

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET TG-101220
TRANSPORTATION COMMISSION,	)	(<i>Consolidated</i>)
)	
Complainant,	)	ORDER 10
)	
v.)	
)	
WASTE MANAGEMENT OF)	
WASHINGTON, INC., d/b/a WASTE)	
MANAGEMENT – NORTHWEST,)	
)	
Respondent.)	
.....)	
WASHINGTON UTILITIES AND	)	DOCKET TG-101221
TRANSPORTATION COMMISSION,	)	(<i>Consolidated</i>)
)	
Complainant,	)	ORDER 10
)	
v.)	
)	
WASTE MANAGEMENT OF)	
WASHINGTON, INC, d/b/a WASTE)	
MANAGEMENT – SNO-KING,)	
)	
Respondent.)	
.....)	
WASHINGTON UTILITIES AND	)	DOCKET TG-101222
TRANSPORTATION COMMISSION,	)	(<i>Consolidated</i>)
)	
Complainant,	)	ORDER 10
)	
v.	)	FINAL ORDER ADOPTING AND
	)	MODIFYING INITIAL ORDER
WASTE MANAGEMENT OF	)	DENYING COMPANY REQUEST
WASHINGTON, INC., d/b/a WASTE	)	TO KEEP EIGHT PERCENT OF
MANAGEMENT – SOUTH SOUND,	)	RETAINED RECYCLING
WASTE MANAGEMENT OF	)	REVENUES AS A FINANCIAL
SEATTLE,	)	INCENTIVE AND REWARD
)	
Respondent.)	
.....)	

1 ***Synopsis.** The Commission approves and adopts Order 09, the Administrative Law Judge's Initial Order, concluding that Waste Management of Washington, Inc., will not be authorized to keep eight percent of the revenues it retains from the sale of recyclable materials collected from its customers as a financial incentive and reward pursuant to the 2010-11 recycling plans between the company and King and Snohomish Counties. The Company has failed to demonstrate that those revenues will be used to increase recycling as required by RCW 81.77.185 and therefore must pass the revenues to residential customers. The Commission, however, modifies Order 09 to delete the ordering paragraph requiring refiling of the applicable tariffs.*

2 **NATURE OF PROCEEDINGS.** These dockets arise from a petition to allow sharing of revenues from recycled materials, lift the interim status of certain tariff changes, and approve revised commodity credits.

3 **APPEARANCES.** Polly L. McNeill, Summit Law Group, Seattle, Washington, represents Waste Management of Washington, Inc. (Waste Management or Company). Fronda Woods, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Staff).¹

4 **PROCEDURAL HISTORY.** Order 09 summarizes the background of this proceeding, which we will not repeat.² In brief, on July 16, 2010, Waste Management of Washington, Inc. (Waste Management or Company) filed revisions to its tariffs governing recycling commodity price adjustment rates for three of the Company's operating divisions in King and Snohomish Counties with a proposed effective date of September 1, 2010. Waste Management also filed recycling plans certified by King and Snohomish Counties (collectively Counties) for the period of September 1, 2010 through August 31, 2011 (subsequently extended to November 30, 2011), which authorize the Company to retain 50 percent of the revenue Waste Management

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. See RCW 34.05.455.

² Order 09 ¶¶ 4-15.

receives from the sale of recyclable materials that it collects through its residential recycling services. The Commission suspended the tariffs, authorized the 50 percent revenue sharing on a temporary basis subject to refund and other conditions, and set the matter for hearing.

- 5 On August 26, 2011, the Commission issued Order 09, Initial Order Denying Company Request to Keep Eight Percent of Retained Recycling Revenues as a Financial Incentive and Reward and Requiring Refiling of Tariffs (Order 09). Order 09 concluded Waste Management would not be authorized to keep eight percent of the revenues it retains from the sale of recyclable materials collected from its customers as a financial incentive and reward pursuant to the 2010-11 recycling plans between the company and King and Snohomish Counties because the Company failed to demonstrate that those revenues will be used to increase recycling as required by RCW 81.77.185. The order, therefore, required the Company to pass the revenues to residential customers.
- 6 On September 15, 2011, Waste Management filed a Petition for Administrative Review by Waste Management of Washington of Order 09 (Petition). Waste Management makes the following principal arguments in its Petition:
- Order 09 errs by limiting the criteria for determining the success of a revenue sharing program to participation levels and material quantities. Other appropriate factors include adding higher-value commodities, expanding the demographics of the customers, enhancing the quality of the materials collected, and processing cleaner and more valuable materials for market. Producing greater recycling revenues by focusing on the quality, rather than the quantity, of the material collected and processed is a legitimate measure of a successful use of funds to increase recycling under the statute.
 - Increasing revenues from the marketing of recyclable materials is a relevant and significant way to determine the success of a revenue sharing program and a hallmark of using retained funds “to increase recycling.” The focus of the revenue sharing legislation was on encouraging companies to maximize revenues, and offering a company a share of those revenues is a greater incentive to “increase recycling” than the plans the Commission previously approved.

- Order 09 errs by suggesting that revenue sharing plans must guarantee an increase in recycling as a condition of Commission approval. The Commission should expect that such plans are designed in good faith to achieve the program results, but it is not reasonable to tie a company's reward to empirical evidence of changes in consumer behavior, particularly as such programs mature and the volumes of recycling materials stabilize or decline and the company provides recycling service to all or virtually all potential customers. Too many factors outside the company's control influence its ability to increase recycling.
- Waste Management does not recover the costs of revenue sharing activities through its base recycling rates, and Order 09 erroneously suggests that it could do so. Program expenses related to recycling education, outreach, and data compilation and analysis, are not collection costs, and the Company is dubious that the Commission would authorize their recovery through regulated rates for collection service.
- Order 09 incorrectly concludes that the King and Snohomish County plans are not performance-based. Under principles of contract law, the Company would be liable for breach of contract if it failed to comply with the terms of its agreements with the Counties and would not be entitled to any profit. Nor should performance goals be the hallmark of an acceptable revenue sharing plan.
- Order 09 is overly broad because its reasoning extends to all aspects of a recycling revenue sharing plan, not just to the portion of the plans in the current proceeding addressed to providing the Company a reward. Insurmountable administrative complexities result if a company's retention of recycling revenues is strictly tied to producing measurable changes in participation levels or material quantities. A more reasonable interpretation of RCW 81.77.185 is that a company may maintain such revenues only if the program is designed with activities and investments that are *intended* to increase recycling.

7 On September 23, 2011, Staff filed its Answer to the Petition in which Staff makes the following points:

- Order 09 simply concluded that Waste Management failed to meet its burden of proof under the statute to demonstrate that the financial reward in the plans at issue will be used to increase recycling. Waste Management improperly asks the Commission to go beyond that specific question and render an advisory opinion on the circumstances under which a company may receive a financial reward for participating in a recycling revenue sharing plan.
- Order 09 correctly finds that nothing in the plans at issue in this proceeding condition the Company's reward on satisfactory performance under the plan. The hypothetical facts on which Waste Management relies in its Petition are not present in this case and cannot be the basis for the relief the Company requests.
- The Commission should adopt Order 09 as a final order with the exception of paragraph 41 (Order Paragraph (2)). Under the partial settlement agreement the Commission approved in these dockets, the Company must pass to residential customers the revenues it is not authorized to retain in the 2009-10 plan period through an adjustment to the Company's next recycling commodity credits under WAC 480-70-351(2). Accordingly, the tariff refiling requirement in Order 09, paragraph 41, conflicts with the Commission's previous determination and should be deleted.

DISCUSSION AND DECISION

8 The Commission has reviewed Order 09 and finds that its conclusions and reasoning properly resolve the issues presented in this proceeding. Accordingly, with the exception of paragraph 41, the Commission adopts Order 09 as the final order of the Commission. The Commission nevertheless will address the arguments Waste Management makes in its Petition.

9 Waste Management construes Order 09 too narrowly by contending that it limits the criteria for determining the success of a recycling revenue sharing program to overall participation levels and gross material quantities. Nothing in that order states or suggests that a revenue sharing plan is inconsistent with RCW 81.77.185 if it increases recycling by targeting increases within specific demographic groups, rather than the population as a whole, or by promoting an increase in the quality or particular types of recycling materials, instead of the entire tonnage of all materials collected. As Staff correctly notes, however, Waste Management did not present such facts in this proceeding, and we render no opinion on the hypothetical circumstances the Company now proffers.³ We merely repeat that the touchstone of our review of recycling revenue sharing plans is the statutory language and requirements, and the Commission will approve only plans that satisfactorily “demonstrate how the revenues will be used to increase recycling.”

10 We further support the conclusion in Order 09 that increasing revenues from the marketing of recyclable materials, without more, is not equivalent to an increase in recycling under RCW 81.77.185. Commodity prices for recycled materials may rise, for example, resulting in an increase in revenues even though every other measure of recycling activity declines during a particular plan period. We find nothing in the statutory language that indicates any legislative intent to provide companies with a financial reward under such circumstances. The plans at issue in this proceeding reward Waste Management with a percentage of the retained revenues regardless of the level of recycling activity, including if there is a reduction in recycling. Such a plan cannot be reconciled with the requirement in RCW 81.77.185 that a plan demonstrate how the retained revenues will be used to *increase recycling*.

³ Similarly, the Commission does not opine on whether the Company could recover some or all of its recycling revenue sharing costs in its regulated rates. Order 09 states only that a company’s regulated rates generally include legal and regulatory compliance costs and suggests that some of these types of costs may be recovered or recoverable in recycling revenue sharing plans. Whether the plans at issue here include such costs and whether Waste Management could recover some of those costs in its regulated rates, however, is not before us and is not part of the basis on which the Commission reaches its conclusions in these dockets.

- 11 Waste Management also incorrectly interprets Order 09 to require revenue sharing plans to guarantee an increase in recycling as a condition of Commission approval. The statute requires that those plans “demonstrate how the retained revenues will be used to increase recycling.” By using the word “demonstrate,” the legislature has required more than a good faith belief that the retained revenues will be used to increase recycling. Such a requirement is not a guarantee, but it cannot be satisfied with mere intent, as the Company proposes. We make no attempt to address all of the ways in which a company could make the requisite demonstration. We conclude only that under the facts of this case, the plans at issue fail to demonstrate that the percentage of retained revenues designated as a financial reward will be used to increase recycling.
- 12 That financial reward in the plans as written is not based on Waste Management’s performance as the Company contends. Waste Management concedes, as it must, that there is no express provision in the plans that conditions that reward on the Company’s satisfactory performance of specific activities or achievement of identified goals. The Commission is not willing to rely on general principles of contract law to determine the extent to which Waste Management is or should be entitled to a financial reward based on whether and how the Company has performed under the plan. The Commission looks to the language of the plan, and the express provisions of that plan must demonstrate how the retained revenues will be used to increase recycling. The provision granting Waste Management eight percent of the retained revenues as a financial reward is unconditional and thus, on its face, does not make the requisite demonstration.
- 13 Such review, moreover, applies to all retained revenues under a plan, not simply those establishing a financial reward for the Company. We agree with Waste Management that the statute does not distinguish between different types or uses of retained revenues but requires simply that the plan must demonstrate how all retained revenues will be used to increase recycling. But nothing in Order 09 conditions plan approval or a company’s revenue retention on a post hoc Commission review of the plan’s results. As a practical matter, companies should expect the Commission to consider past results in determining whether the same or a similar plan makes the requisite demonstration, but such circumstances are not present here. The only issue before the Commission in this proceeding is whether the plans, as written, demonstrate how the

retained revenues designated as a financial reward to the Company will be used to increase recycling. Order 09 correctly concludes that they do not.

- 14 Order 09, however, incorrectly required Waste Management to revise and refile the suspended tariffs. The Commission agrees with the Company and Staff that the partial settlement agreement the Commission approved has already addressed those tariffs, and therefore in adopting that order, the Commission will strike paragraph 41 (Order Paragraph (2)) from Order 09.

ORDER

THE COMMISSION ORDERS that

- 15 (1) The Commission approves and adopts Order 09 as the final order of the Commission as modified in this Order.
- 16 (2) Paragraph 41 in Order 09 is stricken.
- 17 (3) The Petition for Administrative Review by Waste Management of Washington of Order 09 is DENIED.

Dated at Olympia, Washington, and effective October 25, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.