

February 23, 2012

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VIA EMAIL/ORIGINAL VIA FIRST CLASS MAIL

David Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
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Re: Docket No. TG-112162 – Comments of the WCI Companies (“Murrey’s Disposal, American Disposal, Mason County Garbage, Harold LeMay Enterprises, Inc. d/b/a Pierce County Refuse”)

Dear Mr. Danner:

On behalf of the above-referenced Waste Connections companies involved in current revenue share plans in Pierce and Mason Counties, please consider the below our response to the Commission’s “Notice of Opportunity to Comment” of January 13, 2012. These are intended as overview comments in response to the questions posed by the Commission and should not be considered exhaustive of substantive legal positions of the parties, particularly in light of the admonition of the Commission at footnote 2, page 1 of the Notice of Opportunity to Comment. And because these parties are currently involved in suspended plans pending final determination by the Commission, we will not address with specificity some of the questions included in the Commission’s comprehensive inquiry, including elaborating on quantifiable benchmarks for measuring performance or certain other analogous issues currently raised in the suspended proceeding, particularly such as the appropriateness of individual revenue share plan expenditures.

The Companies, however, welcome this opportunity to comment and believe that when the overall record in Docket No. TG-112162 is finally developed, a potentially useful interpretive policy statement under RCW 34.05.230 may well be the result. We thus provide the following, consistent with the format and sequencing included in the January 13, 2012 notice:

I. RECYCLING REVENUE SHARE PLANS

A. What is the meaning of “increase recycling” under RCW 81.77.185?

1. This legislatively undefined term has been the focus of intense discussion and scrutiny since fall, 2010, when 2009-2010 plan year expenditures were reviewed by the Commission. Murrey’s Disposal, American Disposal and Mason County (“the WCI Companies”) revenue share plan approvals

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were the subjects of unprecedented Petitions for Reconsideration after the October 28, 2010 Open Meeting and in the subsequent adjudicative proceeding, *In re TG-101542, 101545 and 101548, Mason County Garbage Co., Inc. d/b/a Mason County Garbage et al.*, (May 2011). That Order No. 5 on Reconsideration is likely the most comprehensive analysis of the focal statute to date. As the Commission there noted, the plain meaning of the statute, not the rather scant legislative history, appears to mandate how an individual revenue share plan agreement ("RSA") meets the test of demonstrating that the revenue share proceeds "will be used to increase recycling." The Order also makes clear that to demonstrate revenues are used to increase recycling, not all expenditures need be made on recycling activities and went on to recognize that some portion of the revenues will be used by the counties or the Commission " . . . as a reward to provide an incentive to the company to develop and implement recycling efforts and thereby increase recycling." Order No. 5, TG-101542, 101545 and 101548 at 12.

While the Commission did not exhaustively delineate in either Orders No. 5 or 6 in that case what specific measures would be deemed to increase recycling, it clearly resolved that revenue share plan proceeds need not all be expended on recycling activities to qualify for retention and that retention of a portion of revenue share by companies can galvanize recycling efforts and concurrently, "increase recycling."

Subsequent revenue share plans submitted by the WCI Companies and other participating haulers in King and Snohomish Counties have provided numerous examples of programs designed to increase recycling and the initial workshop on January 9, 2012 touched upon some of those as well.

At this juncture, it is not the intent of the WCI companies to finitely detail all instances of increasing recycling or programs that qualify as being directed thereto. Rather, what they propose at this preliminary comment stage is to touch upon some of the more established, compelling or intriguing examples of subject activities which do or may increase recycling.¹ In any final definition of "increasing recycling" the Commission adopts, we urge the Commission to take as broad a view possible of what constitutes same so as not to stifle innovation and/or disincentivize participants in developing technology, customer education and outreach efforts among others.

Examples of Activities Which Potentially Increase Recycling

- * High-grading of materials

¹ It should also be noted that the Workshop appeared to arrive at consensus on the fact that in order to qualify as a demonstrated activity to increase recycling, the activity need not necessarily result in increased recycling, it merely has to be an activity or program that the sponsors design to increase recycling. *See, i.e.,* Comments of Chairman Goltz at Revenue Share Workshop, January 9, 2012, TG-112162, at 15.

- * Identifying new markets for recycled products;
 - o Obtaining prices above standard ranges as reported in regional and national trade publications (improving value);
 - o Improving processing equipment to expand volumes handled and broadening materials base;
 - o Expanding types and kinds of materials accepted in county systems;
 - E.g. food waste, yard waste variations, 3-7 plastics.
- * Customer outreach focus to non-English speaking customers;
- * Education and outreach materials and enhanced education at all levels of primary and secondary public and private school curricula;
- * Increasing frequency of curbside collection and other refinement of optimal service levels and container right-sizing;
- * Hiring of additional company or county staff directed to promote recycling pilot projects and attempting to modify customer behavior;
- * Activities decreasing tonnages of solid waste produced and increasing pounds of recycling generated per household. For instance, over the 2007-2032 period, the Pierce County Comprehensive Solid Waste Plan envisions recycling rates increasing over a 25 year interval as follows:

Pierce County System

	Lbs. per capita per day disposed	Lbs. per capita per day recycled	Total lbs. per capita per day – generated	
2007	4.5	3.33	7.83	
2032	1.09	4.64	5.73	@81% Recycle tons of 650,246

This very ambitious incremental roadmap mandating recycling increases and solid waste reduction in Pierce County means participating haulers are faced with a formidable target to deliver empirical waste reduction results year-over-year and in the aggregate. Plans of the Pierce County haulers have rightfully focused on performance metrics like this and due to the very real pressures posed by waste reduction objectives in local law we believe that performance-based RSAs are the best model to achieve the primary policy goals of the county while also responding to the Commission’s articulated role as the ultimate determinant of whether plan activities “increase recycling.”

Other measures potentially increasing recycling would include:

- * Continuing efforts to reduce contamination of waste materials;
- * Facilitating transportation systems from point of generation, collection, transfer, processing and eventual shipment to national and international destinations for remanufacturing, reforming or reutilizing secondary materials to reduce processing and delivery bottlenecks;
- * Increasing locations and ubiquitousness of glass depots and recycling containers at commercial enterprises throughout the county.
- * Investing in new and reconditioned equipment that utilizes primary recycling materials that do not require modification such as bleaching of paper and/or that rely on "virgin" materials without adulteration to expand needs and applications for such unprocessed materials;
- * Identifying and stimulating untapped markets for consumption of recycled materials by identifying evolving demand for an expanded base of products that can be reused or reprocessed.

2. As noted, we intentionally avoid discussion of specific measurement of increasing recycling in an RSA, but note that Pierce County is commenting in detail about quantifiable measurements and measurement criteria and framework with which we largely concur. Most of those conventional measurement data are readily available and are geared to assessing incremental diminutions in solid waste generated, diverted to recycling, or removed as waste stream contaminants as the tools to verify these developments. They have been used successfully in comparison to historic and other baseline data to show that recycling is increasing as reflected by diversion, service levels, set outs and participating residents numbers and other such quantifiable measurements. Moreover, none appear to entail a level of complexity that would require greater definition or refinement by this Commission. Indeed, in the WCI Companies' experience, the specificity of data reporting requirements at the county level have been comprehensive and responsive to new initiatives and to variations in the level of detail of data required to be reported to evidence and measure achievements in the increase of recycling.

In circumstances such as establishing product transformation and/or "high-grading" of materials, again, objective sales price compilation data are reported in trade publications, government indices and widely noted on the internet so the premise of whether markets reflect the higher value of transformed or high-grade materials should be borne out by widely distributed data gauging what the secondary market is yielding for the sale of recyclable goods at any particular point in time.

3. In measuring innovations or previous in test initiatives in the attempt to augment recycling, the Commission Staff should be encouraged to work with the counties to agree upon criteria identified by

the counties in their experience that will best capture the success or lack thereof in new program initiatives. Criteria to do so may be quite varied and perhaps even subtle at the start, but difficulties of capturing signs of success in the outcomes should never deter the willingness to attempt efforts to expand or broaden the type, kind, focus or innovation that forging new product use or market acceptance may entail.

B. Should companies be required to prepare a budget of anticipated retained revenues and expenditures under the recycling revenue sharing plan?

The WCI Companies do not believe that a pre-determined budget format mandate for RSAs should be mandated by the Commission. As the Commission is well aware, and as noted in comments from the bench at the opening of the workshop, revenue share plans are an exception to conventional ratemaking whose proceeds are in fact effectively removed from the results of operations of regulated solid waste collection companies. As such, they are not subject to the same kind of pro forma revenue and expenditure analyses of general rate case proponents and indeed involve a retrospective look back and prospective look forward characteristic that is removed by "real time" from actual ongoing revenue generation, because unlike regulated operations, the secondary market controls the generation of sales proceeds and revenues and expenses can accordingly be subject to overnight fluctuation.

1. Because of the vagaries of revenue and expense projections in this area, the WCI Companies believe that detailed budgeting exercises are largely an exercise in futility. This is not to say, however, that incremental monitoring of ongoing reporting of revenue and expenses is impossible. The goal: more frequent collaboration with counties to monitor participation, programs and markets to ensure revenue share proceeds are prudently apportioned to create appropriate levels of incentives to customers and companies alike to increase recycling on an on-going basis. We believe that modifying county data reporting frameworks which is currently underway at the county level with the WCI Companies in Pierce County, for example, is also a workable solution to the "roller-coaster" revenue ride in the secondary market over the past few years.

2. The WCI Companies also support a mechanism that would allow a participating provider under an approved RSA, upon consultation with and approval by its participating county, to notify and submit to the Commission revisions to an extant, approved plan if revenue or expense trends become pronounced enough to quantifiably conclude that material assumptions about revenues comprising the resources of the current plan will positively or negatively mean the plans' goals will be underachieved or otherwise may involve impractical targets based on developing sales data trends in the current plan year. As Pierce County suggests, part of the measurement for this circumstance can be addressed by defining a variation range plus or minus when quantifiable present revenue or expenses deviate from or no longer align to the Company's approved goals in a current year recycling plan. While admittedly this sounds somewhat akin to budget-based programs, the adjustments need not be based on exceeding or falling short "of budget," but rather a current assessment of whether plan goals

will be vastly exceeded or materially missed based on current data reflecting ongoing recycling market sales and plan year expenditures. Obviously one way to accomplish this is to build in more frequent (i.e. monthly and quarterly meetings) between the county and company to assess these developing trends.

C. What are permissible expenditures under recycling revenue sharing plans?

Due again to the current suspended filings in TG-111672, TG-111674 and TG-111681, *In re Mason County Garbage Company, et al.* the WCI Companies will avoid discussion and defense of specific expenditures here since that issue is one of the most pertinent in the retrospective plan review now pending before the Commission, and instead, speak generally in responding to the itemized parts of Section I, C. in the Notice circular.

Many current revenue share agreements contain programs, curricula development, outreach, pilot projects for new untested materials and other features far beyond the scope of those contained in local minimum service level ordinances. Thus, many performance objectives are novel, untried, experimental and fledgling such that their mere completion **should** be validly recognized for reward and retention under an approved RSA. The fact that an expense may "recur" in two or more reporting cycles should also not necessarily signal an expense need be moved into base collection rates, particularly where that expense would only be possible due to the existence of a revenue share program. For instance, funding for certain outreach emphases, through additional company or county personnel or media programs, may only be sustainable in periods of abundant markets and it is questionable whether the Company would propose or the Commission would allow funding of such initiatives from regulated solid waste collection rates on a sustained or recurring basis.

As for specific dollar or percentage amounts allowable for meeting performance incentives, we are reminded that 50% of the total amount of sales proceeds from collected recyclables in any given year is automatically returned to the ratepayers in the form of commodity credits through the deferred accounting mechanism. Under RCW 81.77.185, "up to 50%" is the statutory maximum for the remainder to be potentially retained and decreeing some inflexible standard within that which would establish a "floor or ceiling" on the amount of the prescribed retention share would seem contrary to law for a number of reasons. First, if the Legislature had intended to establish such percentage or dollar amount limitations under general legislative intent doctrines, one would think it would have said so. Instead, it left the "up to 50%" cap quite unspecific and any attempt now to prescribe that in interpretive statement or rule form would seem not only again contrary to the intent but inconsistent with a program whose forces are largely shaped by the market, not the participants, regulators or even local customers. Moreover, potential arbitrary standards of maximum, minimum or other such retention levels could well be internally inconsistent with individual plan goals which typically seek to maximize recovery/reuse/recycling of waste streams generated within the county jurisdiction. Thus, capping potential incentives within the "up to 50% maximum" would seem to "top off" or otherwise

impede efforts to recycle which the standard plan seeks to avoid in goals it establishes. The WCI Companies strongly oppose establishing any finite dollar amount or percentage of revenue retention share as potentially arbitrary and contrary to both statutory and evolving RSA plan goals.

Finally, setting percentages or dollar amounts for retention recovery seems inapposite once again to the premise that revenue share is outside/removed from regulated ratemaking processes and indices. Recent references in Open Meeting staff memo footnotes on revenue share plans analogizing "returns" and contrasting returns with indicated operating ratios/returns yielded by the Lurito-Gallagher methodology, merely underscore the "apples and oranges" comparison that mixing methodologies here entails. As legislative study committees in the late 1990's and later (and which numerous pleadings on this topic cited previously) attest, revenue share programs were never intended to be wholly subsumed by ratemaking criteria and this very limited exception to conventional Commission economic regulation was established to focus on one goal: increasing the type, kind, volume and percentage of the waste stream diverted from landfills or incinerators. To now attempt to equate results of revenue share plans with general rate case results of operations and then apply traditional earnings models or criteria to those results, transposes the original goals of revenue share legislation with a traditional ratemaking analytical perspective that, while admittedly more comfortable and familiar to all parties, was never envisioned. The latest trend of falling back on a description of "returns," and "percentages of yield," "revenue margins," and here, the prospect of promulgating retention recovery percentages or finite dollar amounts from revenue share, once again seems to exacerbate the theoretical disconnect from the original goals of the revenue share legislation.

II. PROCESS ISSUES

A. What is the role of the Counties under RCW 81.77.185?

1. The Commission's first inquiry on the Counties' role in considering/negotiating financial conditions in the plan is somewhat unexpected to the extent that this is likely one aspect of revenue share that has not been controversial, to the WCI Companies' knowledge. Order No. 5 in the 2011 proceeding seems to recognize the "frontline" role of the counties, in concert with local solid waste management plans, in negotiating and formulating revenue share in consistency with county solid waste minimum service level ordinances. Despite the holding in Order No. 5 that the Commission is the ultimate arbiter in determining whether the plan demonstrates how the retained revenues will be used to increase recycling and maintains an independent vantage point on that subject, we are unaware of objections to the Counties' principal role to date in negotiating with the hauler at the local level the basic financial details of the revenue share plan. In other words, in the initial phase of the compilation of the plan and consideration of costs, expenditures and conditions to their use and retention of a portion of those proceeds, the counties' proactive role in establishing those financial expectations has not be challenged. Finally, we hope the ultimate interpretive statement will acknowledge and reinforce

the integral role of the counties and the haulers in developing, implementing, adjusting, and operating under RSAs.

2. The opportunity for greater collaboration in this two-pronged governmental review process, however, is clearly indicated by recent regulatory litigation and the WCI Companies believe that better and more routine coordination between the counties and the Commission staff is already occurring, with earlier consultation at the formative stages of plan development also a reality.

B. What is the role of Commission Staff in development and County review of plans?

Public sector budget pressures of course are a factor in any increased participation trend, but certainly formalizing the WUTC staff's review of a draft plan through a meeting with county, Commission staff and the company is something that the WCI Companies arranged last summer and are very willing to formally build into timelines prior to filing of any certified and approved plans with the Commission. The present compressed schedule between reporting year cut-off and the 45-day filing deadlines for revising rates obviously is not conducive to institutionalizing meaningful WUTC staff review and comments of draft plans. Indeed, full year reporting data is typically not even available at these "preview" meetings and those results appear to directly impact the staff recommendation on approval or suspension of the filing. Clearly, having a dialogue on differing perceptions of the results, recommended retention range and other RSA data is optimally aired at those earlier meetings rather than debated at an Open Meeting where numerous other agenda items compete for time.

3. The WCI Companies thus have no opposition to formalizing a "consultative process" at least to the extent that there is a recognition for the need for a formal sit down session among county, WUTC staff and company to review draft plans and program goals at least 60 days before an applicable filing deadline, with WUTC staff review receiving draft plans at least a week before a scheduled meeting with the County and hauler.

C. When and what must companies file with the Commission?

1. Again, RCW 81.77.185 is not specific on time and configuration of the submission of the "final plan," i.e. the plan for the upcoming year in conjunction with the proposed revised tariff pages for commodity credit adjustments which are filed on 45-days notice pursuant to state law. Obviously, as part of that filing and because the reporting year expenditures affect the balance of the "up to 50%" revenue share proceeds computations, a summary and recap of those certified expenditure amounts and proposed retention of unspent revenue share is submitted with the revised tariff pages in order to "demonstrate" how the proceeds from secondary market sales can be used to "increase recycling." Notably, there is no corresponding statutory deadline implicated that necessarily requires prospective plans be filed simultaneously with the commodity credit true-up and the expenditure recap although that generally has been the practice. However, as more guidance from the Commission has been

forthcoming in recent Orders and in questions from the bench at Open Meetings, companies and counties have sought to revise some of their proposed plans just after the data reporting period closes in reference both to those recent financial results and Commission discussion. Prospective plan submissions have followed a few weeks after the commodity credit tariff page revisions.²

2. As to supporting documentation for the demonstration of how retained revenues will be used to increase recycling, the WCI Companies are obviously willing to work with staff of the Commission to respond to requests for further documentation and substantiation of expenses, but due to the variation in programs involved in revenue share, we are doubtful that any articulation of a standard form and reporting criteria would be all-inclusive or facilitate any omnibus format requirement such as that in WAC 480-07-520 for general rate case workpaper documentation. For example, some forms of documentation like those dealing with increased customer outreach are not readily susceptible to documentation other than through the examples of the circulars, media or other communication message and/or invoices supporting their costs. Measuring the enhancement of recycling through those efforts is a much more subjective quantification aside from previously-noted trends in waste diversion per capita, etc. While some threshold criteria for documentation can certainly be outlined in an interpretive statement, we remain skeptical that any hard and fast requirements for supporting documentation could ever be all-inclusive nor should the Commission prudently aim for such definition.

3. We similarly do not believe all companies should be required to use the same plan period (i.e. a calendar year) unless and until commodity credit filings are similarly calibrated. Moreover, standardizing reporting periods to one point annually would have some significant impact on WUTC staff resources, particularly when calendar year disposal fee rate changes are considered which currently do impact staff workloads and can cause delays in the review and processing of general rate cases filed in the fall for January 1 effective dates. Pierce County though has indicated it wants to synchronize all reporting periods for the three participating haulers in revenue share to avoid the current staggered periods whereby Murrey's and American Disposal file in September and Pierce County Refuse files in January. They have expressed a preference in the future that all participating haulers file in mid-January for a March 1 effective date so as to synchronize with routine disposal fee rate changes on March 1 of the year and to avoid rate confusion for residential customers who would theoretically see a change in their bills effective November 1 for revenue share and commodity credits and then a change March 1, even without considering any possible general rate filing during that year. Having all solid waste collection companies use the same calendar year reporting period would impose practical and logistical concerns for Commission and possibly county staff resources that would seem presently unworkable.

² See, i.e., TG-120073 *In re Harold LeMay Enterprises, Inc. d/b/a Pierce County Refuse* which filed revised tariff pages January 13, 2012 and the 2012/2013 RSA plan January 27, 2012.

4. As noted above in Section C, 1, the WCI Companies do not oppose building in time before new revenue share plans are submitted/filed to seek and receive staff review of the county-hauler draft plans for the upcoming year. Since the expenditure summary for the previous plan year and the commodity credit adjustments are filed together and must be filed on 45 days notice under RCW 81.28.050, the only way more time could currently be built into the review process is by readjusting reporting periods to have them conclude more than the current 60 days before the commodity credits are due to be adjusted. This would likely involve a one-time adjustment for interim periods where the new review interval is first established. All of this could be accomplished ultimately by a rule revision most likely to WAC 480-70-351, but should be further explored at the March 28 workshop session to evaluate the various complications posed. Ultimately, if the Commission and stakeholders believe an additional review period is beneficial, the WCI Companies suggest adding at least another 30 days for review would be worthwhile so long as the interval is not extended to be so protracted that rate levels become even more disassociated from recyclable market price realities with results almost converse to what occurs in the secondary marketplace, such as transpired in 2008/2009.

D/E/F Interpretive/Policy Statement Resolution, anything else to be included and should the Commission conduct a rulemaking?

With the exception to references to changes to WAC 480-70-351 on reporting period intervals and congruity between plan and calendar years and possibly one or two other "form" items, almost all of the above topics seem appropriate to be included as interpretive policy guidance in a prospective statement issued under RCW 34.05.230. Due to the relatively fluid nature of the development of issues and potential resolutions at this formative stage of revenue share plan analyses, a rulemaking directed to better defining expectations and outcomes actually strike the WCI Companies as rather premature and inflexible.³ Whether or not the majority of the parties will agree with forthcoming identifications of the requisite elements of RSA's, the counties' roles, timing and substance of WUTC staff involvement, articulation of allowable expenditures, etc., the time does not seem auspicious to initiate a formal rulemaking, particularly when stakeholders are still discussing conceptual frameworks for plans going forward and when current and recent plan adjudications may provide additional guidance to parties, particularly on expenditure issues. Ironically, despite the legislative program's decade-old existence,

³ Under RCW 34.05.230(i), interpretive and policy statements "... are advisory only. To better inform and involve the public an agency is encouraged to convert *long-standing* interpretive and policy statements into rules." [Emphasis added.] There is little about revenue share program evaluations that are "long-standing" by the Commission. Only since 2009/2010 have they even been the subject of Open Meeting presentations, and other than the cited May, 2011 Order No. 5 and a decision in October, 2011 involving Waste Management of Washington, Inc., there is little Commission case law or other "signposts" leading the way for the various parties here. Again, in light of the APA's emphasis on rulemaking codifying established regulatory practices, that process does not yet seem indicated. Moreover, RCW 34.05.230(2) authorizes a party who wants to convert an initial policy statement into a rule, to subsequently petition the Commission to do so.

David Danner, Executive Director and Secretary

February 23, 2012

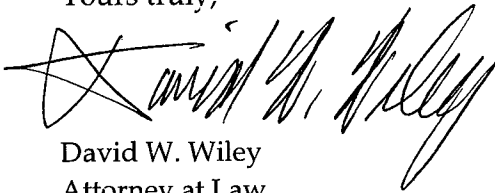
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we believe most would concur that revenue share agreements and planning therefor are still "works in progress" that regulatory rulemaking definition confines are not particularly adept at anticipating.

Even assuming there were not a current rulemaking moratorium by Executive Order there appears little in the realm of RCW 81.77.185 at present that necessarily lends itself to useful rulemaking, except, as acknowledged, in the future plan interval, format and basic required elements areas. Again, most of these items could await additional stakeholder discussion, workshop, policy statement and current adjudication outcomes to determine whether substantial uncertainty on these topics is removed. Moreover, were a prospective rule to include broadly defined terms such as WAC 480-70-351(1)(c)'s reference to the potential for a program " . . . hav[ing] any unintended results or consequences," an interpretive statement is apt to have more definitional value than a rulemaking and likely achieve that at considerably less cost for the Commission, counties and regulated solid waste collection companies.

Thus, for the present, the WCI Companies believe the interpretive/policy statement vehicle is preferable and concur that the issues raised in the "Notice of Opportunity to Comment" adequately cover the "current landscape" in identifying concerns raised in various past and prospective revenue share plans. Understandably, the policy statement alternative will likely not address every developing issue nor resolve for instance, to the satisfaction of all parties, the compilation of activities qualifying as demonstrating how program initiatives within RSAs "increase recycling." The prospect of some elements of the interpretive statement augmenting guidance to participants at the WUTC staff, county and participating hauler level though is sufficiently realistic that, with a continued opportunity to comment, participate and perhaps shape outcomes for now, this significantly improves upon circumstances of eighteen months to a year ago and is welcomed.

Yours truly,



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