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SUMMIT LAW GROUP
a professional limited liability company

POLLY L. MCNEILL
DID: (206) 676-7040
E-MAIL: pollym@summitlaw.com

October 10, 1997

Via Facsimile
Original Via U.S. Mail

Mr. Steve McLellan, Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Re: In Re the Petition of Recycling and Disposal Services, Inc., for a Declaratory Order; Docket No. TG-971167

Dear Mr. McLellan:

Enclosed are the original and four copies of the Reply Brief of Sanitary Service Company and Certificate of Service in the above-referenced matter. Please accept the same for filing.

Sincerely yours,

SUMMIT LAW GROUP PLLC

Polly L. McNeill

Enclosures
cc: All Parties

1505 WESTLAKE AVE N SUITE 300
SEATTLE, WASHINGTON 98109
telephone 206 281-9881
facsimile 206 281-9882

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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Recycling and Disposal Services, Inc., for a Declaratory Order	)))))	Docket No. TG-971167 REPLY BRIEF OF SANITARY SERVICE COMPANY

COMES NOW Sanitary Service Company, Certificate of Convenience and Necessity No. G-14, by and through Polly L. McNeill of Summit Law Group, and respectfully submits the following Reply Brief in Docket No. TG-971167.

A. Is It So Far-Fetched to Think That Two Governmental Entities Might Share Responsibilities?

In its Opening Brief, Staff takes the surprising position that the Commission really does not have any jurisdiction at all over any aspect of SSC's city operations, since Bellingham "has effectively exercised its jurisdiction over residential and commercial solid waste, pursuant to RCW 81.77.020." When did this happen? From 1966 until approximately two weeks ago on September 24, the Commission has reviewed SSC's City commercial rates and exercised regulatory supervision over the company's operations. What have we been doing all these years, with rate filings, annual reports, facility inspections — to say nothing about the regulatory fee SSC has been paying to the Commission every year?

The ramifications of such a position are almost unfathomable. Certainly, all parties have acknowledged that Bellingham could completely opt out under RCW 81.77.020: but it has not done so. And, Staff's brief cites to no statute that says the Commission can unilaterally abandon

its jurisdiction. Besides, if it were to do so, the Commission may be vulnerable to a takings claim for SSC's vested property right — a switch from the more typical situation where municipalities are accused of takings when they opt out. See In re Buchmann Sanitary Service, Inc. et al., Order M.V.G. No. 1772 (March 5, 1996) (a certificate is a valuable and vested property right).

The Staff's stance seems to be founded on an "all or nothing" view of the Commission's regulatory authority. Staff infers that, if the Commission does not regulate disposal fees, it has no meaningful role to play. Although it was probably not intended, this position denigrates the hard work and concerted efforts of staff over the years, especially the auditors who have scrutinized cost items line by line, evaluated depreciation schedules, questioned overhead allocations, and generally taken a hard and time-consuming look at SSC's books virtually every time it filed for a rate increase. Other staff in enforcement, record-keeping, consumer affairs – all these efforts are belittled by Staff's argument.

If it is determined that the two governmental authorities can coordinate their regulatory authority over commercial solid waste by allowing Bellingham to contractually manage disposal while the Commission continues to regulate collection, SSC believes that the Commission's role is not a subordinate one. Indeed, it would be similar to the Commission's oversight with most solid waste collection companies, since almost all other jurisdictions utilize flow control ordinances rather than contracts. In those cases, the Commission does not involve itself with disposal issues at all and yet still has an important regulatory purpose. In the final analysis, Staff's suggestion that the Commission should pick up its sticks and go home is not realistic.

Although it is more interested in certainty than outcome, SSC continues in its belief that Bellingham has the authority over disposal, and that the Commission regulates collection. Staff

cites to a provision in the 1985 agreement between the City and SSC, but that provision is really only a contractual acknowledgement that there is a need for reconciling the two governmental roles. It is noteworthy that the next contract, the currently-effective 1989 contract, does not include the same provision. Apparently, once the parties realized that the 1985 provision would simply create an impasse situation, it was revised out.

In addition to the reasons provided in its Opening Brief in support of reconciling authorities by allocating authority over disposal and collection to the respective governments, SSC notes that the Commission itself in last year's legislation acknowledged that it does not regulate disposal. In Substitute Senate Bill 5670, where the Commission corrected the glitch in prior laws that automatically cancelled certificates upon annexation or incorporation, only "collection" was deleted from the existing language and addressed in amendatory provision (attached). Notably, "garbage disposal" was left in place, indicating that the Commission itself did not view it as relevant to its authority.

Notably, RDS cites to the Commission's decision in King Cy. Dept. of Public Works v. Seattle Disposal Co. for the proposition that the Commission's authority under state law "trumps" Bellingham's. In that case, though, it was collection rates that the county was trying to regulate. No one in this case is saying that the Commission does not currently have sole regulatory authority over SSC's commercial collection rates (except, perhaps, Staff).

B. Why Should Drop Box Customers Get Special Treatment?

Staff and RDS argue that drop box customers should get to choose their disposal site. While SSC stands ready, willing and able to comply with the Commission's order on this issue, it is nonetheless concerned about the repercussions of taking such a generalized, broad position.

Both Staff and RDS rest a lot of weight on the inaccurate assumption that drop box waste is not commingled – this is simply not true. It may not go into a compactor, but drop box waste is not necessarily all from the same generator. At Bellis Fair, for instance, the tenants share drop box compactors and it would be impossible to identify whose waste belonged to whom. Indeed, it is not unusual at all for generators to share the same detachable container. If drop box customers can direct their waste, why not container customers? Indeed, why not residential customers? There is no real reason for distinguishing those situations.

Even if the assumption were correct, the statute relied on by Staff and RDS does not provide any support for distinguishing between waste that is commingled with others'. If the Commission were to rely on this statute to rule broadly that drop box customers may choose their disposal site, then it should anticipate customers with other kinds of service levels requesting the same choice.

Interestingly, the literal language of RCW 36.58.060 actually <u>precludes</u> drop box customers from directing waste. The statute says that the wastes belongs to the original owner "until they arrive at the disposal site or transfer station or <u>detachable containers</u>." A drop box is a detachable container! Therefore, the statute itself does not support the position taken by RDS and Staff.

In addition to the reasoning presented in SSC's Opening Brief for rejecting this broad policy position, SSC here submits that the Commission would be setting a dangerous precedent that could lead to not only the "disruption" referred to in Staff's Opening Brief, but actual chaos in the collection of solid waste generally if it were to accept RDS's and Staff's notion that drop box customers can choose disposal sites.

C. Is This Declaratory Proceeding Being Used as Pretext for a Ruling on Temporary Authority?

In its brief, RDS repeatedly uses the phrase "public interest" as the standard and puts SSC's "service" at issue. It mischaracterizes the September 15 letter from Gene Eckhardt as informing SSC that the company "would not be acting in the public interest" if it refused to deliver drop boxes to RDS. In addition, RDS notes that on October 3, Waste Management (with whom RDS has an agreement to accept waste from its transfer station) apparently filed an application for temporary authority.[1]

It is not a leap of logic to surmise that RDS and its contractual partner are hoping for a ruling in this matter that would support issuance of such authority. As noted by Recomp in its Opening Brief, the only place in the solid waste statutes and regulations that the phrase "public interest" appears is in WAC 480-70-130, which governs temporary certificates. SSC believes using this proceeding for a preemptive determination on Waste Management's application is improper — but more importantly, there is no evidence that the standards of WAC 480-70-130 can be met.

To issue a temporary permit, the Commission must determine if it would be consistent with the public interest to do so by considering three factors: 1) whether there is an immediate need for the requested service; 2) whether the requested service is currently available, and 3) whether there are any other circumstances indicating that the grant of temporary authority is consistent with the public interest. None of those factors are present.

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[1] RDS is "the pot calling the kettle black" on this issue. While there clearly is commonality of interests between RDS and Waste Management, that is not the case with SSC and the disposal site used by Recomp. The owner of the Rabanco Regional Landfill has no ownership interest in SSC, contrary to RDS's inference of self-dealing on page 2 of Petitioner's Brief.

There is, first of all, no immediate need: even if the waste were being delivered to Recomp rather than RDS, having to pay slightly higher tipping fees cannot constitute "immediate and urgent" need. Order M.V.G. No. 1624, In re Brent Gagnon, d/b/a/ West Waste & Recycling, App. No. GA-76793 (May 1993). In addition, SSC is currently delivering commercial drop box waste to RDS when requested by customers, and an application may not issue where the existing carrier is ready, willing and able to provide the proposed service. SSC has been delivering drop boxes to RDS at customers' request since March, with the exception of a brief period between September 10 and October 2 when the City was ordering it to do otherwise.

RDS infers that SSC was prompted to recommence delivery of waste to its facility by Waste Management's application of October 3, but that is simply not true. Not only was SSC unaware of the application until learning of it in RDS's brief, but in fact SSC asked for and received a letter from Bellingham allowing its delivery of waste to RDS on October 2, before the date of the application.

Finally, surely this proceeding and the uncertainty surrounding the drop box issue constitutes an "other circumstance" that would warrant denial of a temporary certificate. Where the Commission itself has yet to decide whether or not commercial drop box customers have a right to direct their waste, certainly the collection company cannot be deemed to know how to respond. The quality of SSC's service cannot be questioned, and there is nothing to indicate that the company is anything other than ready, willing and able. SSC's service is clearly to the satisfaction of the Commission, and there is no evidence at all that it will not provide the appropriate drop box service once the Commission itself decides how it should be done.

RDS tries to argue that the fact that SSC has two tariffs, one for County and one for City, somehow is not in the public interest. Of course, RDS itself charges two different rates for those

two different classes of customers, which is part of the reason SSC has two different disposal rates. SSC does not set the disposal rate — whether it is different for the County than it is for the City cannot conceivably be evidence of its service capabilities.

D. What Happened to the Agreed-Upon Facts and Exhibits?

Finally, it cannot go without comment that both RDS and Staff have included in their briefs references to evidence and documents that are not included in the Final Statement of Facts and Exhibits. Although SSC does not really think any of the facts are determinative, it is nonetheless troubling that counsel spent so much time and energy trying to prepare an agreed-upon record, only to have it so blatantly ignored. If RDS wanted to include facts about its common ownership with Bellingham Towers, for example, it could have done so during the time period spent on preparing the factual statements. SSC has yet to even see any of the exhibits referenced in RDS's Opening Brief — if RDS wanted to include them, they should have been provided to all parties as part of the stipulated exhibits.

Staff's brief also goes beyond the record. For instance, Staff discusses how solid waste is handled in Seattle without any support or authentication. No one disputes that Seattle does not exercise control over collection of commercial solid waste; but that city uses a flow control ordinance to direct all waste to its designated facilities — so how is it relevant? If Staff wanted to rely on facts regarding Seattle, it could have requested of other parties that they be included in the record.

Obviously, most disconcerting to SSC is Staff's reliance on excerpts from the 1989 proceeding in which counsel stated — incorrectly — that SSC was not obligated by its City contract to deliver commercial waste to the designated facility. Staff was aware of these materials well before the Final Statement of Facts and Exhibits were prepared and relied on them

in its Memorandum of Commission Staff on Estoppel and Contract Interpretation of September 29. If Staff had requested that these facts be included in the record, the clarification of mischaracterized facts that SSC is compelled to provided below could have been avoided.

First, the contract in effect in 1989 was the 1985 agreement. As others to this proceeding are so fond of saying: the document speaks for itself. It is accurately summarized by Staff on page 3 of its Opening Brief: "Section 5.2 directs SSC to take all waste collected in the City to TRC, the predecessor of Recomp, without distinguishing between residential and commercial waste." Counsel for SSC was simply wrong in her statements to the Commission at the Open Meeting in 1989.

If Staff had provided the actual exhibits to the proceeding rather than just the exhibit list, it would have been apparent that counsel's statements at the Open Meeting were just plain incorrect. Exhibit 9 of the 1989 proceedings was a letter from the Mayor of Bellingham to SSC asking for an explanation as to why SSC's trucks had been carrying "residential solid waste and, in some cases, commercial waste" to the County landfill rather than TRC (attached). Exhibit 10, then, is SSC's response, which states, "Pursuant to Sanitary Service Company's (SSC) contract with the City of Bellingham, all loads of solid waste collected in the City are delivered to TRC's facility except for those loads which TRC rejects . . . ." (attached). Mr. Razore then goes on to discuss how Jack Garner, Bellingham's Director of Public Works, directed SSC to alternative disposal sites when TRC was not able to accept more waste.

Therefore, the statements of counsel in the 1989 proceeding were, by her own admission, inaccurate and should not be used as evidence, especially where the exhibits and documents clearly show the truth of the situation.

It is unfortunate that neither Staff nor RDS conferred with the other parties during the extensive efforts to prepare a record for this case. The facts would likely have been included, but to rely on them in briefs and ignore the prepared record so blatantly should not be countenanced and be stricken.

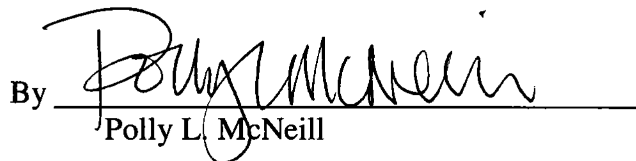
E. Conclusion.

SSC still hopes that the Commission and Bellingham will continue with their past working balance of powers between the City and the agency. Whatever the outcome, though, the company will strive to continue its past practice of providing service to the best of its ability to its customers.

In addition, SSC would herein like to request an opportunity for oral argument before the Commissioners, before a ruling in this matter is issued.

DATED this 10th day of October, 1997.

SUMMIT LAW GROUP PLLC
Attorneys for Sanitary Service Company



By ______________________
Polly L. McNeill

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons and entities listed on the Service List below via facsimile and by depositing a copy of said document in the United States Mail, addressed as shown on said Service List, with first-class postage prepaid.

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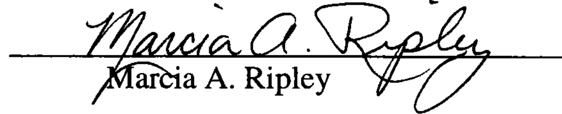

Marcia A. Ripley

SERVICE LIST

James L. Austin, Jr., Esq.
Karr Tuttle Campbell
Washington Mutual Tower
1201 Third Avenue, Suite 2900
Seattle, WA 98101-3028

Richard N. Little, Jr., Esq.
Assistant City Attorney
Office of the City Attorney
210 Lottie Street
Bellingham, WA 98225

Robert A. Rowland, Esq.
2602 Westridge Avenue West
Suite M-301
Tacoma, WA 98466

James K. Sells, Esq.
Ryan, Sells, Uptegraft and Decker, Inc. P.S.
9657 Levin Road N.W., Suite 240
Silverdale, WA 98383

Mary M. Tennyson, Esq.
Senior Assistant Attorney General
Attorney General of Washington
Utilities and Transportation Division
1400 S. Evergreen Park Drive S.W.
P.O. Box 40128
Olympia, WA 98504-0128