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November 23, 1994

Mr. Steve McLellan, Secretary
Washington Utilities and
Transportation Commission
1300 South Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504-7250

Re: The Disposal Group, Inc. v. Waste Management Disposal Services of
Oregon, Inc.
Docket No. TG-941154

Dear Mr. McLellan:

Enclosed please find the original and 19 copies of the *Brief of Commission Staff* in the above-referenced matter. Please accept the same for filing.

Very truly yours,

Steven W. Smith
Assistant Attorney General

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Enclosures

cc\enc: Parties of Record

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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

THE DISPOSAL GROUP, INC., dba
Vancouver Sanitary Service and
Twin City Sanitary Corporation (G-65);

Complainant,

v.

WASTE MANAGEMENT DISPOSAL
SERVICES OF OREGON, INC., dba
Oregon Waste Systems, a Delaware
Corporation,

Respondents.

DOCKET NO. TG-941154

BRIEF OF COMMISSION STAFF

STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

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I. NATURE OF THE CASE

This proceeding involves a complaint and amended complaint filed by The Disposal Group, Inc., (TDG) against Waste Management Disposal Services, Inc., dba Oregon Waste Systems (OWS) and T&G Trucking & Freight Company (T&G). The amended complaint alleges that OWS and/or T&G are operating as solid waste collection companies in the State of Washington without a certificate of public convenience and necessity as required by chapter 81.77 RCW.

II. STATEMENT OF THE FACTS

Complainant TDG is a solid waste collection company which operates in the unincorporated areas of Clark County as authorized by Certificate of Public Convenience and Necessity No. G-65 issued by this Commission. Stipulated Fact No. 24. Respondent OWS operates a recycling center and landfill at Arlington, Oregon known as Columbia Ridge Landfill and Recycling Center (CRLRC). Stipulated Fact No. 2. Respondent T&G is in the business of providing the transportation of cargo containers having a prior or subsequent movement by water or rail. T&G holds operating authority issued by the Interstate Commerce Commission and a permit issued by the Oregon Public Utility Commission. Ex. 13, pp. 1, 3. Neither respondent holds a certificate from the WUTC to operate as a solid waste collection company in this state under chapter 81.77 RCW. Stipulated Fact Nos. 25 and 26; Ex. 13, p. 1.

Rust Remedial Services, Inc. (RUST) performs environmental land remediation and clean up in several states. RUST was the successful bidder for clean up and remediation of industrial sludge at the Aluminum Company of America (ALCOA) plant near Vancouver, Washington. On July 20, 1994 RUST entered into a contract with ALCOA to cleanup and remove sludge from waste water treatment ponds on the ALCOA site. Stipulated Fact Nos. 3 and 6; Ex. 5, ¶ 2. RUST removes the sludge from the ponds using heavy equipment to load the sludge into lined, sealed, top loading containers mounted on wheeled trailers or chassis at the ALCOA site. Stipulated Fact No. 8; Ex. 5, ¶ 2.

RUST has contracted with OWS for the transportation of the sludge from the ALCOA plant to OWS' landfill, the Columbia Ridge Landfill and Recycling Center in Arlington, Oregon to be used solely as alternate daily cover (ADC). Stipulated Fact No. 9, Ex. 6, ¶ 3.

OWS has, in turn, contracted with T&G for the transportation of the loaded containers of sludge over public highways from the ALCOA site in Washington to a railroad siding near Portland, Oregon. OWS also contracts with Union Pacific Railroad (UP) for transportation of the sludge from that railroad siding to CRLRC in Arlington, Oregon. At Portland the containers of sludge are loaded onto UP flat cars for the movement to Arlington. Stipulated Fact Nos. 11 and 12; Ex. 4, ¶ 4. T&G and UP are compensated by OWS for this transportation. Stipulated Fact No. 13. T&G takes empty containers from the rail siding near Portland to the ALCOA site, where they are loaded with sludge by RUST while the driver remains in the truck. The loaded containers are then transported directly to the rail siding near Portland. Ex. 13, p. 2.

OWS is subject to state and federal requirements to provide daily cover at its landfill. See 40 C.F.R. § 258.21 and OAR § 340-94-040(7) and (8). Stipulated Fact No. 20. By letter of August 22, 1994, OWS asked for authorization from the Oregon Department of Environmental Quality (DEQ) to study the suitability of sludge as ADC at CRLRC. Stipulated Fact No. 14; Ex. 8. The DEQ authorized OWS to proceed with an evaluation of sludge as ADC at the Arlington landfill. Stipulated Fact Nos. 15 and 17; Ex. 9.

The sludge from the ALCOA plant is used as ADC at CRLRC. Stipulated Fact No. 16. RUST pays OWS a fixed rate of between fifty to seventy percent of OWS' posted gate rate for solid waste. Stipulated Fact No. 18. If the sludge were not useable as ADC, OWS would charge RUST a higher fee for receiving the sludge at CRLRC. Stipulated Fact No. 22. The sludge has value to OWS as ADC. Stipulated Fact No. 21. If OWS is not allowed to use the sludge as ADC, OWS will need to locate other material for ADC at expense to OWS by excavating soil on site, by offering discounts to others for receipt of ADC material, or by purchasing ADC material directly. Stipulated Fact No. 23; Ex. 4, ¶ 10.

III. ARGUMENT

A. If The Sludge Has Value, it is Property Within the Meaning of The Interstate Commerce Act.

By Federal law, the Interstate Commerce Commission has exclusive economic jurisdiction over the transportation by motor carrier of property or passengers between a place in one state and a place in another state. 49 U.S.C. § 10521(a)(1)(A). Thus, if sludge in the context of this proceeding, is property within the meaning of that statute, then the WUTC can not require the carrier of that sludge to acquire a certificate under chapter 81.77 RCW to haul the sludge to Oregon.

The ICC, in interpreting its regulatory jurisdiction, has determined that waste is not property within the meaning of 49 U.S.C. § 10521 and, therefore, that agency does not regulate the transportation of waste across state lines. Joray Trucking Corp. Common Carrier Application, 99 MCC 109, 110-11 (1965);

Transportation of "Waste" Products for Reuse and Recycling, 114 MCC 92, 104 (1971). Consequently, the transportation of waste, which has no property value, solely for the purpose of disposal, is not property subject to ICC regulation.

Transportation of "Waste" Products at 104, citing Joray. Conversely, if the waste has property value and is not transported solely for disposal, then the movement of that commodity across state lines is subject to ICC, but not state jurisdiction.

Measured against that standard, the sludge in issue is property and no G-certificate is required to move it from the ALCOA site in Washington to the rail siding in Oregon.

b. Whether the Shipper is RUST or OWS, the Sludge Has Property Value Based on its Use as ADC.

There are two parties who could be considered the shipper of the sludge to Arlington, Oregon. The first shipper is RUST who pays OWS to deliver the sludge to Arlington. Exs. 1 and 7, Stipulated Fact No. 9. The second shipper is OWS who pays T&G to transport the sludge from Washington to Oregon. Ex. 2; Stipulated Fact Nos. 11 and 13. If the sludge has value to either, or both, of the shippers then the WUTC would be preempted by Federal law from the economic regulation of the movement of the sludge across state lines.

Focusing first on OWS, it cannot realistically be doubted that the sludge has value as ADC. OWS is required by state and federal law to provide daily cover at its landfill in Arlington. Providing for this daily cover is a business expense of operating the landfill. If OWS did not use the sludge from ALCOA, OWS would have to find other daily cover material at an expense to OWS. For example, OWS

would have to pay to excavate soil on site, or purchase ADC material directly or offer discounts to other generators for receipt of their ADC materials. Ex. 4, ¶ 10; Stipulated Fact Nos. 20-23.

The sludge is a commodity OWS pays for (through discounts on the receipt of the sludge) as a business expense necessary to provide the disposal service to others. In other words, the value to OWS is in its capacity as consumer, not in its capacity as a provider of a disposal service to a waste generator. OWS is not accepting the sludge for disposal. Ex. 5, ¶ 4.

Focusing on RUST as the shipper, the sludge, likewise, has value to it as ADC. If OWS directly paid RUST for the sludge there would be no question that the sludge had economic value to RUST. Conversely, if OWS accepted the sludge for only disposal and RUST paid the full posted disposal rate, there would be little question that the sludge was waste with only negative economic value to RUST. Under the arrangement between RUST and OWS, however, RUST does pay OWS to receive the sludge but at a lower price than would otherwise be charged if the sludge were not used for ADC. The fact that the value of the sludge to RUST is reflected in a significantly reduced price confirms that the sludge has value to RUST. Because the sludge is useable as ADC, the sludge has positive economic value for RUST. It is because the sludge has economic value to RUST when delivered to CRLRC that RUST has a fixed and persisting intent that the sludge move to Arlington from Clark County Washington.

Because the sludge has value to both OWS and RUST and because the sludge travels in a continuous movement from Washington State to Oregon State, T&G Trucking does not require a certificate from the WUTC for that movement.

There is another statutory basis for concluding that T&G's transportation of sludge is not subject to Commission jurisdiction. The ICC has the statutory authority to exempt from its jurisdiction transportation provided by a rail carrier as a part of a continuous intermodal movement 49 U.S.C. § 10505(f). Pursuant to this statutory authority the ICC has adopted a rule, 49 C.F.R. § 1090.2, which provides as follows:

Except as provided in 49 U.S.C. 10505(e) and (g), 109229(1), and 10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Motor carrier TOFC/COFC pickup and delivery services arranged independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier are similarly exempt. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. The exemption does not apply to a motor carrier service in which a rail carrier participates only as the motor carrier's agent (Plan I TOFC/COFC), nor does the exemption operate to relieve any carrier of any obligation it would otherwise have, absent the exemption, with respect to providing contractual terms for liability and claims.

The TOFC/COFC (trailer-on-flat car/container-on-flat car) service described in the rule is the service UP and T&G perform in transporting the sludge by motor carrier and rail in a continuous intermodal freight movement from the ALCOA site to Arlington, Oregon. Those movements are exempt from ICC regulation as well

as state regulation of even the intrastate leg of a continuous intermodal movement. ICC v. Texas, 479 US 450 (1987).

Thus, even if T&G were not transporting the sludge directly across state lines, (e.g., transporting the sludge from the ALCOA site to a railroad siding in Washington for subsequent movement by rail to Oregon), the UTC would still not have jurisdiction over T&G for that transportation. 49 C.F.R. § 1090.2.

C. Even if the Sludge Had No Value There is Substantial Doubt that the WUTC Would Have Jurisdiction.

Because of the two statutory bases precluding WUTC jurisdiction, there is no need for the Commission to address any constitutional constraints on its jurisdiction in this case. We would point out, however, that even if the sludge were determined to be only waste under the above arrangement, it is likely on this record that a court would find that the economic regulation of this transportation by the WUTC would violate the Commerce Clause of the United States Constitution.

The Supreme Court has adopted a two-tiered approach to analyzing state regulations under the commerce clause. When a statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, a "virtual per se" rule of invalidity has applied on the ground that such regulation amounts to "simple economic protectionism." City of Philadelphia, 437 U.S. 617, 623-624, 57 L. Ed. 2d 475, 98 S. Ct. 2571 (1978).

But where other legislative objectives exist and there is no patent discrimination, the Court has applied the balancing test first articulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970):

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . .

Pike at 142.

There is substantial doubt that the economic regulation of the haul by T&G would be constitutional under the Pike v. Bruce Church balancing test. A comparison of In re: Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, Docket No. TG-920304 (Kleenwell) and this case will help to show the commerce clause issues that would be raised by requiring T&G to get a G-certificate.

In the Kleenwell case, the Commission noted that the statutory purpose of chapter 81.77 RCW is to protect public health and safety by ensuring universal solid waste collection service in both urban and rural areas at reasonable prices. The Commission noted that universal service in all areas of the state is accomplished under the state statute by providing for quasi-exclusive certificates within the service territories and by regulating rates. WAC 480-70-050(2); RCW 81.77.040. Rate regulation provides rates that are just, fair and reasonable and that do not discriminate among customers or provide unreasonable preferences. RCW 81.28.010, 81.28.180 and 81.28-090. Thus, customers in rural areas are

served at the same rates as customers in more densely populated parts of a service territory.

In the context of the typical residential and business service territory, the regulatory scheme embodied in chapter 81.77 RCW cannot succeed if there are two sets of carriers, one regulated and one unregulated. The ability of certified carriers to subsidize service to rural areas would be diminished because of cream-skimming in urban areas. For example, Kleenwell opted to serve only the most densely populated section of the state. Thus, the cost of serving everyone else rises due to the syphoning off of high profit customers to the unregulated carrier who has no common carrier obligation to serve all customers. Commission Decision and Order Denying Administrative Review; Affirming Initial Order; Directing Company to Cease and Desist, Docket No. TG-920304 (hereinafter Order), at pp. 21-22.

The purpose of chapter 81.77 RCW, of providing universal service at reasonable rates, would not appear to be frustrated in the case of T&G transporting sludge from ALCOA. This is not to say that the cream-skimming of one or a few customers could never frustrate the legitimate statutory purpose of universal service at reasonable rates. On the limited record before the Commission, however, there is no evidence that T&G's activities have any impact on existing rates or universal service in T&G's service territory. Against that

background, it would be very difficult to establish under the Pike test, that the local benefits outweighed the burden imposed on interstate commerce.¹

A second fact that distinguishes this case from Kleenwell is that, in the latter case, there was a movement entirely within the state of Washington prior to moving across state lines. In such situations the intent of the shipper is critical in determining whether the in-state leg of the movement is intrastate or interstate in nature. Baltimore & Ohio Southwestern Railway v. Settle, 260 U.S. 166, 173-74 (1922). Of course, in this case there is no movement entirely within this state. The sludge moves immediately and continuously from Washington to Oregon.² In any event, RUST at all times does intend that the sludge go to the designated disposal site in Arlington, Oregon. Thus, even if the receipt of sludge at Arlington were characterized as disposal, that disposal would not be incidental to the transportation for collection as found in Kleenwell. Kleenwell order at p. 9.

¹ Although, as mentioned above, waste is not property for purposes of 49 U.S.C. § 10521, it is "commerce" for purposes of the commerce clause. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

² The Commission addressed this situation in the Kleenwell Order at page 11 in the following manner:


The Commission has never taken the position that the foreign portions of isolated long haul movement of biomedical waste from a Washington warehouse to an out-of-state disposal facility is a movement over which the Commission exercises jurisdiction.

CONCLUSION

For the foregoing reasons, the Commission Staff requests that the complainant's prayer for relief be denied.

DATED this 23rd day of November, 1994

CHRISTINE O. GREGOIRE
Attorney General



STEVE W. SMITH
Assistant Attorney General

C E R T I F I C A T E

I, Steven W. Smith, do hereby certify that I did cause to be served upon all parties of record below listed, a true and correct copy of the foregoing Brief of Commission via Facsimile Transmission, State Inter-Office Campus delivery, or by U.S. Mail, postage prepaid and addressed to the following at the addresses listed for each party:


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DATED this 23rd day of November, 1994.



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