

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of )  
 ) DOCKET NO. TG-971167  
 RECYCLING AND DISPOSAL )  
 SERVICE, INC. )  
 ) DECLARATORY ORDER  
 for a Declaratory Ruling. )  
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**PROCEEDING:** This is a proceeding on a petition for declaratory order. On July 21, 1997, Recycling and Disposal Services, Inc. (RDS), operator of a disposal facility in Whatcom County, petitioned for a declaratory ruling. The petition requests that the Commission declare that the Commission, and not the City of Bellingham, regulates the collection of solid waste within the City; that Sanitary Service Company. (Sanitary) has no duty to deliver collected wastes to a disposal facility operated by Recomp of Washington, Inc. (Recomp), and that it is not in the public interest for a solid waste carrier to tender collected wastes to a facility charging higher than market rates.

On July 25, 1997, the Commission gave notice that it had received the petition and notice of opportunity to participate, to the affected carrier; to the City of Bellingham (City or Bellingham); and to the affected disposal site as well as to all certificated solid waste companies. All entities seeking to participate were allowed to do so. All parties consented to the entry of a Commission declaratory order on the subjects of the petition.

Prehearing conferences were held before Administrative Law Judge C. Robert Wallis. All requests for party status were granted. The parties subsequently agreed to submit the matter to the Commission upon stipulated and contended facts. The parties filed stipulated facts, additional non-stipulated facts, and briefs.

**SUMMARY:** The Commission grants in part and denies in part the requested Order, declaring as requested that the Commission and not the City regulates the collection of solid waste from commercial waste generators within Bellingham.

The Commission declines to declare Sanitary's rights vis-a-vis the City under a contract between the two, and declines to declare that the carrier is acting contrary to the public interest in its tender of wastes to Recomp.<sup>1</sup>

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<sup>1</sup>The latter question was not briefed or argued.

The Commission declares that the contract between the City of Bellingham and Sanitary Service Company. (Sanitary) for the collection and disposal of residential wastes does not bar the Commission from establishing rates for disposal based upon lawful and reasonably available economic options. The Commission also declares that generators of non-hazardous commercial solid waste in the City of Bellingham have no right to designate which disposal facility will receive wastes that they generate.

**APPEARANCES:** Petitioner, RDS is represented by Robert Rowland, attorney, Tacoma. Respondent, Sanitary Service Company., by Polly L. McNeill, attorney, Seattle. City of Bellingham, by Richard Little, Assistant City Attorney, Bellingham. Recomp of Washington, Inc. (Recomp) by James Austin, attorney, Seattle. Washington Refuse and Recycling Association (WRRRA) by James Sells, attorney, Silverdale. Commission Staff by Mary M. Tennyson, Senior Assistant Attorney General, Olympia.

**MEMORANDUM**

This is a proceeding on a Petition for Declaratory Ruling filed by Recycling and Disposal services, Inc. relating to the authority of a carrier of solid waste to direct solid waste to disposal sites. The Petition alleges that Sanitary Service Company (Sanitary), a regulated carrier, is delivering wastes of commercial generators collected under authority from this Commission to a facility that charges more than the market rate for disposal, and asks the Commission to declare that it regulates the collection; that the carrier is not required to deliver wastes to the higher-priced facility; and that its doing so is contrary to the public interest.

The issues in this matter are complex and significant. The parties do not find agreement among themselves in defining the issues that the Commission should resolve, and dispute some of the underlying facts. We will resolve the matters that the petition brings to us that are within our jurisdiction to resolve and that are necessary to resolve the disputes among the parties.

The parties worked valiantly to develop a fully- or substantially-agreed statement of facts. Several parties, but not all, agreed on a single statement. All agreed upon consideration of certain proposed evidence. The participants agreed that no hearing of any kind should be held. Subsequently, additional evidence was offered. We find that the parties did not agree that the evidence presented as of a particular date would be the exclusive evidence for consideration, and will consider later-offered evidence.

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### Introduction and Overview.

State law authorizes and requires the Commission to grant authority before a person can begin providing solid waste collection services in the State. Chapter 81.77 RCW. The Commission must regulate commercial solid waste transportation for collection and disposal. State law also allows cities to control solid waste collection service within their boundaries, either by providing the service themselves or by contracting with a private carrier for the service. RCW 35.21.120 *et seq.* During periods of city control, the Commission has no jurisdiction over service in the city. RCW 81.77.020.

Bellingham contracted with Sanitary in 1954 for all city waste collection service. Beginning in 1966, it contracted with Sanitary for residential service only, an arrangement that has continued to the present under a series of contracts. The City is responsible for Sanitary's service to residential customers who use individual residential garbage cans and the Commission regulates Sanitary in providing service to commercial and industrial waste generators, including apartment houses, using various larger containers.

In 1974, the City, Sanitary, and Recomp entered into a contract providing for a new disposal facility for commercial and residential waste. A 1982 City/Carrier contract for residential service provided that Sanitary was obligated to dispose of all wastes collected in the City -- specifically mentioning residential and commercial wastes -- at the preferred Recomp disposal facility.<sup>2</sup> The current agreement (entered in 1989) is titled a contract for "residential service"; it requires "all wastes collected within the City" to be disposed of at the Recomp facility but does not specify, as did the earlier contract, that commercial wastes are included.<sup>3</sup>

Sanitary did tender all commercial solid wastes collected under regulation to the Recomp disposal facility designated in its residential service contract with the City until earlier in 1997. Rates that Sanitary paid for disposal of the commercial wastes that it collected in the city have been found over the years to be within a reasonable range and have been accepted for ratemaking purposes. No evidence in any order or in any other considered Commission decision indicates that the Commission considered the

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<sup>2</sup>Recomp operates a waste incinerator which the City was instrumental in bringing into being. Ash on the site from prior operations is a City responsibility. Funds to dispose of the ash are generated by the disposal of both residential and commercial waste streams.

<sup>3</sup>Recomp states that the current contract is based on a long-term relationship and that the contract is needed to fund city ash removal. This argument clearly highlights the Commission's concerns -- costs of city operations appear to be assigned to and recovered from commercial customers of a regulated service. Even if the purpose of the relationship is to provide funding, the goal must be -- and clearly can be, in various ways -- accomplished by an arrangement that is structured in a manner to meet technical legal requirements. It is also possible that other means of funding could meet the city's needs.

tender or the expense to be improper, that it considered the existence of the contract term to be relevant for ratemaking, or that it approved the term. In 1989, Sanitary represented to the Commission at an open public meeting that the contract for residential service did not require it to use a particular disposal facility.

The Commission has allowed Recomp's charges as a proper element of Sanitary's commercial solid waste rates since at least 1979 -- but there has been no alternative until recently. The Commission's actions appear only to be consistent with the principle that reasonable and prudent costs of operation should be considered in setting rates.

Recently, petitioner RDS opened its disposal facility. There is no evidence to suggest that either of the facilities -- Recomp's or RDS' -- are unlawfully operated or that they fail in any way to comply with all pertinent health and safety regulations. No evidence shows that either facility poses any demonstrated risk of environmental damage or of hazardous materials liability to any commercial waste generator under any provisions of State or Federal law. No evidence demonstrates that any commercial waste generator produces wastes that are classified under state or federal law as hazardous materials or that disposal or treatment of hazardous wastes is in any way related to the services at issue.

During a portion of 1997, the RDS facility was charging about \$40 per ton for waste disposal while Recomp, the facility designated by the City of Bellingham, was charging about \$100 per ton for City wastes and \$40 for wastes generated in the County, outside the City. That is a matter of grave concern to the Commission, because of its responsibilities toward captive ratepayers of the regulated commercial service. If Sanitary were free to choose a disposal site under those circumstances, as a prudent business it would deliver all city and county wastes to RDS and pay \$40 per ton; if Sanitary were required to use Recomp, it would deliver city wastes to that facility and pay \$100 per ton. It is the Commission's responsibility to determine the rates Sanitary's commercial customers must pay and whether Sanitary may recover all of the costs of disposal.<sup>4</sup>

The City, Recomp, and Sanitary all contend (1) that the current contract requires Sanitary to deliver to Recomp the commercial wastes that Sanitary collects within the City, and (2) that the Commission must pass through all of the costs of that disposal to commercial customers. They cite RCW 81.77.160,<sup>5</sup> which requires that the

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<sup>4</sup>According to most recent information submitted to the Commission, the rates are now equivalent at approximately \$55 per ton for all service at each facility.

<sup>5</sup>The statute reads in part as follows [emphasis added]:  
The commission, in fixing and altering collection rates charged by every solid waste collection company under this section, shall include in the base for the collection rates:

(1) All charges for the disposal of solid waste at the facility or facilities that the solid waste

Commission accept uncritically and authorize full collection in rates, all charges associated with disposal at a site that is mandated in the jurisdiction's "comprehensive solid waste management plan or ordinance."

They contend alternatively that the contract is an exercise of the City's right to contract for collection service; that the Commission should defer to the local jurisdiction out of a spirit of comity, recognizing the local jurisdiction's primary role in disposal decisions because of the health and safety aspects of disposal; that the City's rights as a charter municipality eclipse those of the Commission under state law; or that the Commission is estopped from acting inconsistently with approval of Sanitary's expenses for Recomp's rates, no matter what the level of those expenses. RDS and Commission Staff largely disagree.

Commission Staff also urges that Sanitary's commercial customers have the power to designate the disposal site for wastes that they generate. On the basis of a Staff opinion, Sanitary is allowing its commercial customers to designate a disposal site. The City, Recomp, Sanitary and the Association oppose the concept.

**Statement of the Issues.**

One of the participants chose to describe this matter as a "struggle" between the City and the Commission for control of solid waste collection within the city. We -- emphatically -- do not see it that way. The participants do have disagreements -- but we note that all participants (including the City) submitted themselves and their issues to the Commission's jurisdiction to enter a declaratory order on the topic.<sup>6</sup> We see this as an exercise in determining the requirements of law that apply to all of the participants, and so that all may consistently follow the law.

The City clearly has the power to contract with Sanitary or any other carrier for all service within the city, and the City has the power by means of a comprehensive waste plan or ordinance to designate a disposal facility or facilities for all city wastes whose charges the Commission under RCW 81.77.160 would then be obligated to pass through to ratepayers. If there is any lack in the City's existing approach, and the City chooses to rectify that lack, it is a simple matter for the City to do so.

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collection company is required to use *under a local comprehensive solid waste management plan or ordinance* designating disposal sites; and

(2) All known and measurable costs related to implementation of the approved county or city comprehensive solid waste management plan. [Emphasis added]

<sup>6</sup>The City's consent to Commission jurisdiction was conditional. The City refuses to allow the Commission to decide the validity of the contract between the City and Sanitary. The Commission fully agrees that it has no jurisdiction to decide the validity of the contract as between the contracting parties. Because the Commission has regulatory responsibilities that might be affected by the contract, the Commission will examine the contract only for the purpose of assisting the Commission in deciding its responsibilities under law.

The Commission has no proprietary interest in regulated solid waste collection, and it will cooperate with the City in whatever choice the City makes. However, the Commission does have the responsibility under Title 81 and Chapter 81.77 RCW to regulate in the public interest and according to the public service laws in all instances where the City has not taken action that preempts the Commission's decisions. We would be derelict in our duties were we to fail to do so.

Therefore, we will examine the facts to determine how the parties' actions to date affect the Commission, whether those actions require the Commission to accept Recomp's charges uncritically for ratemaking purposes, and whether Sanitary's commercial customers have the power to designate a disposal facility.

**I. Does the contract between Sanitary and the City of Bellingham obligate the Commission to accept Recomp's charges for ratemaking purposes under RCW 81.77.160?**

The answer to this question is derived from answers to several other questions posed by the participants.

**A. Does the Commission have the power to invalidate a contract between Bellingham and Recomp?**

Clearly, the answer to this question is "no." As an administrative agency, the Commission's powers are strictly limited to those granted in the statutes. The Commission can examine the contract to determine how the Commission should treat matters for purposes of fulfilling the Commission's responsibilities under law, including the setting of rates.

**B. What does the contract say, and what does it require the regulated carrier to do?**

We begin with the caution that the purpose of our inquiry is only to guide the Commission in its application of pertinent law, and not to invalidate the contract or affect the rights and duties of the parties to the contract. In that context only, we find that the contract should be seen as one for residential collection service, and that according to its plain meaning the contract does not require Sanitary to deliver commercial wastes to Recomp.

Basic principles of construction are firm and consistent. Some of those that are relevant here are the following. When contract terms are clear and unambiguous, a court must effectuate the meaning of the language. Price v. Farmers Inc. Co., 82 Wn.App. 20 (1996). The fact that parties disagree about the meaning of terms does not make them ambiguous. Mayer v. Pierce County Medical, 80 Wn.App. 416 (1995). To determine whether a contract is ambiguous, one reads it as a whole and asks whether two meanings are possible. Allstate Insurance Company v.

Hammonds,

72 Wn.App. 664 (1994). In interpreting a contract, one must read it as a an average person would read it, and not with a strained or forced interpretation. McInturff v. Dairyland Inc. Co., 56 Wn.App. 773 (1990).

The contract is clear on its face and its terms speak only to residential service. The contract is entitled as one for residential service, and not one of its terms applies to anything but residential service. In that context, the requirement that Sanitary deliver "all wastes" that it collects within the city to Recomp is clear, refers only to the subject of the contract -- residential wastes -- and does not require the carrier to deliver wastes from any other source. Only by going outside the contract does one learn that the carrier also operates as a regulated carrier in the collection of commercial wastes within the City. Only by going outside the contract does one learn of the history of the relationships and the possibility that the term may mean something else, applying to commercial collections. When a document is clear on its face, we should not look behind it for indicia to change its terms. Price v. Farmers Ins., above.

If we do look outside the language of the document itself, we also find support for that view. The prior version of the contract did specifically direct the disposal of commercial wastes at Recomp, and the change lends credence to our interpretation. In addition, the principle of *Inclusio unius est exclusio alterius*<sup>7</sup> leads to the same conclusion.

A third reason for adopting this view is that -- as we shall see momentarily -- the contrary view raises substantial questions of law and policy, and it is preferable to avoid the interpretation that poses problems that would otherwise ensue.

- C. If the contract is interpreted to mandate the disposal of solid wastes in a City-designated facility, how does that affect the Commission's responsibilities?

Recognizing that other matters are at issue and that a full answer to the issues raised in the petition requires us to address other issues, we continue. The question becomes, if we did perceive the contract as one mandating commercial waste disposal, how would that affect the Commission's regulation of the carrier?

The chief reason for the Commission's concern -- the potential "evil" in a contract of this sort -- lies in one analysis of how the contract would function. Let us be clear that we cast no aspersions toward any of the participants, who have according to the evidence acted at all times in good faith. Nevertheless, a contract of this sort could be seen as requiring the carrier, as consideration for entering the

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<sup>7</sup>The inclusion of one is the exclusion of others. *Black's Law Dictionary* (Fifth ed., 1979, p.687).



contract with the City, to perform an act that benefits the City, at the expense of regulated, not contract, ratepayers. If the subject of the requirement did not relate to disposal (which has a particularly local aspect to it), the concern would be more clearly focused.

Suppose that a City enters a contract for residential service with the carrier who provides regulated commercial service in the City that requires the contracting carrier to use, for all of its vehicles operating in the City, a vehicle maintenance and repair firm that also maintains and repairs the City's fleet. The City negotiates a contract with the vehicle maintenance service giving the City a discount if the carrier is required to use the maintenance service. The maintenance business charges the carrier, a captive customer, rates that are higher than the "market rate" that it charges other customers. In this hypothetical situation, if the higher fees are included in calculating the carrier's regulated commercial rates, the City is shifting some of its expenses to the carrier's commercial customers.

The City has every right to direct that residential contract collections be disposed of in its preferred facility. There, the City is accountable directly to its taxpayers who pay the charges in the City-authorized rates. In the instance of Commission-regulated commercial rates, however, the City does not here have the same direct line of accountability.

The City clearly has the power to direct the disposal site for solid wastes. The City can contract with a carrier for commercial collection service and mandate disposal, just as it does for residential wastes. In addition, the legislature has determined that the Commission must nonetheless accept the mandated charges as an element of rates, if the City satisfies the requirements of RCW 81.77.160. Therefore, we shall explore whether it has done any of these.

1. If the contract requires delivery of commercial wastes at Recomp, does it meet the requirements of RCW 81.77.160 such that the Commission is obligated to accept all related charges as elements in rates for commercial customers?

The Commission has no authority over the licensing, the operation, or the business of solid waste facilities. Our involvement arises only from the standpoint of evaluating the disposal expenses of a regulated carrier. We review each carrier's expenses to determine whether they are reasonable and should be considered in determining the carrier's rates for service. We have the obligation to do so unless a principle of law or a statute bars us.<sup>8</sup>

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<sup>8</sup>The provisions of RCW 81.77.160 are such a mandate. See also, Waste Management of Seattle, Inc., et al., v. Utilities and Transportation Commission, 123 Wn.2d 621 (1994).



We find that this contract does not qualify under the terms of the statute. The statute requires the Commission to accept the costs of disposal in rates only when the disposal is directed via a "comprehensive plan or ordinance."<sup>9</sup> We find -- again only for the purpose of determining the Commission's rights and responsibilities under its own statutory mandates -- that if the contract is interpreted as designation of Recomp as the exclusive disposal site for commercial solid waste, the designation is neither the consequence of a comprehensive solid waste management plan nor a comprehensive or other ordinance.

Recomp contends that because the City joined with Whatcom County in formulating the Whatcom County comprehensive solid waste management plan, and because the County plan specifically states that the city contract with Sanitary is within the Plan, the plan thereby requires us to accept Recomp as the sole disposal site and pass the costs along to commercial ratepayers. We disagree.

The County plan itself does not direct disposal at any site. On the contrary, it specifically approves disposal at any qualified site. The county plan itself cannot be the foundation for a disposal requirement. In acknowledging the City contract, the Plan merely states that the solid waste flows under that contract to an acceptable site comply with the plan. Nothing in the Plan itself requires disposal of city commercial wastes at the Recomp facility, and as Commission Staff points out, the plan's acceptance of the City arrangement is not a mandate and does not in any way approve or incorporate any mandate that only the Recomp facility may be used.

There is no indication that the City developed a disposal site mandate through the public process required in chapter 70.95 RCW. And the County plan itself appears to be of 1990 vintage, while chapter 70.95 RCW requires an update no less often than every five years. These are somewhat technical concerns, but they do also support the decision we reach.

Merely because the contract was entered and approved by ordinance, it does not become a mandate via "ordinance" that complies with the requirements of RCW 81.77.160. The interpretation of the contract, which we discuss above, is inconsistent with finding this to be a qualifying ordinance. All contracts presumably must be entered by ordinance or pursuant to the authority of ordinance. If the legislature intended to allow mandatory designation by contract, it could have done so. That the contract is approved by ordinance does not make it an ordinance designating a disposal site, but an ordinance approving a contract.<sup>10</sup>

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<sup>9</sup>The comprehensive plan reference appears to have reference to Chapter 70.95 RCW, which requires local jurisdictions to promulgate a comprehensive solid waste plan. Recomp uses the County plan, promulgated under that statute, in its argument that the City has complied with the "plan" requirement of RCW 81.77.160. The city points out that RCW 70.95.050 allows a city to adopt its own plan or enter and agreement with the county, which Bellingham has done.

<sup>10</sup>Indeed, one of the parties observes that an ordinance to limit the waste stream to Recomp could be found unconstitutional.

2. Does comity or the City's power require us to defer to its actions?

Recomp suggests that solid waste disposal is imbued with such local flavor that the Commission should defer to its judgment in a spirit of comity or under the mandate of law to defer to local law in the event of a conflict. In this matter, we respectfully disagree with Recomp, and find no conflict.

We agree strongly with the observation that disposal is a matter of local concern and that the Commission has no jurisdiction over disposal. Local officials have the unenviable responsibility for both the public health and the public fisc. We agree that state agencies such as the Commission should recognize the burdens and the challenges facing local government and extend cooperation whenever possible.<sup>11</sup>

Here, the Commission faces requirements of its own. Those demand that we assert jurisdiction except when a local government follows any of the several statutory paths, outlined in this order, that give it the means to control the waste stream or the collection process. The purpose, of course, is to provide the regulated ratepayer with the assurance that the important health and financial matters will be lawfully and comprehensively attended to. Those laws and those principles demand that we defer whenever -- but only when -- the requirements of law for deferral are met.

The same response answers the City's argument that under "home rule," local actions take precedence over state law.<sup>12</sup> The City clearly has the power to designate a mandatory solid waste facility. The means to do so in ways that require the Commission to include related costs in setting rates are stated in RCW 81.77.160. But the Commission has responsibilities under law, as well, and there is no indication in any pertinent statute that a city has power to regulate the services of carriers or services not under contract with the city. See, Washington Natural Gas Co. V. P.U.D. No. 1 of Snohomish County, 77 Wn.2d 94 (1969). Our responsibilities require us to ask whether the City has used the means set out in the statute. We find for our regulatory purposes that it has not, that there is no "conflict" between the City and the Commission, and that the Commission may not lawfully defer when doing so runs counter to the Commission's statutory obligations.<sup>13</sup>

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<sup>11</sup>Recomp argues that the contract is one for disposal, and as such the Commission has no basis to interfere with it. We disagree with Recomp's conclusion that the contract is one for disposal; it is a contract for residential solid waste collection. As we note in this decision, the City has numerous ways available to exercise its authority over disposal. We find in this order that it has not done so in a way that affects the Commission's responsibilities.

<sup>12</sup>The City cites Nelson v. Seattle, 64 Wn.2d 862 (1964), which cites Ayers v. Tacoma, 6 Wn.2d 545 (1940).

<sup>13</sup>Recomp argues creatively that the rates under the contract are reasonable because preventing Sanitary from passing all costs to customers in rates would be unfair. This runs counter to the purpose of economic regulation. The Commission clearly has both the authority and the responsibility to disallow improper or imprudent expenses.

- 3. Does the contract between Sanitary and Bellingham exercise the City's right under RCW 35.21.152 to enter contracts for solid waste collection?

We conclude that this is not a contract that exercises the City's power under the statute to assume responsibility for collection service.

As we have noted above, we interpret the contract in a way that preserves its integrity and limits its application to residential wastes.

If it were a contract undertaken pursuant to RCW 35.21.152 to exercise the City's authority to assume jurisdiction over commercial solid wastes, we would agree with Commission Staff that the Commission should respectfully defer to the City's rights and withdraw from all regulation.

The statutes allowing alternative jurisdiction -- the commission primary, subject to assumption of responsibility by the City -- provides for alternative regulation, not joint regulation. The circumstances here demonstrate why shared responsibility is inappropriate. In a situation with shared responsibility, neither regulator has clear responsibility nor clear accountability for all of the relevant decisions. Jurisdiction under this statute is all or nothing. The Commission acknowledges and supports the City's exercise of its right to contract for solid waste service. We believe, however, that the City's exercise of any regulation of commercial solid waste collection under this statute would exclude Commission regulation.

We reject the City's suggested interpretation of the contract for the reasons stated. If the City disagrees with us as to our interpretation, it may readily enter into such a contract that clearly accomplishes its goal, and the Commission will cease regulation of the carrier's commercial collection activities in Bellingham.

- D. Is the Commission estopped from denying the contended meaning of the contract or from acting to disallow excessive disposal expenses?

Sanitary contends that the Commission is estopped from taking any action inconsistent with approval of the residential contract, including a mandate for disposal at the Recomp facility, because it failed to take action against the contract earlier. The Commission disagrees.

We do not find any basis for estoppel here. Estoppel, when applied against a governmental entity, requires clear, cogent and convincing evidence of (1) an admission, statement or act by the government that is inconsistent with its later claim; (2) a party's act in reliance on the admission, statement or act of the government; (3) injury to the relying party if the government were allowed to contradict or repudiate its prior admission, statement or action; (4) the necessity of estoppel to prevent a manifest injustice; and (5) no impairment of the governmental functions in the application of

estoppel.

Here the Commission made no admission or statement or took no action inconsistent with its present position; there was no reliance on any Commission statement or action; if there is any injury from asserted reliance, it is minor and remediable; there is no manifest injustice; and the application of estoppel would impair the Commission's exercise of its governmental function.

The parties cite the case of Kramarevecky v. DSHS,<sup>14</sup> as controlling here to mandate the application of estoppel. We do not agree that it does control, both because the decision itself professed that it did not change prior law, and because the facts in this matter are markedly different in nearly every regard.

1. The Commission did not approve the City/carrier contract. As the City notes in its consent to Commission jurisdiction, the Commission has no power to approve or reject a contract exercising the City's independent power to remove residential solid waste collection service from regulation. In Kramarevecky, the plaintiffs were required to and did provide information that was for the purpose of determining eligibility – i.e., so that the Department could take action upon it. Here, the filing has no such purpose. In approving expenses for setting rates in the past, the Commission was exercising its power to determine the reasonableness of expenses and was not deferring to the contract. The Commission had no occasion to examine the questions that are raised in this petition, and therefore had no occasion to review the legal and policy questions that it now considers.

2. There is no reliance on any asserted act or statement. The parties entered the original and subsequent contracts without reliance on the Commission action or inaction.

3. There is little or no injury to a party from this decision. First, we believe the decision to reflect existing law and it is no different from other applications of law under Commission regulation. To the extent that the decision could in the disallowance of certain of Sanitary's expenses, the parties can agree with this decision, in which case there would be no adverse consequence; the RDS and Recomp rates are equivalent now and would involve no disallowance; and to prevent future disallowance of expenses, Sanitary, Bellingham and Recomp can with relative ease modify their agreements or their relationships to accomplish the results they desire. Finally, there is no damage resulting from the Commission's action. In distinction from the situation in Kramarevecky, where the harm to the citizens was repayment of funds they had received and spent, there is no such obligation here. Instead, the Commission's actions are forward-looking in application and operate to deprive the parties of no benefit already received, and the parties can change the structure of their relationship with apparent ease.

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<sup>14</sup>122 Wn2d 738 (1993)

4. There is no manifest injustice. In the worst possible scenario, some of Sanitary's expenses may be disallowed. That is a normal function of regulated ratemaking and is the sort of consequence that any regulated company accepts in conducting its affairs.

5. Here, the application of estoppel would impair the Commission's governmental function to regulate in the public interest, in that it would allow a regulated entity to avoid the consequences of regulation, by entering a private contract depriving the Commission of the opportunity first to examine whether the contract is proper and second to examine expenses under the contract to determine whether they are proper.

### **Conclusion.**

The Commission concludes that for purposes of the regulation of Sanitary Service Company., the carrier's contract with the City of Bellingham when interpreted with reference to the language of the contract only, is a contract only for residential collection and does not obligate Sanitary to dispose of commercial wastes at the facilities of Recomp. The carrier is free to dispose of wastes at whatever facility it chooses, and rates should be set on the basis that the carrier will make a reasonable choice.

If the contract is determined to bind Sanitary to deliver commercial city wastes to Recomp, the contract does not obligate the Commission to accept all costs of disposal at Recomp under terms of RCW 81.77.160, because Recomp is not designated as a mandatory disposal site pursuant to a "comprehensive plan or ordinance" relating to the disposal of solid waste.

The contract is not one for the performance of commercial solid waste collection under RCW 35.21.152. If it is determined to be such a contract, it is inconsistent with the Commission's regulatory role and the Commission will withdraw from regulating commercial waste collection within the City.

The Commission is not obligated to accept the designation of Recomp as a mandatory disposal facility, or to include all resulting costs of such a designation in setting Sanitary's rates, under principles of estoppel.

As a consequence, the Commission may establish rates for collection based upon the reasonable cost for the service, which may involve reference to costs of the service at reasonably available alternative disposal sites.

## **II. Do generators of solid waste have the power to designate a disposal site?**

We conclude that Sanitary's commercial customers do not have the power to designate a receiving disposal facility.

Property rights in discarded goods are preserved only for the purpose of allowing owners to reclaim goods disposed in error. RCW36.58.260. The statement of rights in any event only extends to placement in a container, of the sort used for all commercial wastes in Bellingham. As the Association points out, if we find that wastes are property then under the commerce clause and the provisions of federal deregulation we lose the authority to regulate all solid wastes. Sanitary notes that customers are not entitled to designate a disposal site. Spokane v. Carlson, 73 Wn.2d 76 (1968).

Liability-based concerns offer no basis for generator control on the basis of this record. In prior cases involving hazardous medical wastes,<sup>15</sup> the Commission has acknowledged special concerns involving hazardous wastes and potential continuing liability. We noted --based on testimony of health professionals -- that liability and health concerns about an existing carrier's sole disposal facility, related to this unique waste stream, could be sufficiently strong to provide support for an application for new service. Here, we have no expert information -- or any other information whatsoever -- to support the possibility of liability after collection. There is absolutely no basis shown for generator designation of a disposal facility.

**III. Must the Commission, should it, or may it require Sanitary to use RDS' facility for the disposal of Bellingham commercial solid wastes?**

Except in the most extraordinary of circumstances or in enforcing the requirements of law, the Commission does not tell regulated entities how to run their businesses. So long as carriers comply with legal requirements, they are generally free to operate as they see fit. The Commission can review carriers' decisions to determine whether they were proper and it can set rates on the basis of reasonable costs, as opposed to actual costs. But other than determining reasonable costs (and the possibility of decisions required by safety concerns) the Commission has no jurisdiction to mandate disposal sites.

**IV. What is the effect of this decision?**

The effect of this decision is to clarify the Commission's legal obligations under existing statutes. According to representations, Recomp and Bellingham have agreed on a price for waste disposal that is at or near the market level. So long as rates remain at market levels, the Commission will take no action inconsistent with Recomp's charges.

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<sup>15</sup>See, Order MVG No. 1707, In re Medical Resource Recycling System, Inc., App. No. GA-76820 (May, 1994); Order MVG No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (Jan. 1993)

Under our interpretation of the contract, Sanitary appears to be free to select any lawful disposal site or to use all available sites for disposal. If competitive pressures again lead to disparate prices for disposal, the Commission could refuse to approve rates based on charges that are higher than the reasonable market rate. If competitive pressures force alternative prices down and Sanitary fails to follow the market, it runs the risk that its rates will be set reduced to a level that is too low to allow it to recover all of its costs.

If Bellingham wishes to control the waste stream in a manner requiring the Commission to include all related expenses when setting Sanitary's rates pursuant to RCW 81.77.160, it can complete its own comprehensive solid waste plan pursuant to chapter 70.95 RCW that designates Recomp as its sole disposal site; it can participate with the County in a comprehensive solid waste plan that designates Recomp as the sole disposal facility for Bellingham commercial wastes; or it can adopt a qualifying ordinance that designates Recomp.<sup>16</sup> The statute will then apply, and the Commission will set rates pursuant to the statutory requirements.

Bellingham may also choose to exercise its authority to control the collection of commercial as well as residential solid waste. If it does so, the Commission will cease regulating Sanitary's commercial city operations.

The Commission has no quarrel with Bellingham or any other city that wishes to exercise its authority under law to assume responsibility for the service to its citizens, so long as the authority is clearly and properly exercised. The Commission looks forward to working cooperatively with all of the parties toward achieving common goals.

The Commission has in the text of this order, above, set out its findings of fact and conclusions of law on specific facts and issues presented to the Commission. Below, the Commission sets out the ultimate facts that it finds and conclusions that it makes, and incorporates therein by means of this reference the facts found and conclusions made, above.

### FINDINGS OF FACT

1. On July 21, 1997, Recycling and Disposal Services, Inc., filed a Petition for Declaratory Ruling requesting resolution of issues relating to a contract

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<sup>16</sup>The Commission does not speak to any of the barriers or potential problems that might exist to achieving these alternatives. In particular, it does not address the constitutionality of any option or ways in which constitutionality might be lost or achieved.



between the City of Bellingham and regulated carrier Sanitary Service Company.

2. On July 25, 1997, the Commission gave notice of receipt of the petition and of opportunity to participate to all certificated solid waste companies and to other persons that the Commission identified as having an interest in the subject of the petition.

3. Two prehearing conferences were held. All requests for party status were granted. No party objected to the standing of the petitioner, to the standing of any other entity seeking to participate, or to the jurisdiction of the Commission to rule upon the petition.

4. The parties disagree about how to frame the issue that the Commission should answer.

5. The parties agreed to negotiate a statement of agreed facts, but failed to achieve total agreement. After an evidentiary ruling by the presiding officer, the parties submitted statements of fact and items of evidence that they contend reflect the facts necessary to resolve the issues.

6. The parties declined an evidentiary hearing. They submitted initial and responding legal memoranda upon the issues. Commission Staff cited additional facts in its memorandum.

7. The parties agreed that the matter be submitted to the Commission for resolution upon the submitted facts and memoranda.

8. Sanitary Service Company., is a carrier operating under Commission regulation in providing service to commercial customers in Bellingham, Washington.

9. Sanitary Service Company operates as a carrier of solid waste under Commission regulation in providing service to commercial customers in Bellingham, Washington.

10. Sanitary Service Company operates as a carrier of solid waste under contract with the City of Bellingham in providing service to residential customers within the City .

11. The contract between the City and the carrier is designated as one for residential services and does not specifically refer to the collection, transportation, or disposal of wastes generated by commercial customers. The contract provides that all wastes collected within the City shall be tendered to the facility of Recomp for disposal. The contract term refers to residential wastes only. The contract does not exercise the

City's right to contract for the collection of solid waste from commercial customers within the City.

12. The City adopted the contract with Sanitary for residential collection service by ordinance. The City has not adopted an ordinance, comprehensive or otherwise, that specifically designates Recomp as the exclusive disposal site for all wastes collected within the City.

13. The City has not promulgated a comprehensive solid waste management plan under the provisions of chapter 70.95 RCW, or otherwise. The City joined in the Plan that Whatcom County promulgated under chapter 70.95 RCW in 1990. That Plan listed all licensed disposal facilities and designated them all as proper disposal sites for County wastes. Because RDS did not start operating in the County until after 1990, its facility is not listed. The County Plan recites the existence of the City's contract with Sanitary for residential collection service and notes that it complies with the Plan, but does not mandate that City wastes must be tendered to Recomp for disposal.

14. The Commission has taken no prior action or made no admission that is inconsistent with this decision. The decision causes no manifest injustice to any person, and a decision restricting the Commission's ability to regulate as requested by the City, Recomp and the carrier would impair the Commission's ability to regulate in the public interest under the public service laws.

15. The Commission has never authorized generators of non-hazardous solid waste to designate a disposal facility to which the waste should be taken.

Based on the findings of fact, above, the Commission hereby makes the following conclusions of law.

#### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction to enter a declaratory order with respect to the interpretation of pertinent statutes as applied to the facts that are found, to determine the Commission's proper application of the laws governing the Commission's operation to the facts.

2. The declaratory order entered in this matter relates only to and is entirely dependent upon the facts as found from the submissions of the parties.

3. The Commission should enter a declaratory order as set out below.

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Based upon the above findings of fact and conclusions of law, the Commission enters the following declaratory order.

### ORDER

THE COMMISSION ORDERS AND DECLARES, pursuant to RCW 34.05.240 and WAC 480-09-230, that:

1. The Commission and not the City of Bellingham regulates the collection of solid waste from commercial generators within the City, including determination of the rates for service to commercial customers and including determination of the reasonable expense for disposal of the collected wastes.
2. The Commission has no authority to decide the validity of a contract between a regulated carrier and a third party. The Commission may examine such a contract to determine whether, and if so, how, the terms of the contract affect the Commission in exercising its regulatory functions.
3. Bellingham has the authority to determine the disposal site for commercial wastes that are collected within the City and to assure that charges to customers for collection are based upon all costs of the selected disposal, by contracting for service or by meeting the terms of RCW 81.77.160.
4. The Commission is not estopped from taking action inconsistent with the full and uncritical acceptance of Recomp disposal fees when setting rates for commercial service within the city of Bellingham.
5. The Commission may determine reasonable regulated rates for commercial solid waste collection service in the City of Bellingham and is not bound to include all charges for disposal at the Recomp facility.
6. The Commission may determine reasonable regulated rates for commercial solid waste collection service in the City of Bellingham.
7. Commercial generators of non-hazardous wastes in the City of Bellingham do not have the right to designate the disposal facility to which those wastes must be delivered.

DATED at Olympia, Washington, and effective this 13<sup>th</sup> day of

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January 1998.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



ANNE LEVINSON, Chair



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner