

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,)	
)	
Complainant,)	
)	
v.)	DOCKETS TG-111672, TG-111674
)	TG-111681 and TG-120073 <i>consolidated</i>
)	
MURREY'S DISPOSAL COMPANY, INC., G-9,)	
)	
Respondent.)	COMMISSION STAFF'S RESPONSE
.....)	TO MOTION FOR SUMMARY
)	DETERMINATION BY
)	RESPONDENTS MURREY'S
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,)	DISPOSAL COMPANY, INC., ET AL.
)	
Complainant,)	
)	
v.)	
)	
AMERICAN DISPOSAL COMPANY, INC., G-87,)	
)	
Respondent.)	
.....)	
)	
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,)	
)	
Complainant,)	
)	
v.)	
)	
MASON COUNTY GARBAGE CO., INC. D/B/A MASON COUNTY GARBAGE, G-88,)	
)	
Respondent.)	
.....)	
)	
)	
)	

WASHINGTON UTILITIES AND)
TRANSPORTATION COMMISSION,)
)
Complainant,)
)
v.)
)
HAROLD LEMAY ENTERPRISES,)
INC., d/b/a PIERCE COUNTY)
REFUSE, G-98,)
)
Respondent.)
.....)

I. INTRODUCTION

1 The Respondent solid waste companies essentially argue that the Commission is legally prohibited in this docket from allowing them to keep, as an incentive reward under their revenue sharing plans, anything less than the full amount of unspent retained revenues generated from the sale of recyclable materials, no matter how large that amount may be—at least not prior to May 30, 2012, the date that the Commission issued its *Interpretive and Policy Statement* (“IPS”) on this matter. According to the Respondents, doing so would violate their “fundamental administrative due process rights,” since “there was no reason for any party to believe” that if a company merely showed that some of the revenues had been spent to increase recycling, under a plan certified by the County, the Commission would or could do anything other than permit the company to keep for itself whatever was left over and unspent. Respondents’ Motion for Summary Determination, at ¶ 33.

2 As for the period after May 30, 2012, the Respondent companies maintain that the IPS still should not be applied, since it was issued eight months after the 2011-12 reporting year for Murrey’s Disposal Company (“Murrey’s) and Mason County Garbage Co. (“Mason County”), notwithstanding the fact that the Commission suspended these plans in October

2011, and expressly made it known that the amount of retained revenues that companies would be permitted to keep under those plans would be reviewed. *Id.* at ¶ 42 and n. 20.

3 Staff submits that Respondents' position is without merit. The Commission has the authority to limit respondent companies' incentive rewards for their prior completed plan periods to the percentage of expenditures the Commission permitted Murrey's and American to retain in 2009-2010. The Commission also has the authority to limit the respondent companies' incentive rewards for their current recycling revenue sharing plans to a maximum of five percent of expenditures (conditioned upon meeting the performance criteria in the plans), consistent with the IPS. The Commission should do so in this case, for the reasons set forth previously in Staff's Motion for Summary Determination, and for the reasons set forth below.

II. ARGUMENT

A. **The Commission's prior orders and actions do not establish any "due process" right for the Companies to keep, without limit, all unspent retained revenues generated from the sale of recyclable materials.**

4 The Commission held, in Order No. 5 in Docket TG-101542, *et al*, that RCW 81.77.185 allows solid waste collection companies to retain "some portion" of retained revenues as an incentive to increase recycling. It likewise held that a company need not spend all retained revenues on recycling activities. Order 05, at ¶¶ 31, 48. The Commission did not, however, hold that a company may keep all unspent monies, without limit, as an "incentive reward." Nor did the Commission create any legitimate expectation for such a result.

5 In fact, the Commission stated that it expected all recycling plans to ensure that most of the retained revenues are spent on recycling activities. *Id.* at ¶ 28. The plans at issue for

2010-2011 do not meet this test. Indeed, Murrey's seeks to keep an incentive reward of over 150% of the amount spent on recycling activities, while Harold Lemay Enterprises, Inc. seeks to keep an incentive reward well over the amount of money it spent on recycling activities.

6 The Commission also emphasized that RCW 81.77.185 permits a company to retain “up to” fifty percent of the revenue paid to the companies for recycling materials. Order 05, at ¶ 37. The Companies, however, would virtually gut the “up to” language in the statute. They contend that as long as they spend any amount on activities that increase recycling, and obtain certification from the County, they may keep the remainder of unspent revenues for themselves.

7 But this would require that the Commission treat expenditures and unspent retained revenues identically. If, for example, Company A submits a plan under which it spends \$100,000 on recycling activities and has \$500,000 in unspent retained revenues, while Company B submits a plan under which it spends \$500,000 on recycling activities and has \$100,000 in unspent retained revenues, the Commission would be legally obligated to treat the plans the same and award Company A five times the incentive reward allowed for Company B.

8 This is absurd. It is neither required by RCW 81.77.185, nor by the Commission's prior actions and orders. Simply because the Commission determined that “some portion” of unspent monies may be deemed to be monies that are “used to increase recycling” under RCW 81.77.185 (and hence eligible to be kept as an incentive reward) does not mean that the Commission is obliged to treat all unspent monies in the same manner. The Commission may rightly determine that the amounts proposed to be retained here as incentive rewards

are excessive, and do not meet the statutory requirement that such monies be “used to increase recycling.”

9 The Commission emphasized in Order 05 that it was only deciding the specific plans at issue in that case. It approved an incentive reward of \$79,684 for Murrey’s for the 2009-2010 plan period in Order 06 in Docket TG-101542, *et al.*, as reasonable, given the facts of that case. The Commission did not then expressly state that it might take a wholly different view if the incentive reward sought were significantly higher (as is the case here), due to unprecedented unspent revenues, because the Commission was not presented with those facts at that time. In fact, the Commission might well have been chastised for issuing a premature advisory opinion had it done so. But Respondents appear to argue that because the Commission did not explicitly address that situation in Order 05 or Order 06, it is precluded from doing so now—and moreover, is absolutely precluded from considering the actual amount of company expenditures as a factor in determining how much to allow as an incentive reward under RCW 81.77.185. This is simply not a reasonable argument, and should be rejected.

10 Finally, in this regard, it should be noted that the tremendous increase in recycling revenues during 2010 and 2011 was, as the Company recognizes, “completely dependent on international market prices and economic circumstances over which the company, county, and agency have little control.” Respondents’ Motion for Summary Determination, at 13 n. 11. In other words, the staggering incentive rewards that the companies propose to keep in this docket were not the product of any additional effort or expenditure on the part of the Companies. It is difficult to conceive how these monies, if they are simply kept by the companies, are somehow “used to increase recycling,” as required by RCW 81.77.185. And

to contend that the Commission is precluded from considering this reality in determining the amount of incentive rewards the companies are allowed to keep is clearly not reasonable.

The Commission should reject the Respondent companies' arguments to the contrary.

B. The Commission should limit the Respondent companies' incentive rewards for their current recycling revenue plan periods to no more than five percent of the revenues the Respondents spent on recycling plan activities, consistent with the *Interpretive and Policy Statement*.

11 Respondents' Motion for Summary Determination, at 20, section XI, argues that the IPS should not be applied to any recycling revenues received prior to May 30, 2012, the date the IPS was issued by the Commission. ("Reliance in any form on the IPS's decision points for treatment of revenues received before May 30, 2012 is impermissible.") Respondents appear to further argue that application of the IPS to any portion of their current recycling revenue plan periods is impermissible. In either event, Staff disagrees. Application of the IPS, which limits incentive rewards to five percent of revenues actually spent by the Companies on recycling activities, is both permissible and appropriate.

12 Respondents' "due process" claim essentially argues that they had no notice that any of the unspent revenue retention amounts for the current recycling plan periods would be disallowed as an incentive reward. This is simply not true. Respondents were put on notice, when the Commission suspended the recyclable commodity revenue adjustments for the current plans and allowed them to become effective only a temporary basis, subject to refund, that unspent revenue amounts would be closely scrutinized. The Commission clearly expressed its concern with the large amount of unspent revenue that had accrued during the Respondent companies' prior plan year. While the exact amount of revenue permitted to be retained as an incentive reward was not specified, companies clearly could

not contend a “right” or “legitimate expectation” that they could keep all unspent revenues as an incentive reward for the current plan periods.

13 Respondents also contend that because interpretive and policy statements are advisory in nature (RCW 34.05.230(1)), the principles contained in those policies cannot be applied to the current plan periods. But this essentially would make the IPS of no use whatsoever. Moreover, it would be inconsistent with Respondents’ own actions in this docket. As Respondents’ correctly note,

“Upon request of all parties, the current suspended dockets were continued pending the results of the workshop sessions and the formal Interpretive and Policy Statement which the Commission indicated it was contemplating issuing pursuant to RCW 34.05.230.” Respondents’ Motion for Summary Determination, at ¶ 7. (Emphasis added).

Why would Respondents ask that the proceedings in this docket be suspended for consideration of the forthcoming IPS, if the results of the IPS could not legally be applied to the current plan periods in any event? Only after the IPS interpreted the statute in a manner that Respondents deemed unsatisfactory to their interests, do the Respondents now argue that the principles set forth in the IPS may not be applied even to their current plan periods.

14 Staff also disagrees with Respondents’ contention that application of the IPS to the current plan periods is not permissible because it would result in the imposition of a retroactive “penalty” or “administrative sanction” against the companies. The IPS is the Commission’s considered interpretation of the statutory language set forth in RCW 81.77.185. Simply because the IPS may not allow Respondent companies to keep the huge amount of unspent revenues they seek as incentive rewards does not make application of the IPS a “penalty” or “administrative sanction.”

15 Finally, Staff disagrees with the contention set forth in Intervenor Washington Refuse and Recycling Association's ("WRRRA") Joinder in Respondents' Motion for Summary Determination. WRRRA argues that "there must be a financial incentive for the company if the various [recycling revenue sharing] programs are to be successful." Staff does not dispute this statement. But, WRRRA goes further: "The retention rate proposed by Staff here simply is not enough to take the risk on a regular, or even irregular, basis." Intervenor's Joinder, at ¶ 3.

16 Evidently this is not true for King or Snohomish counties, or the companies that operate in those counties. The IPS's determination that incentive rewards should be limited to five percent of expenditures was not simply the result of a unilateral mission on the part of the Commission. Rather, the Commission sought input from the affected counties in this matter. In response, King and Snohomish counties both recommended that incentive rewards be limited to a percentage of expenditures, and further indicated that they had both negotiated plans in which the companies agreed to "an incentive equal to 5% of expenditures." IPS, at ¶¶ 31-32. Furthermore, as Staff previously noted in its Motion for Summary Determination, at ¶ 38, both Waste Management of Washington, Inc. and Rabanco Ltd. have entered into approved settlement agreements reflecting this amount of incentive reward, not only for current and future plans, but also for plans pertaining to the 2010-2011 plan periods. There is no reason why companies operating in Pierce or Mason counties should be treated any differently regarding their revenue sharing plans.

III. CONCLUSION


17 The arguments raised by Respondents in their Motion for Summary Determination, and in the Joinder of Intervenor's, are without merit. Staff, therefore, requests that the

Commission grant the relief set forth in Staff's Motion for Summary Determination in these consolidated dockets.

Dated this 13th day of November 2012.

Respectfully submitted,

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