

BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

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In the Matter of the Petition of)
MASON COUNTY GARBAGE CO., INC.) DOCKET TG-101542 (Consolidated)
d/b/a MASON COUNTY GARBAGE, G-88)
Requesting Authority to Retain Thirty Percent)
of the Revenue Received From the Sale of)
Recyclable Materials Collected in Residential)
Recycling Service)

In the Matter of the Petition of)
MURREY'S DISPOSAL COMPANY, INC.,) DOCKET TG-101545 (Consolidated)
G-9,)
Requesting Authority to Retain Fifty Percent of)
the Revenue Received From the Sale of)
Recyclable Materials Collected in Residential)
Recycling Service)

In the Matter of the Petition of) DOCKET TG-101548 (Consolidated)
AMERICAN DISPOSAL COMPANY, INC.,)
G-87,) RESPONSE MEMORANDUM OF
Requesting Authority to Retain Fifty Percent of) INTERVENOR WASTE MANAGEMENT
the Revenue Received From the Sale of) OF WASHINGTON, INC.
Recyclable Materials Collected in Residential)
Recycling Service)

- 1 1. Intervenor Waste Management of Washington, Inc. (“Waste Management”) respectfully
2 submits this Response Memorandum in support of the analysis of RCW 81.77.185 articulated
3 by Petitioners Mason County Garbage, Murrey’s Disposal Company, Inc. and American
4 Disposal Company, Inc. (“Petitioners”).
- 5 2. Waste Management suggests that there is common ground in the arguments of Petitioners
6 and Commission Staff. Discerning the legislature’s intent in enacting RCW 81.77.185 and
7 interpreting the meaning of the statutory language is informed by the analysis of both parties.
8 Ultimately, Waste Management believes that prospective approvals to retain revenue are
9 consistent with the statute, and that the pattern and practice of the Commission in
10 implementing the law for almost eight years leads to a conclusion that the Motion for
11 Summary Determination by Petitioners Mason County Garbage, Murrey’s Disposal
12 Company, Inc and American Disposal, Inc. in Support of Revenue Retention Authorization
13 must be granted.

14 **ANALYSIS:**

15 **The legislature has directed the Commission to grant prospectively requests for**
16 **revenue retention if certain conditions have been satisfied, and it would be error to**
17 **use the agency’s general plenary authorities in contravention of the specific**
18 **statutory mandate.**

- 19 3. In its articulation of the issues presented (and of those “not addressed in this motion”), the
20 Commission Staff Motion for Summary Determination, and Motion in Support Thereof
21 (“Staff Motion”) rests on a distinction between the authority of the Washington Utilities and
22 Transportation Commission (“Commission”) over a company’s right to retain unspent
23 revenue from the prior reporting year, on the one hand, and a certified plan that allows a
24 company to earn profits in the upcoming revenue-sharing plan period, on the other. Staff
25 Motion at 3-4, 5. In other words, Staff assigns legal significance to whether the
26 Commission’s review is over a request to retain revenue prospectively, versus a review of
how the revenue was spent retroactively.

1 4. The Staff Motion essentially rests on an argument that RCW 81.77.185 only affects the
2 Commission's authority to approve revenue-sharing prospectively – and does not constrain
3 its ability to direct the treatment of unspent revenues that arise from the prior year. But the
4 position taken by Staff renders the prospective approval of revenue retention meaningless.
5 The prospective approval is based on estimates and projections, and so at the end of any
6 given plan year there will *always* be a discrepancy of some sort. If the estimated revenues
7 are greater than projected, if the costs of implementing plan activities are less than estimated,
8 if good faith efforts to predict the future are off by any amount, there will likely be unspent
9 revenues. The Commission's approval to retain a certain percentage of revenue is therefore
10 hollow. Even if the Commission approves the revenue retention prospectively, it could
11 nullify that approval by reopening the books after the plan year has passed and requiring
12 unspent revenues to be carried forward.

13 5. It is not insignificant that revenue-sharing requests arise in the context of filings for recycling
14 commodity credit/debit adjustment. The mechanics for setting that amount involve an annual
15 renewal with a look-back and look-forward. In this context, the amount of recycling revenue
16 actually earned (or spent) in the preceding year is a relevant monetary benchmark. With
17 programs involving revenue sharing, the preceding year's recycling revenue is calculated to
18 include the amounts retained by the company because knowing that total amount is required
19 for purposes of projecting the next year's estimated revenues/expenses that is used in making
20 the next-year's recycling commodity adjustment. Also necessary is determining the
21 difference between the projected revenue/expense estimated for the preceding year's
22 recycling commodity credit, and the actual amount – that delta is incorporated into the
23 recycling commodity adjustment, too. So there is a reason for the Commission to look back
24 over the preceding year, and there is a means of repaying ratepaters the difference between
25 estimated and actual revenues/expenses. The recycling commodity credit is therefore related
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1 to the revenue sharing process: they arise in the same filings and they involve the same
2 revenues – but only the former entails a retrospective element.

3 6. Figuring the total amount of revenue earned (or spent) in the preceding year, the actual
4 amount of the prospectively-approved retention percentage, and the expenditures of retained
5 revenue made – those numbers are not directly relevant for the recycling commodity
6 adjustment. Moreover, those numbers are not before the Commission under
7 RCW 81.77.185, either, so long as the Commission approved the revenue retention for the
8 prior year in a prospective manner. They are meaningful points of data, to be sure, and all
9 parties – the local jurisdiction, the company, and the Commission – would be interested in a
10 financial analysis of how a revenue-sharing plan has been implemented. Arguably, the
11 Commission needs to know what expenditures were made to make sure the base recycling
12 collection rates are not paying for revenue-sharing plan activities and investments. But if the
13 Commission were to have unlimited authority over how monies in the prior year are used in
14 the next, then the prospective approval so vigorously advocated in the Staff Motion would be
15 meaningless. Retroactively reopening the prior year's approval would seem to be directly
16 contrary to the mechanics of implementing the statute.

17 7. The Commission's plenary powers should not be used to contradict specific legislation
18 expressly controlling the revenue sharing process. This interpretation is supported by the
19 familiar rule of construction that where there is a conflict between one statutory provision
20 which deals with a subject in a general way and another provision which deals with the same
21 subject in a specific manner, the latter will prevail. *Knowles v. Holly*, 82 Wn.2d 694, 513
22 P.2d 18 (1973); *State ex rel. Phillips v. State Liquor Control Board*, 59 Wn.2d 565, 369 P.2d
23 844 (1962). *See also Waste Management of Seattle, Inc. v. Utilities and Transp. Comm'n.*,
24 123 Wn.2d 621, 637, 869 P.2d 1034 (1994) (holding that the specifics of the affiliated
25 interests statutes curtailed the Commission's general rate-setting authority).

- 1 8. In a sense, Waste Management agrees with the position articulated in the Staff Motion that
2 RCW 81.77.185 directs the Commission's approval of revenue-retention prospectively.
3 However, that is the end of the inquiry for that plan-year, and to utilize the Commission's
4 plenary power for reopening an approved-year's books essentially renders the approval moot.
5 The revenue sharing plan is not a matter for deferred accounting. The fact that it arises in the
6 same docket with a deferred accounting calculation should not be used to convert the revenue
7 sharing approval to a meaningless process.
- 8 9. Under RCW 81.77.185, the Commission is required to allow revenue retention under a plan
9 that is appropriately certified by the local government and that demonstrates how the
10 revenues will be used to increase recycling. If the plan satisfies those conditions, the
11 Commission must allow the participating company to retain whatever percentage of revenue
12 has been agreed to with the local jurisdiction. With Pierce County, that included an
13 allowance for the company to keep unspent revenues if certain performance standards were
14 achieved. With other plans in other counties, the reward to the participating company may
15 take a different approach. *See Wash. Utils. & Transp. Comm'n v. Waste Management of*
16 *Washington, Inc.* (Dockets TG-101220, TG-101221, TG-101222) (consolidated) (involving
17 plans in which the local governments and participating company agreed to allow for an 8%
18 return in the prospective budget). Once the Commission issues its approval for prospective
19 retention, though, it would be contrary to the mechanics of revenue sharing that the
20 legislature established to allow the Commission to reopen the approval after the plan-year is
21 completed.
- 22 10. Ordering how unspent revenue is to be handled is clearly a departure from the Commission's
23 ratesetting oversight under its general authorities. The underlying analysis that prompted the
24 legislature to enact a revenue sharing law acknowledged that would be the case and
25 observed, "[T]his incentive system does not fit into the Utilities and Transportation
26 Commission's existing model." WASH. DEP'T OF ECOLOGY, REVITALIZING RECYCLING IN

1 WASHINGTON (Publication No. 00-07-009) (2000) at 12. Using the Commission's pre-
2 existing plenary authorities to counteract the prospective revenue sharing approval required
3 by RCW 81.77.185 is therefore legally inappropriate. The law was expressly intended to
4 allow for something different than the "existing model." Furthermore, if the logic presented
5 in the Staff Motion is right, the Commission would be side-stepping this legislative directive
6 by using its general authorities as a basis for a look-back. The Commission has authority to
7 approve revenue retention prospectively, but not to reconsider that approval by using the
8 deferred accounting presented by a recycling commodity adjustment as a surrogate for
9 retroactive ratemaking. Including a condition in the prospective orders approving the
10 revenue retention that allows the Commission to come back and order unspent revenues to be
11 carried over is tautological.

12 *II.* One reason the retroactive/prospective distinction is implicated in this proceeding is the fact
13 that Pierce County apparently itself imposed performance conditions on the companies in the
14 terms of the Plan itself. When the preceding year's revenue retention was approved, the right
15 to access the funds came with a condition precedent that Pierce County imposed. Having
16 then satisfied the conditions, the companies became eligible for the preceding-year's revenue
17 – the approval of which, when it was granted, was for a prospective plan period. In a sense,
18 the "contract" for revenue sharing between Petitioners and Pierce County contained
19 conditions precedent. That does not render the approval that was issued before the plan was
20 implemented ineffective, nor does it provide a basis for reconsidering the approval that was
21 made. If a contract contains a condition precedent, when that condition is satisfied the
22 effective date of the agreement is not changed. The contract is effective on the date entered
23 into, not when the conditions precedent are met. *Ross v. Harding*, 64 Wn.2d 231, 391 P.2d
24 526 (1964). The Pierce County Plans do not confer "retroactive performance rewards" as
25 suggested by the Staff Motion. Instead the Commission (and the County) granted a
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1 prospective approval to retain revenues so long as certain performance conditions were met –
2 without retroactive refund.

ANALYSIS:

3 **The Commission's construction of RCW 81.77.185 is evidenced by its practice and**
4 **behavior in implementing the statute since 2002, and the agency has not until 2009**
5 **required unspent revenue to be carried forward or investigated expenditures**
6 **retroactively in any meaningful way.**

7 12. The Staff Motion meticulously marches through the legislative background and various
8 related bills, which is intellectually intriguing but ultimately not determinative in discerning
9 legislative intent for RCW 81.77.185. Both Staff and Petitioners urge the Commission to
10 abide by the unambiguous terms of the statute.

11 13. From 2002 until 2009, the prospective approval of a revenue sharing request by the
12 Commission was the point of implementation of RCW 81.77.185, and it was accomplished in
13 Open Meetings by way of the No Action or Consent Agenda. All of the parties participating
14 in revenue sharing plans were ambushed by a change in policy that started in 2009, which
15 has precipitated multiple adjudicative proceedings. If the statute was rendered suddenly
16 ambiguous by the change from "thirty" to "fifty" percent, the Commission Staff has given no
17 explanation for why that might be.

18 14. The Commission's current position is a change of interpretation, not just a matter of more
19 closely following RCW 81.77.185. It is now administering the statute differently than it has
20 in the past. The agency's position in these filings is a change of practice. That, in and of
21 itself, is evidence that for almost a decade, the Commission has apparently been satisfied that
22 participating companies were providing adequate documentation of the financial data
23 necessary to approve revenue retentions. Consistent with the premise of the Staff Motion,
24 the Commission's actions have been to prospectively approve revenue retention under
25 certified plans, and to administer the process for making recycling commodity adjustments,
26 all as a matter of course and under its No Action or Consent Agendas. There has been no

1 look-back to determine whether all revenues had been used and no effort to direct the
2 treatment of unspent revenues.

3 15. Indeed, the practice and behavior of the affected parties under the legislation that authorized
4 a thirty-percent revenue retention should be compelling evidence of what they believed the
5 legislature intended for all this time. Long-continued contemporaneous and practical
6 interpretation of a statute by the agency charged with its administration and the regulated
7 public constitutes an invaluable aid to determine the meaning of a doubtful statute.
8 2B SUTHERLAND STATUTORY CONSTRUCTION § 49:3 (7th ed.). In addition, the use of
9 contemporary and practical interpretation provides certainty in the law and justifies reliance
10 upon the conduct of public officials. *Id.* The Commission's historical mechanics in
11 implementing RCW 81.77.185 via the No Action or Consent Agenda significantly
12 undermines the arguments in the Staff Motion that evidence a change in how the agency is
13 now interpreting the statute. If the Commission, the participating companies, and the local
14 jurisdictions have operated under a common understanding of how the revenue sharing
15 programs worked all this time, why is there now any question of statutory intent?

16 16. Tellingly, a contemporaneous construction by the department charged with administering an
17 ambiguous statute is even more persuasive if the legislature not only fails to repudiate the
18 construction, but also amends the statute in some other particular without disturbing the
19 administrative interpretation. *Bradley v. Department of Labor & Indus.*, 52 Wn.2d 780, 786-
20 87, 329 P.2d 196 (1958). In this instance, of course, the only change made in 2010 was to
21 increase the revenue retention ceiling from "thirty" to "fifty." The legislature declined the
22 opportunity to make further amendments that might influence the Commission's handling of
23 these filings.

24 17. The doctrine of equitable estoppel against an agency of the government imposes a difficult
25 burden of proof, and yet analysis of the statutory meaning of RCW 81.77.185 would not be
26 complete without considering analogies to that doctrine. The party claiming estoppel must

1 demonstrate the elements of equitable estoppel, and also make a showing that estoppel is
2 necessary to prevent a manifest injustice and that it will not impair a governmental function.
3 Order M.V.G. 133363, *In re Seafair Moving & Transfer, Inc.* (Feb. 1986). When equitable
4 estoppel is asserted against the government, the party asserting estoppel must establish five
5 elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the
6 party to be estopped, which is inconsistent with its later claims, (2) the asserting party acted
7 in reliance upon the statement or action, (3) injury would result to the asserting party if the
8 other party were allowed to repudiate its prior statement or action, (4) estoppel is “necessary
9 to prevent a manifest injustice,” and (5) estoppel will not impair governmental functions.

10 *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

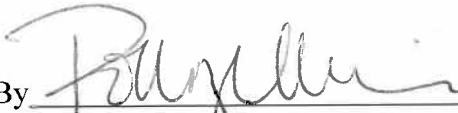
11 18. Waste Management does not suggest that all the elements of estoppel are demonstrated in
12 this instance, but undeniably both the industry as well as the local governments have relied
13 on the Commission’s behavior, and its implementation of RCW 81.77.185 has been
14 historically and dependably inconsistent with its current position. The doctrine of estoppel
15 insulates regulated parties from the arbitrary actions of governmental staff. An agency acting
16 in its governmental capacity should be consistent and reliable. The regulated industry should
17 be able to understand its legal obligations and predictably operate in compliance with
18 regulatory constraints. The doctrine of estoppel protects individuals from the extreme
19 vagaries of agency administration, and although the situation presented by revenue sharing
20 may not be that extreme, it is nonetheless illustrative of a policy worth considering in
21 interpreting today the meaning of RCW 81.77.185, which has essentially been in effect for
22 over eight years.

23 CONCLUSION

24 19. For the reasons stated above, Intervenor Waste Management of Washington, Inc. urges the
25 Commission to grant Petitioner’s Motion for Summary Determination by Petitioners Mason
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1 County Garbage, Murrey's Disposal Company, Inc. and American Disposal Company, Inc.
2 in Support of Revenue Retention Authorization

3 DATED this 11th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2011, I caused to be served the original and 3 copies of the foregoing document to the following address via federal express to:

David Danner, Executive Director and Secretary
Policy and Legislative Issues
Washington Utilities and Transportation Commission
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I certify I have also provided to the Washington Utilities and Transportation Commission's Secretary an official electronic file containing the foregoing document via email to: records@utc.wa.gov.

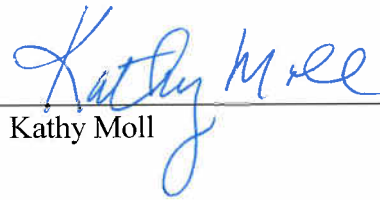
I also certify that I have served via e-mail the foregoing document on:

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7 DATED at Seattle, Washington, this 11th day of March, 2011.

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