

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Commission’s) DOCKET TG-112162
Investigation of Recycling Revenue)
Sharing Plans) INTERPRETIVE AND POLICY
) STATEMENT ON RCW 81.77.185
.....)

1 The Washington Utilities and Transportation Commission (Commission) has developed this interpretive and policy statement pursuant to RCW 34.05.230 to address issues concerning implementation of recycling revenue sharing plans (Plans) under RCW 81.77.185. Specifically, the Commission interprets the statute and establishes policies with respect to the following issues: (1) how Plans can demonstrate that retained recycling revenues will be used to “increase recycling” as required by the statute; (2) permissible Plan expenditures; (3) budgets for Plan revenues and expenditures; (4) the role of local governments in developing and implementing Plans; (5) the role of Commission Staff in Plan review and approval; and (6) Plan filing process.

BACKGROUND

2 The legislature originally enacted RCW 81.77.185 in 2002 and amended the statute in 2010. Subsection (1) provides:

The commission shall allow solid waste collection companies collecting recyclable materials 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 that is certified by the appropriate local government authority as being consistent with the local government solid waste plan and that demonstrates how the revenues will be used to increase recycling. The remaining revenue shall be passed to residential customers.

3 The Commission addressed certain Plan requirements in Order 05, Order on Reconsideration in Dockets TG-101542, TG-101545, and TG-101548 (consolidated), issued May 6, 2011 (Order 05). The Commission interpreted the statute to require the

Commission, not the local government, to determine whether a Plan demonstrates how retained revenue will be used to increase recycling.¹ The Commission also concluded that RCW 81.77.185 does not require a company to spend all retained revenues on recycling activities. Rather, at least some portion of those revenues can be used as a reward to provide an incentive to the company to develop and implement recycling efforts and thereby increase recycling.² Finally, the Commission determined that all revenues from the sale of recyclable materials collected from ratepayers, including retained revenues, that are not used to increase recycling must be distributed to residential customers.³

- 4 The Commission subsequently resolved another issue arising under RCW 81.77.185 in Order 10 in Dockets TG-101220, TG-101221, and TG-101222 (consolidated) entered on October 25, 2011 (Order 10). That order adopted an initial order concluding that the company was not authorized to keep eight percent of the revenues it retained from the sale of recyclable materials collected from its customers as a financial incentive and reward because the Plan failed to demonstrate how those revenues would be used to increase recycling.⁴ The Commission further explained that “increasing revenues from the marketing of recyclable materials, without more, is not equivalent to an increase in recycling under RCW 81.77.185.”⁵
- 5 Solid waste collection companies have filed other Plans and accompanying recycling commodity credit adjustments that are currently pending before the Commission. These filings also raise issues requiring interpretation of RCW 81.77.185.
- 6 The Commission, therefore, initiated this docket to examine the statute on a generic basis and to provide guidance to the industry and local governments as they develop future Plans. The Commission received written comments in response to notices outlining issues of general applicability. The Commission also conducted two workshops with stakeholders to address those issues. This interpretive and policy statement is the result of that investigation.

¹ Order 05 ¶¶ 18-23.

² *Id.* ¶¶ 24-31.

³ *Id.* ¶¶ 32-39.

⁴ Order 10 ¶¶ 5 & 8.

⁵ *Id.* ¶ 10.

INTERPRETATIONS AND POLICIES

7 The legislature encourages state agencies “to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only.”⁶ The statement the Commission is issuing in this docket reflects our current interpretation of RCW 81.77.185, but it is not binding on the Commission or interested persons and thus does not preclude parties from raising these issues in the context of specific Plans.

8 Consistent with the Administrative Procedure Act, it may be appropriate at some point to set forth these interpretations and policies in formal rules. The consensus of the persons who commented in this docket, however, was that Plan requirements and processes are still being developed and need flexible consideration before being formalized into rules. We agree. We look forward to continuing to work with companies, local governments, and other stakeholders to implement RCW 81.77.185 and promote the legislature’s goal to increase recycling. In the meantime, we issue this guidance on selected issues arising out of implementation of RCW 81.77.185.

“Increase Recycling”

9 The statute requires that a solid waste company’s Plan must “demonstrate[] how the revenues will be used to increase recycling.” In applying that requirement, the Commission must determine what it means to “increase recycling.”

10 We generally agree with the comments of King, Pierce, and Snohomish Counties, as well as the industry, that this term should be interpreted broadly. RCW 81.77.185 embodies a legislative policy determination that recycling is a public benefit, and that policy should be implemented expansively.

11 We nevertheless observe that the word “increase” includes a temporal component. “Increase” means “to become progressively greater (as in size, amount, number, or intensity).”⁷ We interpret the statutory term “increase recycling” as requiring a demonstration of the likelihood that recycling will become progressively greater as a result of the Plan. In other words, the Plan must demonstrate how the use of retained

⁶ RCW 34.05.230(1). Because we provide interpretations of law and articulate the Commission’s policy preferences, this document is both an interpretive and a policy statement.

⁷ Webster’s New Collegiate Dictionary 577 (1981).

revenue is reasonably designed to generate more recycling at the end of the Plan period than existed at the beginning of that period.⁸ “Increase recycling” does not include revenue usage intended only to maintain recycling at the levels that existed when the Plan began.

- 12 We further agree with the Counties and the industry that the Commission should not be prescriptive in the types of recycling-related activities that a Plan may properly encompass and that “recycling” includes all phases of the solid waste company’s process of collecting, sorting, and selling recyclable materials. Non-exclusive examples of such activities include increasing the number or participation of customers who recycle; minimizing contamination of recyclable materials; increasing the tonnage of recyclable materials collected; and increasing the percentage of recyclable materials that are included in the total solid waste stream.
- 13 Certain proposed examples of “increase recycling,” however, do not fall within a reasonable interpretation of that term. The Commission has previously concluded that “increasing revenues from the marketing of recyclable materials, without more, is not equivalent to an increase in recycling under RCW 81.77.185.”⁹ We continue to hold that view.
- 14 Similarly, “increase recycling” does not include increasing the value of recyclable materials, as opposed to ensuring that materials intended to be recycled can be efficiently and effectively recycled. Reducing contamination and assisting customers to properly identify and prepare materials to be recycled is reasonably related to increasing recycling. Maximizing the price the company receives for the sale of recyclable materials is not.¹⁰

⁸ We recognize that efforts to increase recycling may be part of a longer term strategy and that activities may be designed to result in impacts beyond the end of the Plan period. Such activities are within the contemplation of the statute and would be permissible in a Plan.

⁹ *Id.* ¶ 10.

¹⁰ While obtaining a higher price for recyclable materials would benefit consumers and companies alike, we are constrained by the language of the statute. Even if we were at liberty to go beyond the legislature’s limitations, we would not approve a Plan that permits a company to reap the rewards of higher commodity prices unless the Plan also requires the company to share the risk of lower prices.

- 15 The use of retained revenues to promote goods made from recycled materials is a closer question. In general, we find that consumer purchase and use of these products is an important public policy goal, but it lacks a sufficient nexus to the requisite “increase recycling” to justify funding through ratepayer dollars. We interpret RCW 81.77.185 to require such an increase within the service territory the solid waste company serves. Markets for recycled goods are largely national, even global, and local efforts to stimulate these markets are unlikely to increase recycling demonstrably within the area the Plan covers.
- 16 Where there is a specific local market for goods made from recycled materials, however, use of retained revenues to promote those products could be appropriate. Snohomish County cites the example of promoting “locally produced compost made from curbside-collected food and yard waste.”¹¹ Such promotional efforts would be within the meaning of “increase recycling.”

Permissible Expenditures

- 17 A demonstration of “how the revenues will be used to increase recycling” requires the Commission to evaluate Plan expenditures to determine whether they represent appropriate use of retained revenues. As an initial matter, we agree with those parties who comment that this is a prospective review. The legislature used the future tense, “will be used,” and we must give effect to that language. The Commission will review anticipated expenditures at the time a Plan is submitted for approval to determine their permissibility. The statute does not contemplate a review of actual expenditures at the end of the Plan period as a condition of approval of the Plan, and we will not imply such a requirement.
- 18 Limiting Commission review to anticipated expenditures, however, does not mean that a company’s performance under its Plan is not subject to scrutiny. As discussed further below, we expect Plans to specify in detail the activities the company is obligated to undertake, the expenses the company expects to incur, and the means of enforcing compliance with the Plan. Companies should also quantify and explain any significant discrepancy between planned and actual expenditures under prior Plans as part of the filing for approval of a new Plan. Such an analysis will better enable the

¹¹ Snohomish County Response to WUTC Questions at 4.

Commission to determine whether the anticipated expenditures included in the new Plan demonstrate that retained revenues “will be used to increase recycling.”

- 19 In determining what is and what is not a permissible expenditure, we believe it is appropriate to recognize that the Legislature has assigned to each county’s legislative body the substantial role of crafting solid waste and recycling policies for the “unique needs” of the county.¹² Accordingly, we deem it appropriate to give deference to the policy preferences of county legislative bodies as expressed in their adopted solid waste management plans.
- 20 With respect to the permissible Plan expenditures themselves, we address two types: (1) Cost reimbursement, and (2) incentives, bonuses, or return on Plan activities or compliance with Plan requirements.

Cost Reimbursement

- 21 An examination of expenses that can be funded with retained revenues requires the Commission to address the more fundamental question of the nature and purpose of Plans under RCW 81.77.185. Staff contends that “retained revenues are meant to provide funds to be used to try new and innovative programs at little or no risk to the company,” not for “sustaining/ongoing activities or efforts that are part of the companies recycling operations and are more appropriately included in rates.”¹³ The Counties and the companies, on the other hand, urge us to take a broad view of the activities and expenditures that can be included in Plans and funded with retained revenues.
- 22 We agree with Staff that the primary purpose of RCW 81.77.185 is to provide a unique mechanism to finance efforts to increase recycling that companies might not otherwise pursue. At the same time, however, the statute does not restrict the use of retained revenues in a Plan except to require that those “revenues will be used to increase recycling.” We will not impose a restriction on the use of retained revenues that the legislature did not intend. Accordingly, with one caveat, cost recovery

¹² RCW 70.95.080(1); *see also* RCW 70.95.092 (assigning to county legislative bodies the authority to establish service levels).

¹³ Initial Comments of Commission Staff at 6.

expenditures will be permissible if the Plan demonstrates how those expenditures and the activities they fund will “increase recycling.”

- 23 The caveat on the permissibility of Plan cost recovery expenditures is that retained revenues cannot be used for costs that are included in the company’s rates for collecting the recyclable materials. Obviously, the company is not entitled to recover the same costs twice – once through its rates and a second time from retained revenues.
- 24 However, we will not automatically preclude Plan expenditures that are used to recover costs that are not but *could* be funded through base rates. We nevertheless agree with Staff that given the choice between funding recycling activities through base rates and through retained revenues, it would seem to make more sense for the company, as well as for proponents of recycling, to fund those activities through rates. Such a practice would secure recycling investments for their useful life and allow the company to benefit from an increased return. We also avoid the issue of whether to allow a return in future years when the original cost was funded in part or in whole with retained revenues. The recycling effort could benefit because a greater percentage of retained revenues would be returned to customers in the form of a bill credit. It is intuitive that the greater, and more visible, the bill credit, the greater the positive reinforcement to the consumers for their recycling efforts.
- 25 Within these general parameters, the Commission will not prescribe specific costs that may be included in Plans, but we will expect Staff to scrutinize certain costs particularly carefully. Equipment investment, for example, is traditionally recovered through rates, as are expenses that recur year after year. Such costs might be incurred to “increase recycling” in unique circumstances, but a Plan that includes such expenditures must justify their recovery from retained revenues rather than through general rates. We are not attempting to draw a bright line on such costs. We recognize that some types of expenses clearly intended to increase recycling, or facilitate the increase of recycling, may be included in the Plan even though they also could be included in base rates. Examples include reasonable expenditures for consumer education and outreach and reasonable expenditures for the collection of data designed to show progress, or lack of progress, in the effort to increase

recycling.¹⁴ We see recurring activities as most susceptible to inclusion in base rates, but are open to an alternative treatment, as long as the parties can demonstrate the need to do so.

Incentives, Bonuses, or Returns

- 26 We concluded in Order 05 that at least some portion of retained revenues can be used as a reward to provide an incentive to the company to develop and implement recycling efforts and thereby increase recycling.¹⁵ We adhere to that view but provide additional guidance on the circumstances in which incentives or other payments to the company are appropriate under the statute.
- 27 We continue to believe that a company may not earn a rate of return or otherwise keep a portion of retained revenues from the sale of recyclable materials solely as a reward for engaging in Plan activities.¹⁶ A return on investment is just that – compensation for the risk of investing one’s own capital in a business enterprise. Reward corresponds to risk. Revenues generated from the sale of recyclable materials belong to the ratepayers who provide the materials. A company takes no financial risk when it uses those revenues to fund Plan activities, and thus the company is not entitled to a financial reward associated with risk.
- 28 Similarly, a Plan may not authorize a bonus or incentive payment to the company solely for complying with Plan requirements. We are sensitive to the Counties’ concerns that such payments provide companies with additional motivation to more willingly engage in Plan activities. To the extent that a company is not meeting its obligations under the Plan, however, the appropriate remedy is to withhold revenues to be distributed to the company. Such enforcement provisions not only are permissible, they are instrumental in demonstrating that retained “revenues will be used to increase recycling.”

¹⁴ Direct payments to a County government as part of a negotiated Plan present a somewhat different issue. We are disinclined to permit such payments unless the company demonstrates (1) how the specific activities on which the County will use those funds will increase recycling; and (2) the County can expend the funds on the specified activities more efficiently than the company, *e.g.*, by funding a single, county-wide outreach or education program, rather than having multiple companies engage in their own individual efforts within their service territories.

¹⁵ Order 05 ¶¶ 24-31.

¹⁶ *See* Order 10 ¶¶ 5 & 8.

29 Bonus or incentive payments, on the other hand, are permissible to the extent they are reasonably designed to encourage the company to achieve or exceed Plan goals or objectives. By “goals or objectives” we mean “the end toward which effort is directed,”¹⁷ as opposed to requirements or conditions that are “a premise upon which the fulfillment of [a Plan] depends.”¹⁸ Thus, for example, a Plan could authorize an incentive payment to the company for meeting or exceeding specified targets for curbside recycling subscribership, but a company is not entitled to a bonus simply for attending quarterly meetings or collecting required data.

30 We realize that in some cases there may be a fine line between Plan “goals or objectives” and “requirements or conditions.” We will not attempt to prescribe all permissible types of bonus or incentive payments. Rather, the Commission will review such payments in a Plan with an eye toward ensuring that they are reasonably likely to further the statutory goal to increase recycling and thus represent a prudent use of ratepayer funds.

31 Part of our review of bonus or incentive payments will be the size and structure of such payments. We agree with the majority of commenters that the payments should be structured as a percentage of revenues or expenses, rather than a fixed dollar amount. We find particularly appealing King and Snohomish County’s proposal that incentive payments should be determined based on a pre-determined percentage of company expenditures to achieve the goal or objective, rather than a percentage of revenues.¹⁹ Such a calculation more closely ties the company’s reward to the efforts it undertakes and, as the Counties state, minimizes the incentive to skimp on those efforts. The Counties also suggest that expenditures on which the incentive payment is based be capped at budgeted levels, subject to County approval of any increase, to forestall inflation of those expenditures to correspondingly increase the bonus. We agree with this approach and will expect future Plans that include bonuses or incentive payments to structure them accordingly.

32 We will also require the percentage applied to those expenditures to be reasonable. Both King and Snohomish Counties recently have negotiated Plans in which they

¹⁷ Webster’s New Collegiate Dictionary 488 (1981).

¹⁸ *Id.* at 233.

¹⁹ Snohomish County Response to WUTC Questions at 8.

have agreed to “an incentive equal to 5% of expenditures.”²⁰ We believe that is an appropriate amount and will expect any bonus or incentive percentage to be no higher than that percentage without compelling justification. We will leave the precise percentage, including any graduated percentages for achieving different levels of goal attainment, to negotiations between the company and the local government, subject to the statutory requirement that the use of retained revenues to make such payments must be reasonably designed to increase recycling.

Budgets

- 33 Several commenters recommended that Plans include budgets of anticipated revenues and expenditures. Others did not object. We agree that such budgets are appropriate. A Plan cannot demonstrate how retained “revenues will be used to increase recycling” if it does not include a detailed budget of how those revenues will be spent.
- 34 Commenters also universally took the position that modifying or making adjustments to those budgets during the Plan period should be the responsibility of the companies and the local government, with little or no Commission involvement. We conclude that Plans should include periodic meetings between the company and the local government to assess the company’s performance under the Plan, including the extent to which actual revenues and expenses are consistent with budgeted numbers. The parties to the Plan should address discrepancies between actual and budgeted figures, both positive and negative, and make appropriate adjustments to the budget or to the Plan as a whole if necessary.
- 35 The Commission, however, bears the ultimate responsibility to ensure that a Plan “demonstrates how the revenues will be used to increase recycling.” We are not willing to relinquish that responsibility when a Plan is materially altered while still in effect. We nevertheless do not believe the Commission must approve or even review every Plan modification.
- 36 Rather, we expect the company to submit a revised Plan to the Commission, with a certification from the local government, if the modifications to the Plan materially impact how the retained revenues will be used to increase recycling or if the Plan does not include provisions that set forth how modifications to the Plan will be made.

²⁰ *Id.*; King County Response to WUTC Questions at 6.

Such modifications include, but are not necessarily limited to, elimination of Plan activities or programs or a substantial increase in overall company expenditures. Commission approval of the modified Plan will not be required, but the Commission may take additional action on that Plan to the extent necessary to comply with RCW 81.77.185, up to and including rejection of the modified Plan.

- 37 Finally, we note that the statute requires the Commission to allow companies to retain *up to* fifty percent of the revenue from the sale of recyclable materials. Use of retained revenues to recover actual Plan expenditures is capped at this amount, and budgets must be established, and modified if necessary, to comply with this limitation. If the company's actual overall expenditures during the Plan period, including any bonuses or incentive payments, are less than 50 percent of the actual retained revenues, the difference must be returned to residential customers. We will not approve a Plan that allocates such "excess" retained revenue to the company, even if the company was budgeted to receive that amount.

Local Government Role

- 38 The statute conditions eligibility for recycling revenue retention on local government certification of the Plan as consistent with the local government solid waste plan. In practice, local governments have been playing an even more significant role. Counties, in particular, generally negotiate Plan terms and conditions with solid waste companies, as well as manage and oversee company compliance with the Plans. We conclude that such local government actions do not encroach on Commission authority or obligation under RCW 81.77.185. Specifically, county participation in negotiating financial conditions does not usurp the Commission's role of determining whether Plans demonstrate how retained revenues will be used to increase recycling. Indeed, we welcome local government involvement in the development of such conditions, although we reiterate that the Commission independently determines whether those conditions comply with the statute.
- 39 We requested comment on ways in which the Commission and local governments can collaborate on development and approval of Plans. The responses suggest that the process that has evolved to date does not lend itself to joint participation by multiple governmental entities. Other than providing additional guidance on its statutory

interpretation, none of the written comments proposed specific actions the Commission should take to aid or facilitate Plan development.

- 40 One suggestion discussed during the second workshop, however, was for a company and local government to make an oral presentation to the Commission prior to submission of a Plan to inform the Commissioners of salient Plan provisions and obtain feedback on any potentially problematic areas. The Commission would welcome such presentations, which could be made at a regularly scheduled or recessed Open Meeting. Companies and Counties interested in making such a presentation should work with Commission Staff to make the appropriate arrangements. We also remain open to working with the Counties and companies in other ways to make process improvements in the future.

Role of Commission Staff

- 41 Staff currently reviews the Plans that have been filed and provides a recommendation to the Commission on whether to approve those Plans. Staff also provides technical assistance to counties and companies upon request, focusing on the proper interpretation of RCW 81.77.185 and Commission orders, practices, and procedures.
- 42 No commenting party proposes significant changes to Staff's role. Specifically, no one recommends that Staff participate in the negotiations between the company and the local government authority to develop a Plan, although there is some support for Staff reviewing a final draft Plan prior to its submission to the Commission for approval.²¹
- 43 We do not perceive a need for Staff to become more involved in the development of Plans. We encourage companies and local governments to consult with Staff on Plan provisions that are new or about which there are questions or concerns about the permissibility of these provisions. We value and rely on Staff as a neutral third party to evaluate and make recommendations on Plans, but that role does not preclude Staff from providing its opinion to requesting parties or from making suggestions for modifying a draft plan to conform to Commission expectations.

²¹ *E.g.*, King County Response to WUTC Questions at 8.

Filing Process

- 44 The Commission must allow companies to retain up to 50 percent of their recycling revenues if (a) the local government certifies that the Plan is consistent with the local government's solid waste plan, and (b) the Commission finds that the Plan demonstrates how the retained revenues will be used to increase recycling. For its part, the Commission has encouraged companies to file a Plan, along with the requisite local government certification, no less than 45 days before the Plan is effective to enable the Commission to make its required determination. Companies have also concurrently filed revisions to their tariffs adjusting the commodity credit for the recycling revenues to be returned to residential customers.
- 45 We take this opportunity to clarify what we expect. We see no reason at this time to modify the 45 day time period for Commission review, but that review period should begin only after a company has filed *all* of the following:
- A copy of the Plan, including a budget of anticipated revenues and expenditures;
 - Certification from the appropriate local government authority that the Plan is consistent with the local government's solid waste plan;
 - A narrative explanation of how the recycling revenues the company retains will be used to increase recycling;
 - An analysis of the company's performance under the existing or prior Plan (as applicable), including but not necessarily limited to quantifying and explaining any significant discrepancy between budgeted and actual revenues and expenditures;
 - The name and contact information for at least one person at the company and one person at the local government to whom the Commission can address questions or requests for additional information; and
 - Any other documentation on which the company relies to demonstrate how the retained revenues will be used to increase recycling.

The requirement that a filing be complete before the 45 day Commission review period begins ensures that the Commission has sufficient time to determine how the retained revenues in a Plan “will be used to increase recycling” and gives companies and local governments an incentive to include all necessary documentation with the Plan filing. Companies should establish Plan and tariff effective dates accordingly.

- 46 No commenters supported a requirement that all companies use the same annual Plan period, and we find no reason to attempt to implement such a standard. We agree that companies and local governments should work together to determine the appropriate period, and we do not want to strain Commission resources by having all Plans filed at the same time.

CONCLUSION

- 47 Revenue from the sale of recyclable materials collected from ratepayers belongs to those ratepayers. The legislature, however, has determined that a company may use a portion of those ratepayer funds to further the public policy goal of increased recycling. We will continue to review recycling revenue sharing Plans to ensure they properly balance these two principles as those Plans continue to evolve.

DATED at Olympia, Washington, and effective May 30, 2012.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner