



March 8, 2012

VIA EMAIL/ORIGINAL VIA FIRST CLASS MAIL

David Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
Attn.: Records Center
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

Re: Docket No. TG-112162 – Replies of the WCI Companies (“Murrey’s Disposal, American Disposal, Mason County Garbage, Harold LeMay Enterprises, Inc. d/b/a Pierce County Refuse”) to Initial Comments Filed by the Parties in Response to the Notice of Opportunity to Comment

Dear Mr. Danner:

On behalf of the above-referenced Waste Connections companies involved in current revenue share plans in Pierce and Mason Counties, we submit the below in summary response to selected comments by various parties in the above docket filed February 23, 2012. We again appreciate this opportunity to comment upon what has become a very topical issue. While our response will touch upon common themes raised by many, if not all, of the parties, we spend particular focus in response to the Commission Staff comments since this is the first formal comment on revenue share plans submitted by the Staff who, due likely to time constraints, did not advance any positions at the workshop on January 9, 2012.

Three counties, Pierce, Snohomish, King, the Washington Refuse and Recycling Association, Waste Management of Washington, Inc. and the WCI Companies in addition to the WUTC Staff filed comments in the opening stage memo. All of the parties spent considerable time and effort addressing what “increasing recycling” means under RCW 81.77.185 and many provided examples of programs at the county level which appear uniformly to be geared to that objective. As King County noted at page 5 of its comments, county budgets for recycling education and outreach that are funded primarily from tipping fees have been diminished as a consequence of reduced disposal fee revenues which were and are used in part to address recycling and without revenue share, it is hard to perceive how many of the highlighted county programs could be sustained.

With the possible exception of the WUTC Staff, all parties thus uniformly found value in the revenue share program, particularly with respect to the statutory goal of increasing recycling.¹

¹ See i.e., the comments of King County at page 5 broadly characterizing revenue share plan activities and expenditures many of which it opined could not have occurred without revenue share or with those activities being limited only to base collection rate funding.

WUTC Staff Construct of "Increase Recycling"

As the WCI Companies understand, the WUTC Staff theory on increasing recycling and the "Revenue Sharing Logic Model" it posited at page one of its Comments seems to involve a recommended premise that we believe may be beyond that contained in the current statute, i.e. a prospective demonstration at the time of an upcoming plan year submission of a "... connection between the activities or efforts funded by retained revenues which are reasonably expected to increase recycling (plan) the revenues retained (budget) and a measurable outcome or result for each activity or effort that demonstrates whether the objective of increased recycling has been met (deliverable)." [emphasis added] (Staff Comments at 1).

The major concern here is the expansionist approach to the two-sentence statutory language in RCW 81.77.185(1). The statute now only says, in relevant part, the Commission "shall allow solid waste collections companies "... to retain up to fifty percent of the revenue paid to the companies for the material" if the companies "submit a plan to the commission certified by the appropriate local government authority" and that "demonstrates how the revenues will be used to increase recycling." The Staff's model appears to extrapolate well beyond that standard, requiring specific nexus and linkage of achieved goals and, most importantly, apparently does that at the initial presentation and approval stage of the prospective plan in requiring specificity of objective and quantitative measurements that could potentially limit expansion of the specified goals and programs during the plan year and possibly constrain experimentation and responses to unanticipated market trends, transformed products or customer demands that could well unfold in the coming year.

Staff's reliance on the budget format to ostensibly mitigate "unintended consequences" (WAC 480-70-351(1)(c), the rule provision relied upon at the Open Meeting for its opposition to retention of unspent revenue generated in the most recent reporting period), bases its prescribed revenue projections apparently on the previous 12-month period. This could be a questionable foundation for any prognosis if the world commodity market over the last four years is any guide.

This tension between expectations and achievements is not easily eliminated simply by adherence to budget-based planning. As Pierce County and the WCI Companies commented, more frequent and routine meetings between county and hauler and periodic focus on alignment of plan goals with "real time" results is likely a more realistic and accurate exercise than revenue projections and planned expenditures that are necessarily removed from fluid international market and sales realities.

Revenue Share Programs as a Whole

The Staff's opposition to revenue share has been generally consistent and has antecedent roots in the original legislative Recycling Assessment Panel Report² where Mr. Eckhardt initially issued what was in effect a "concurring" appendix to that seminal committee report, challenging the then proposed 30% retention amount from the sale of recyclables but, (albeit reluctantly), accepting the reporting requirement feature and annual evaluation of the proposed legislation as a check on "simply additional profit" for the haulers. That position was again echoed in the opposition testimony of Staff at a Senate hearing in 2000,³ two years before revenue share actually was enacted.

However, in May, 2003, the Staff published a more hopeful and positive characterization of the goals of the now-enacted legislation, interpreting RCW 81.77.185, as follows:

Staff believes this means the company and the local government must work together to create a Company Recycling Plan that describes the proposed recycling program, how the company proposes to measure changes in the recycling rate, and how the money retained will be used to increase recycling. The concept behind this model of revenue sharing is that if carriers are allowed to keep more recycling revenue, they will have greater financial interest in encouraging their customers to recycle more and in finding buyers for the recyclable commodities.⁴

It now seems apparent, at least to the WCI Companies in reviewing the crux of the WUTC Staff comments at pages 5-8, that its initial opposition to the legislative revenue share program has indeed not receded and that the Staff's above summary of the legislation just after enactment has returned to the original inherent objections to its incentives, and indeed, possibly even its basic design as removed from regulated ratemaking methodologies.⁵

² WASH. DEPT. OF ECOLOGY, REVITALIZING RECYCLING IN WASHINGTON (Publication No. 00-07-009) at 1, (2000) letter of Eugene K. Eckhardt to Cullen Stephenson, Program Manager of December 28, 1999.

³ S. Rep. SHB 2939, 1st Session, at 3 (Wash. 2000).

⁴ "Recycling Revenue Sharing, A Staff Summary of the Implementation of RCW 81.77.185" (SHB 2308), May, 2003, at 5.

⁵ Actually, WUTC Staff first formally acknowledged the removal premise in the 2003 report "that the revenue kept by the company under an Approved Company Recycling Plan would be removed from the net revenue on the income statement for regulatory purposes." *Ibid*, at 10.

As the WCI Companies noted in their Opening Comments, recent Staff Open Meeting critiques of revenue share plans⁶ have also analogized proposed revenue share results under corollary Lurito-Gallagher performance measures and sharpened focus on “risk” as a premium for any reward under revenue share plans. Their opening Comments, (i.e. at page 8), underscore this increasing congruity of premise. Now, the risk evaluation premise has seemed to morph into a statement by Staff completely minimizing risks in executing revenue share plans by the companies and analogizing revenue share to “contribution in aid of construction (money or property contributed by ratepayers to a regulated public service company).”⁷

This new analogy involves assumptions/presumptions that likely would consume many pages to debate. Suffice it to say here that the risks and undulating returns of secondary market sales of recyclables from 2008-2011 appear to challenge any broad Staff generalization of “little to no risk” of revenue share plans. Moreover, some threshold or fundamental discussion is surely now ripe among the parties which equates the tender by a customer of recyclables at the curbside for collection with relative customer expectations of a return payoff in that process. It would be fair to assume that at least a few ratepayers primarily consider discard of recyclables as something for the greater good, enhancing the “green economy” and diverting reusable products from landfill or incineration disposal which in turn likely preserves capacity and deters some of the increasing costs of disposal. To view the discard of recoverable materials however as “money or other property contributed by ratepayers” in isolation is, respectfully, not a completely accurate portrayal of the circumstance, particularly when one considers, as noted above, that a minimum of half and often a much higher amount of recyclable sale proceeds of customer discards are already being returned to the customer through commodity credits.⁸

Without even utilizing a solid-waste based legal analysis of when ownership of such passes to the hauler (i.e. RCW 36.58.060 at a transfer station), the expenses to market, resell, maximize and transform recyclable materials **do** involve risk to the hauler which the Legislature originally recognized in the reward/incentive premise noted by the Commission Staff in its 2003 summary at the implementation of RCW 81.77.185, and which the Commission’s Order No. 5 in the *Mason County et al. TG-101542* cases (May 2011), affirmed. Again, somehow possibly in the wake of strong markets in 2010/2011, the Commission Staff seems to have lost sight of at least its own precatory goals for the legislation in 2003

⁶ See i.e. Staff Open Meeting Memo in i.e. TG-110220, 110221, 110222, Waste Management of Washington, Inc. (November 24, 2010).

⁷ Staff Comments of February 23, 2012 at 8, fn. 6.

⁸ Moreover, the regulated customer who is steadfast in seeking returns from “property contributions” from generated recyclables always has the option of collecting his/her own aluminum, cardboard, bottle and other recyclables and tendering them to a buyback or other recycling center to maximize financial return by eliminating any role of the hauler.

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to a totally fiscally exploitive rendition of revenue share by participants now of "ratepayer property contributions" and which perception is not generally shared by haulers, or likely, even county participants.

Ultimately, throughout this past 18 month period, the question of whether this unilateral rendition of the goals of revenue share and the designed benefits for consumers, counties and haulers necessarily returns to whether that rendition is consistent with the sparse verbiage of RCW 81.77.185 and the immaterial amount of existing legislative history.

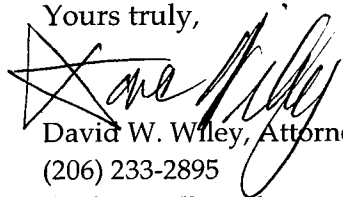
Revenue Share Revisited

Considering the relatively escalated level of the current dispute, more than once since summer, 2010, various parties have had occasion to question whether revenue share should be scrapped, whether all such initiatives should be removed to regulated recyclable collection rates and/or whether the goals of incentivizing greater recycling participation are attributable to the revenue program or to the economy, customer behavioral changes, etc. None of the questioned outcomes, though, nor reemergence of the Commission Staff's original opposition to the program should distract from the fact that the forum to revise the law rests with the Legislature. There, the arguments marshaled for or against the program may more appropriately be calibrated than in any potential incremental administrative actions this agency may take in the public interest.

Without further critiquing the Staff view of the overall value of revenue share, one logical outcome of an interpretative policy statement could well be an expression of the Commissioners' views that further legislative review of identified goals, issues, incentives and results of revenue share programs is in order. Indeed, the WCI Companies believe that any "transformative" statement about the intended inner-workings, philosophies and ultimate goals of the legislation should appropriately await that legislative action rather than possibly broadly rearticulating the original legislation through a well-intended comprehensive interpretive policy statement under RCW 34.05.230.

We, however, greatly appreciate the Commission's continued willingness to address and evaluate these present policy disagreements and practical implementation issues under current plans arising under the existing law, and look forward to developing these important issues with you further at the March 28 workshop session.

Yours truly,



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