
1. I make this Declaration of my own personal knowledge.
2. I am currently employed as a Maintenance Manager at LeMay Pierce County Refuse ("LeMay"). I have been employed by LeMay and its related companies since 2010. I am responsible for developing and implementing maintenance procedures and ensuring their implementation. One of my duties is to assist LeMay in responding to audits and inspections by the Washington State Utilities and Transportation Commission ("UTC").
3. On March 20, 2018 I was present when five UTC inspectors conducted an on-site inspection of 12 LeMay garbage trucks.
4. The inspection took place before drivers conducted their post-trip safety inspection. While LeMay's trucks were parked in the yard, special investigator Sandi Yeomans inspected trucks driven by, among others, Ian Marsh and Nathan Molinek. Mr. Marsh's truck was a rear-loader garbage truck (vehicle 1044). Mr. Molinek's truck was an automated side-loader garbage truck (vehicle 3571).

5. Investigator Yeomans claimed that she saw paint worn off of the Pitman arm of Mr. Marsh's truck. She said that the paint was rubbing off of the Pitman arm due to the Pitman arm coming into contact with the front tire. However, I did not witness investigator Yeomans observe the Pitman arm come into contact with the front tire. In fact, I did not observe her testing the turning radius at the time to determine whether the tire came into contact with the Pitman arm. Investigator Yeomans placed Mr. Marsh's truck out-of-service.

6. Investigator Yeomans also inspected Mr. Molinek's truck. As part of the driver's pre-trip inspection, he is required to check to ensure the brake lights are operational. The brake lights on Mr. Molinek's truck were briefly not operational, but this was remedied immediately. Despite this fact, Investigator Yeomans placed Mr. Molinek's truck out-of-service after the brake lights were operational.

I have read the foregoing 2 pages and declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington, this 25th day of April, 2018.



Donald Kenney