

December 10, 2023

Dear KPPCSD Directors,

On December 14, 2023 the KPPCSD will hold a public hearing to consider any protest votes from Kensington customers to a proposed rate adjustment required under the existing franchise agreement with Bayview Recycling and Refuse Company.

In regard to the action to approve CPI pass-through rates we object to the end date of January 1, 2028. We suggest the duration of the approved pass-through rates should coincide with the end of the Franchise term of August 2026.

In a previous KPPCSD action on November 11, 2021, the franchise agreement was extended to August 2026 due to the implementation of weekly food waste recycling. In that same franchise amendment the parties agreed that a rate review would be initiated “no sooner” than August 2024 (Article 9.2D attached). There has not been a rate review for at least ten years due to a franchise agreement approved in 2014 that eliminated that requirement.

We see problems however with the language of the adopted amendment and suggest your board address these immediately.

- 1) There is no date by which a rate review should be conducted. Nothing in the General Manager’s report explains why the rate review is postponed for three years from the date of the amendment, but the window for the review should not be unbounded thereafter.
- 2) The amendment requires joint engagement of the rate-review firm. This will not result in an independent review if the Franchisee pays for the rate review and passes back the costs of the review to the customers by Bayview in their operating costs. It is more appropriate for the rate-review firm to be contracted by the KPPCSD. The District has collected franchise fees for this purpose. The qualified consultant can be mutually agreed by the District and Bayview if it is based solely on qualifications to do the work and the time frame to do the work, as those criteria do not pose a conflict of interest.
- 3) The franchise agreement should also be amended to include a definition for the company’s “operating margin” which has not previously been established under the current franchise, but is used in determining rate adjustments.

Finally, we urge your board to conduct a legal and fiscal review of the District’s and County’s franchise fee imposed on Bayview Refuse and Recycling. Doing this would improve transparency and accountability to Kensington rate payers. The Zolly vs. Oakland case confirms that local governments must meet specific requirements regarding the franchise fees charged to solid waste companies and passed back in rates to customers, that these are not a tax and that the fee is related to the administration costs of the agreement by the local government. It is documented that in the past, the District has used the franchise funds for other general fund purposes. We request the District respond by reviewing use of the franchise fees and fully demonstrate to Kensington ratepayers that the District is in compliance with Proposition 26.

Thank you for your consideration.

Sincerely,  
Rob Firmin, President KPOA, and Board

## **November 11, 2021 Amendment to Bay View Franchise Agreement**

### **Article 9.2D**

#### **Rate Review**

- (1) At any time, but no sooner than August 31, 2024, upon either Contractor or District request, Contractor and the District shall jointly engage a qualified consultant, mutually agreed upon, to conduct a comprehensive rate review.
- (2) The rate review shall determine whether collection service fees are to be adjusted up or down based on the company's operating margin as reflected on the Company's financial statement for the year ending December 31st prior to the date of review.
- (3) The determination whether an adjustment shall be made and the amount of the adjustment, if made, shall be no greater than the average operating margin of Contractor for the three Fiscal Years prior to the review or 10%, whichever is less.
- (4) Upon adjustment, if any, of Bay View's fees, annual fee increases shall be determined according to the criteria specified in Step 3 of Exhibit B of the underlying Franchise Agreement.