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November 23, 1994

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Mr. Steve McLellan, Secretary
Washington Utilities and
Transportation Commission
1300 Evergreen Park Drive South
P. O. Box 9022
Olympia, WA 98504-9022

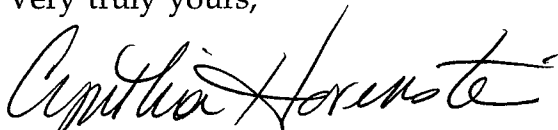
Re: The Disposal Group, Inc. v. Waste Management Disposal Services of
Oregon, Inc., et al
Cause No. TG-941154
Our File No. 144-3

Dear Mr. McLellan:

Enclosed for filing is the original and four copies of the Post-Hearing Brief of Complainant, The Disposal Group, Inc. After filing the original Brief, please return one of the copies, conformed, to our office in the enclosed envelope.

Thank you for your assistance in this matter.

Very truly yours,



CYNTHIA A. HORENSTEIN

CAH:llk

Enclosures

cc: All counsel of Record
Mark Leichner, The Disposal Group

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STATE OF WASH.
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BEFORE THE UTILITIES AND TRANSPORTATION COMMISSION
OF THE STATE OF WASHINGTON

THE DISPOSAL GROUP, INC., dba)
Vancouver Sanitary Service and) CAUSE NO. TG-941154
Twin City Sanitary Service, a)
Washington corporation (G-65);) POST-HEARING BRIEF OF
Complainant,) COMPLAINANT, THE
vs.) DISPOSAL GROUP, INC.
WASTE MANAGEMENT DISPOSAL)
SERVICES OF OREGON, INC., dba)
Oregon Waste Systems, a)
Delaware corporation; and T & G)
TRUCKING & FREIGHT CO., an)
Oregon corporation;)
Respondents.)

COMES NOW, The Disposal Group, Inc. ("TDG" and/or
"Complainant"), and respectfully submits this Post-Hearing Brief.

FACTUAL BACKGROUND

Complainant is a corporation duly organized under the laws of
the State of Washington, and is one of two exclusive certified
haulers of solid waste in the unincorporated areas of Clark County
pursuant to Chapter 81.77 RCW. (Stipulated Facts ["SF"] "24").

1 Rust Remedial Services ("RUST") is an environmental company
2 performing land remediation and cleanup operations. It is owned by
3 WMX. (SF "1").

4 Respondent Waste Management Disposal Services of Oregon, Inc.,
5 dba Oregon Waste Systems ("OWS") is the operator of Columbia Ridge
6 Landfill and Recycling Center ("CRLRC") located in Arlington,
7 Oregon. OWS is owned by Waste Management, Inc., which, like RUST,
8 is also owned by WMX. (SF "2").

9 Aluminum Company of America ("ALCOA") operated an industrial
10 facility in the unincorporated area of Clark County. A wastewater
11 treatment pond is located on the ALCOA site. (Exhibit "7").
12 Industrial sludge was deposited in the containment pond. The
13 industrial sludge was tested by the environmental firm of Hart
14 Crowser and determined not to be a dangerous or toxic waste.
15 (Exhibit "6"). ALCOA put out for bid the cleanup and removal of the
16 industrial sludge. RUST was the successful bidder and entered into
17 a contract with ALCOA on July 20, 1994. (SF "3").

18 RUST entered into a contract with OWS to receive the sludge at
19 CRLRC; the agreement is entitled "Service Agreement, Non-Hazardous
20 Waste Disposal." (Exhibit "1"). The agreement addresses "waste
21 disposal service" at CRLRC. OWS charges a tip fee to receive the
22 industrial sludge at CRLRC; this tip fee is below the posted gate
23 rate. (SF "18"). OWS also accepts materials from other sources at
24 CRLRC at differential rates. (SF "19").

25 OWS contracted with Respondent T & G Trucking and Freight Co.
26 ("T & G") for transportation of the industrial sludge from the ALCOA
27 site. (Exhibit "2").

28 On August 22, 1994, T & G began transporting the sludge from
29 the ALCOA site over the public highways of the State of Washington
30 to a railroad facility in Portland, Oregon, for ultimate delivery of
31

1 the sludge at CRLRC. OWS pays T & G for this transportation.
2 (SF "12").

3 On the same day that T & G began transporting the sludge, OWS
4 requested from the Oregon Department of Environmental Quality
5 ("DEQ") "written notice to proceed with a suitability study for the
6 use of sludge material as an alternative to daily soil cover ("ADC")
7 at CRLRC." (Exhibit "8"). DEQ is the state agency charged with
8 regulatory oversight of CRLRC.

9 DEQ responded to OWS' request on August 26, 1994, by
10 authorizing "OWS to proceed with an evaluation of sludge as ADC" at
11 CRLRC. (Exhibit "9"). DEQ's authorization allows

12 OWS to conduct a test study [of using sludge as ADC]
13 through April 30, 1995. In order for extended approval to
14 be considered, we [DEQ] require OWS to submit a report to
15 DEQ by March 31, 1995, documenting the results of the
16 evaluation of the sludge as ADC. At any time during the
17 test period, if the Department determines that the
18 material is not performing adequately as ADC, the test
19 shall be discontinued. The receipt of this waste must
20 follow your [OWS'] special waste management protocol.

21 DEQ has issued an Interpretive Ruling for purposes of
22 calculating the amount of materials received at landfills, upon
23 which disposal fees are assessed, which provides,

24 [a]ll materials. . . received by a landfill should be
25 counted in tonnage and fee calculations if that material
26 meets the definition of solid waste and would otherwise be
27 disposed of, regardless of the ultimate use/disposition of
28 the material by the landfill owner/operator.

29 (Exhibit "3").

30 When Complainant became aware of the possible transportation of
31 solid waste from ALCOA's facility by an unregulated hauler, TDG
32 contacted ALCOA on August 9, 1994 to advise it, as site owner, of
the solid waste regulatory scheme in Washington. (Exhibit "14").
ALCOA responded on August 12, 1994 that the transportation was

1 exempt from state regulation. (Exhibits "15" and "16"). Citing
2 Joray Trucking Corp. Common Carrier Application, 99 MCC 109 (1965),
3 on August 16, 1994, TDG noted to ALCOA that, despite interstate
4 movement, the transportation of solid waste for compensation over
5 the public highways of the State of Washington is regulated by the
6 Washington Utilities and Transportation Commission ("Commission").
7 (Exhibit "17"). OWS' August 22, 1994 response claimed that the
8 material it was transporting "has value and, therefore, is not a
9 commodity that would come under a G-Certificate in the State of
10 Washington." (Exhibit "7"). TDG then sought Commission assistance,
11 asking that the Commission enforce Chapter 81.77 RCW or, in the
12 alternative, require OWS to demonstrate that the material which it
13 is transporting is regulated under Chapter 81.80 RCW and that OWS
14 has authority to transport the material from the ALCOA site.

15 ISSUES

16 The salient issue in this proceeding is whether Respondents are
17 operating as solid waste collection companies subject to Commission
18 jurisdiction under Chapter 81.77 RCW. The facts in this proceeding
19 are not in dispute, as is attested to by the stipulated record.
20 What is in dispute here is application of applicable law to the
21 facts.

22 The parties have stipulated that Respondents are engaged in
23 transportation for compensation over the public highways of the
24 State of Washington. (SF "12" and "13"). In controversy here is
25 whether the industrial sludge, which is being transported, is solid
26 waste that is collected for disposal, thereby subjecting Respondents
27 to Commission regulation under Chapter 81.77 RCW.

1 RCW 81.77.010(9).

2 The definition of solid waste includes industrial waste.
3 Although the statute does not here define industrial waste, it is
4 defined by regulation at WAC 173-304-100(39) to include "waste
5 by-products from manufacturing operations such as scraps, trimmings,
6 packing, and other discarded materials not otherwise designated as
7 dangerous waste under Chapter 173-303 WAC." (Emphasis added).

8 As noted in Hart Crowser's report (Exhibit "6"), the
9 industrial sludge at issue is not a dangerous waste.

10 The industrial sludge, which is being transported by
11 Respondents to CRLRC, is a waste by-product from ALCOA's
12 manufacturing operations. The material was discarded by ALCOA into
13 the on-site containment pond. The record contains no evidence that
14 ALCOA source separated the sludge, or intended that the material be
15 reused in any manner or moved off-site until it hired RUST to clean
16 up and move the industrial sludge to CRLRC. The only logical
17 conclusion one can draw from the facts is that the industrial sludge
18 is an industrial waste and therefore falls within the definition of
19 solid waste.

20 2. Commission Precedent.

21 The Commission has previously ruled on a factual scenario
22 remarkably similar to the pending matter. In In re Application of
23 Inland Transportation, Inc., Order MV No. 142137 (October 1990), the
24 Commission had before it a motor freight carrier application for
25 contract carrier authority to transport sludge and water by-products
26 for land application under RCW 81.80.070. The shipper/generator, an
27 apple juice processor that produced sludge and water by-products,
28 attempted to contract with the applicant to transport the sludge and
29 water by-products to fields where they were spread directly on the
30

1 ground. The land application was at a permitted solid waste
2 disposal facility.

3 In considering the application, the Commission noted the
4 dilemma that,

5 [t]here is a substantial issue as to whether this
6 service may be provided under motor carrier
7 regulation or whether it should be provided under
solid waste regulation.

8 Id. at 4.

9 The Commission reasoned,

10 [t]here is no evidence that the commodity has any
11 commercial value at all; there is evidence that the
12 shipper must pay the destination site owners to
13 allow "application" of the commodity; the
14 destination is listed in its permit and is regulated
by the local health authority as a solid waste
disposal facility; . . .

15 Id. The Commission then concluded that, "the commodity to be
16 transported has no value and is transported to a solid waste
17 disposal facility. The transportation is subject to regulation
18 under Chapter 81.77 RCW rather than Chapter 81.80 RCW." (Emphasis
19 added) Id. at 8.

20 Applying the facts from Inland to the current proceeding,
21 (1) Respondents are transporting industrial sludge, as did the
22 applicant in Inland, (2) whose destination is a licensed solid waste
23 disposal facility, to wit: CRLRC, and (3) the sludge does not have
24 commercial value. Rather, OWS charges for the industrial sludge to
25 be applied to the land at CRLRC (SF "18"); the shipper in Inland
26 also paid "the destination site to allow [land] 'application' of the
27 commodity." The transportation at issue in this proceeding is the
28 same as in Inland, and, based on the foregoing precedent, should
29 thus be regulated under Chapter 81.77 RCW.

1 Respondents may attempt to claim that their transportation
2 differs from that in Inland because the industrial sludge has
3 commercial value in that, if OWS is not allowed to use the
4 industrial sludge as ADC, OWS will be required to obtain alternative
5 ADC at some expense to OWS. (SF "23"). However, whether a
6 commodity has "commercial value" is not determined in isolation
7 based on the subjective intent of a single transporter and/or
8 landfill operator receiver. Respondents have not demonstrated any
9 commercially feasible secondary market exists for the sludge. To
10 simply assert some peripheral secondary use for a material does not
11 render it a commodity of value under any objective test.

12 Additionally, the mere fact that OWS is charging less than
13 the posted gate rate for disposal of the industrial sludge at CRLRC
14 cannot be used to demonstrate that the industrial sludge has
15 commercial value. OWS has freely admitted that it charges less than
16 the gate rate for other solid waste which it receives at CRLRC.
17 (SF "19"). Arguably of course, any materials received at a landfill
18 have commercial value to the landfill operator in that the commodity
19 a landfill operator is selling is space in its landfill. Here, OWS
20 is charging for consumption of its space (i.e., charging for
21 disposal of the industrial sludge at CRLRC). The fact that material
22 used to fill that space may also be used as ADC may be of temporal
23 benefit to the landfill operator but hardly renders the material
24 "commercially valuable" because of that dimension.

25 Taken together, the fact that the industrial sludge does
26 not have commercial value, combined with the fact that the
27 industrial sludge is being charged to be disposed of, or applied to
28 the land, at CRLRC (a permitted solid waste disposal facility)
29 brings the facts squarely in line with those previously visited by
30 the Commission in Inland, where the Commission reasoned that the
31

1 authority necessary to transport the sludge fell within
2 Chapter 81.77 RCW. The same conclusion should be arrived at in this
3 proceeding.

4 3. DEQ Rule Interpretation.

5 In addition to classification of the industrial sludge as
6 solid waste under Washington statutory and regulatory definitions
7 and Commission precedent, the agency with regulatory authority over
8 CRLRC, DEQ, views the industrial sludge as solid waste.

9 DEQ's regulations require landfill operators to remit
10 solid waste permit compliance fees, per ton solid waste disposal
11 fees and 1991 Recycling Act permit fees ("disposal fees"). Oregon
12 Administrative Rule ("OAR") 340-97-110. Because there has been
13 inconsistent calculation of materials received at Oregon landfills,
14 upon which the disposal fees are assessed, DEQ adopted, effective
15 October 1, 1994, "RULE INTERPRETATION FOR OAR CHAPTER 340 DIVISION
16 97: Relating to the Calculation of Disposal Tonnage for Purpose of
17 Fee Payment by Permitted Municipal and Industrial Solid Waste
18 Landfills." (Exhibit "3"). The Rule Interpretation provides,

19 All materials. . . received by a landfill should be
20 counted in tonnage and fee calculations if that
21 material meets the definition of solid waste and
22 would otherwise be disposed of, regardless of the
ultimate use/disposition of the material by the
landfill owner/operator. [Emphasis added]

23 The industrial sludge from the ALCOA site squarely falls
24 within Oregon's definition of solid waste, defined as,

25 all useless or discarded putrescible and
26 non-putrescible materials, including but not limited
27 to garbage, rubbish, refuse, ashes, paper and
28 cardboard, sewage sludge, septic tank and cesspool
29 pumpings or other sludge, useless or discarded
30 commercial, industrial, demolition and construction
31 materials, discarded or abandoned vehicles or parts
32 thereof, discarded home and industrial appliances,

1 manure, vegetable or animal solid and semi-solid
2 materials, dead animals and infectious waste.
3 [Emphasis added]

4 OAR 340-93-030(75).

5 The industrial sludge would clearly "otherwise be disposed
6 of" in that it has no commercial value and thus could not be sold on
7 the open market.

8 Since the sludge from the ALCOA facility meets Oregon's
9 definition of solid waste and would otherwise be disposed of, DEQ,
10 pursuant to its Rule Interpretation and OAR, is assessing a disposal
11 fee on the industrial sludge "regardless of the ultimate
12 use/disposition of the material by" OWS. DEQ's Rule Interpretation
13 is essentially stating that DEQ is not concerned as to whether the
14 industrial sludge from ALCOA is being disposed of "in" the landfill
15 or "on top" of the landfill. DEQ considers the material solid
16 waste, subject to disposal fees.

17 Complainant is not here suggesting that an Oregon agency's
18 policy interpretation on the characteristics of industrial sludge is
19 binding on the Commission. However, the pertinent Rule
20 Interpretation is offered in this proceeding to provide insight to
21 the Commission as to how the agency with regulatory oversight at the
22 facility at which the industrial sludge ultimately comes to rest
23 classifies the industrial sludge received at the facility. In that
24 classification of the industrial sludge as solid waste is the
25 prominent issue in this proceeding, DEQ's classification should be
26 given considerable weight.

27 4. DEQ's Conditional Approval of Sludge as ADC.

28 In its August 26, 1994 correspondence to CRLRC
29 (Exhibit "9"), DEQ authorized,

30 OWS to proceed with an evaluation of sludge as ADC.
31 . . . DEQ authorizes OWS to conduct a test study

1 through April 30, 1995. In order for extended
2 approval to be considered, we require OWS to submit
3 a report to DEQ by March 31, 1995, documenting the
4 results of the evaluation of the sludge as ADC. At
5 any time during the test period, if the Department
6 determines that the material is not performing
7 adequately as ADC, the test shall be discontinued.
8 The receipt of this waste must follow your special
9 waste management protocol. [Emphasis added]

10 Again, although DEQ's interpretation of the material is
11 not binding upon the Commission, it is certainly relevant and
12 persuasive information offered to the Commission in making its
13 threshold determination as to whether the industrial sludge from
14 ALCOA's facility should be classified as solid waste.

15 By its own terms, DEQ considers this material solid waste
16 and directs OWS to follow its "special waste management protocol"
17 upon receipt of the industrial sludge at CRLRC.

18 Additionally, DEQ has provided only conditional approval
19 to OWS to utilize the industrial sludge as ADC. If DEQ does not
20 allow continued use of the industrial sludge as ADC after the test
21 period, the question arises as to whether there is retroactive
22 classification of the sludge from a commodity which has value to OWS
23 to a solid waste that will be assessed the full posted tip fee at
24 CRLRC. Respondents' argument that the industrial sludge has
25 commercial value is considerably weakened by the fact that
26 Respondents' use of the industrial sludge as ADC may be ultimately
27 disallowed by DEQ anytime during the test period or upon completion
28 of OWS' test study.

29 Based on Washington statute and regulations, Commission
30 precedent, and sister state agency interpretations, the Commission
31 should conclude that the industrial sludge at issue is in fact solid
32 waste.

1 B. "Collection and/or Disposal."

2 It is anticipated that Respondents may claim that RUST's
3 activities at the site, namely the loading of the industrial sludge
4 into T & G's containers (Exhibit "13," page 2, line 20), negates any
5 conclusion that T & G is "collecting" the industrial sludge and thus
6 Respondents do not fall within the definition of a solid waste
7 collecting company.

8 However, the Commission is well aware of the method which solid
9 waste collection companies collect solid waste in drop boxes. The
10 solid waste trucks transport loaded drop boxes they have collected
11 just as T & G transports loaded containers. In both instances,
12 someone other than the transporter is loading material into the
13 containers/drop boxes. In the former instance, the solid waste
14 collection companies' activities are deemed "collection."
15 Respondents have not offered any evidence which demonstrates that
16 T & G's activities differ from solid waste collection companies'
17 routine collection of drop boxes. Accordingly, Respondents'
18 activities unquestionably constitute the "collection" of the
19 industrial sludge.

20 Because Respondents are engaged in the transportation of solid
21 waste for collection and/or disposal for compensation over the
22 public highways of the State of Washington, they are solid waste
23 collection companies subject to Commission regulation under
24 Chapter 81.77 RCW.

25 REBUTTAL ARGUMENTS

26 A. Industrial Sludge is Not "Property."

27 It is anticipated that Respondents will assert that the
28 industrial sludge is a commercial recyclable material, excluded from
29 the definition of solid waste found at RCW 81.77.010(9), and thus
30

1 the transportation of the industrial sludge does not fall within the
2 Commission's regulation of solid waste collection companies.

3 In determining whether the industrial sludge is a recyclable
4 material, we look to the statutory definition of "recyclable
5 materials" which provides,

6 those solid wastes that are separated for recycling or
7 reuse, such as papers, metals, and glass, that are
8 identified as recyclable materials pursuant to a local
comprehensive solid waste plan.

9 RCW 70.95.030(15). The components of the definition are: (1) solid
10 wastes (2) that are separated for recycling or reuse and (3) that
11 are identified as recyclable materials pursuant to a local
12 comprehensive solid waste plan.

13 1. Solid Waste.

14 Considerable argument has been offered with regard to
15 concluding that the sludge is a solid waste (see pages 5-11 supra).

16 2. Industrial Sludge is Not Separated for Recycling or
17 Reuse.

18 The statutory definition provides examples of materials
19 that are customarily separated for recycling or reuse, namely
20 "papers, metals, and glass." RCW 70.95.030(15). Industrial sludge
21 is not mentioned.

22 Additionally, Respondents have not demonstrated that the
23 industrial sludge at ALCOA's facility was "separated for recycling
24 or reuse." On the contrary, the waste material was deposited in an
25 on-site wastewater treatment pond, apparently for disposal. In
26 fact, the contract between Alcoa and RUST was for "clean up and
27 remediation" of the industrial sludge (SF "3") for ultimate delivery
28 to CRLRC. There is no mention in the record, whether through
29 stipulated facts, affidavits or written agreements that the
30 generator, ALCOA, intended that the industrial sludge be "separated
31

1 for recycling or reuse." Accordingly, the industrial sludge also
2 fails the second element in determining whether it is a recyclable
3 material.

4 3. Industrial Sludge is Not Identified as a Recyclable
5 in Clark County's Solid Waste Management Plan.

6 Chapter 5 of Clark County's Solid Waste Management Plan
7 ("SWMP") is dedicated to "Waste Recycling." Clark County's SWMP
8 defines recyclable materials as,

9 those materials listed in Table 5-1 [i.e.,
10 Newspaper, Corrugated Containers, High Grade Paper,
11 Mixed Waste Paper, Polycoated Containers, Glass
12 Containers, Aluminum Cans, Tin and Bi-Metal Cans,
13 Scrap Metals, PET Beverage Containers, HDPE Beverage
14 Containers, Plastic Packaging, Other Plastics, Yard
15 Waste] that:

16 Are to be remanufactured into a usable
17 product and marketed for any use other
18 than landfill disposal, incineration or
19 fiber based fuels; and

20 Are separated from non-recyclable material
21 before collection or transport such that
22 the material remaining in the load or
23 container is a recyclable commodity or is
24 material from a residential curbside
25 collection program under the authority of
26 RCW 36.58.040(1) or (2). [Emphasis
27 added].

28 Id. at 5-2.

29 Initially, industrial sludge is not a material listed in
30 Table 5-1 of the SWMP. Secondly, the industrial sludge is not
31 "remanufactured" into a material that is "marketed" and used for
32 "other than landfill disposal." On the contrary, the industrial
sludge is taken in its unaltered state from the ALCOA facility and
applied directly to the land at CRLRC, the same as the disposal of

1 any other solid waste. Finally, the industrial sludge is not
2 "separated from non-recyclable materials before. . . transport."
3 Rather, the entire industrial sludge in the wastewater treatment
4 pond is sent to CRLRC.

5 The industrial sludge does not meet one element of
6 "recyclable materials" and thus it continues to be classified as a
7 solid waste, the transportation of which again is regulated by the
8 Commission pursuant to Chapter 81.77 RCW.

9 B. Inconsistencies.

10 Factual assertions made by Respondents put into question
11 whether the industrial sludge has always been a valuable material to
12 OWS and thus excluded from Commission jurisdiction, as claimed by
13 Respondents.

14 1. Timing.

15 Respondents entered facts into evidence that, "because OWS
16 is able to recycle the sludge as daily cover, it can offer RUST a
17 favorable rate, which was a material factor in RUST's decision to
18 have the material delivered to the CRLRC in Oregon." (Exhibit "5,"
19 page 2, line 16). Apparently due in part to the favorable rate
20 included in OWS' bid, RUST entered into a contract (signed
21 September 5 and 16, 1994) with OWS to remove the industrial sludge
22 from the ALCOA site. (Exhibit "1"). Transportation of the sludge
23 to CRLRC commenced on August 22, 1994, the same day OWS requested
24 approval from DEQ to use the sludge as ADC. (Exhibit "8"). By
25 letter dated August 26, 1994, DEQ authorized "OWS to proceed with an
26 evaluation of sludge as ADC" at CRLRC. (Exhibit "9").

27 Presumably, RUST used OWS' bid when preparing RUST's
28 proposal to Alcoa, which resulted in a contract between Alcoa and
29 RUST dated July 20, 1994. (SF "3"). It is curious that OWS was
30 able to propose "favorable rates", prior to the July 20, 1994
31

1 contract, which assumed the sludge would be used as ADC, even though
2 the approval from DEQ to test the sludge as ADC was not given until
3 four days after the transportation began (i.e., August 26, 1994).
4 The timing of events raises a material question of fact as to
5 whether there was any intent to use the sludge as ADC until August
6 22, 1994 - the date DEQ approval was sought (Exhibit "8") and the
7 date on which the theory that the material has value was offered to
8 Complainant (Exhibit "7").

9 2. OWS' Responses to Complainant.

10 In early August 1994, when Complainant became aware of the
11 possible transportation of solid waste from ALCOA's facility by an
12 unregulated hauler, Complainant contacted ALCOA to advise it, as
13 site owner, of the solid waste regulatory scheme in Washington.
14 (Exhibit "14"). After a lengthy analysis of trailer-on-
15 flatcar/container-on-flatcar provisions, ALCOA concluded that the
16 transportation was exempt from state regulation:

17 Contrary to Ms. Horenstein's contention, a
18 G-certificate is not required for the intermodal
19 transport of waste from the ALCOA site in Washington
20 to the OWS landfill in Gilliam County, Oregon.
21 Specifically, waste will be placed into sealed
22 intermodal containers at the ALCOA site and hauled
23 by truck to an intermodal railyard in Portland,
24 Oregon, from which the waste will be loaded onto
25 railcars for delivery to the landfill in Oregon. As
26 explained below, Congress and the Interstate
27 Commerce Commission have exempted such trailer-
28 on-flatcar/container-on-flatcar (TOFC/COFC)
29 operations from state regulation. [Emphasis added].

30 (Exhibit "15" at page 1). Respondents thus initially took the
31 position that the "waste" was exempt from State regulation.

32 It was not until Complainant responded to ALCOA (on August
16, 1994) that the transportation of solid waste for compensation on
the highways of the State of Washington is regulated by the

1 Commission, regardless of interstate movement, citing Joray Trucking
2 Corp. Common Carrier Application, 99 MCC 109 (1965) (Exhibit "17"),
3 that OWS first asserted the argument (in its August 22, 1994
4 correspondence) that the material it was transporting suddenly "has
5 value. . . and therefore is not a commodity that would come under a
6 G Certificate in the state of Washington." (Exhibit "7").

7 It is again curious that Respondents initially asserted
8 that the transportation of waste was not subject to Commission
9 jurisdiction and then later asserted that the industrial sludge had
10 value and thus was not subject to Commission jurisdiction. The
11 second argument appeared to surface only as a bootstrapping premise
12 to ensure compliance.

13 3. Contracts.

14 OWS entered into a "Service Agreement, Non-Hazardous Waste
15 Disposal" with RUST, executed on September 5, 1994, and
16 September 16, 1994. (Exhibit "1"). This is the only written
17 agreement between RUST and OWS offered into evidence with regard to
18 the transportation of the industrial sludge from the ALCOA facility
19 to CRLRC. The Exhibit is fraught with references to "waste disposal
20 at CRLRC" and nowhere addresses the use of the sludge as ADC. For
21 instance,

22 This is a legally binding contract, and Contractor
23 [OWS] agrees to provide and Customer [RUST] agrees
24 to accept the waste disposal services subject to the
25 terms and conditions specified in this contract.
26 ESTIMATED MONTHLY AMOUNT OF WASTE FOR LAND DISPOSAL:
27 50,000 tons. [Emphasis added].

28 Id. at 1. The agreement goes on to set forth,

29 TERMS AND CONDITIONS OF DISPOSAL AGREEMENT. . . the
30 agreement of the parties for the disposal of waste
31 shall consist of. . . Customer warrants that the
32 waste delivered to Contractor. . . Contractor has
the right to refuse or reject after acceptance any

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1 load of wastes delivered to its Facility. . .
2 Customer agrees to pay Contractor's posted disposal
3 rates. . . [Emphasis added].

4 Id. at 2.

5 Despite this clear contractual language, OWS now claims
6 the "contract language simply appears on OWS's standard form
7 contract and does not represent the reality of this situation."
8 (Exhibit "4," page 4, line 4).

9 It is indeed curious, based on the substantial volume of
10 industrial sludge to be transported from ALCOA's site to OWS, namely
11 approximately 50,000 tons, that OWS would use a "standard form
12 contract" which in no way accurately documents Respondents' claim
13 that the material is not waste, that the material will be used as
14 ADC, that OWS is charging less than the posted gate rate, etc.

15 With a transaction of this magnitude, if the material was
16 truly intended to be used as ADC, it is a reasonable assumption that
17 prudent business practices would dictate the contract would bear
18 some resemblance to the purported activities, as opposed to a
19 diametrically opposed agreement (i.e., an agreement that addresses
20 waste disposal, assessment of tip fees at posted gate rates, etc.).

21 In summary, it appears that the classification of the
22 subject material constituted a moving target during August, when
23 Complainant was in direct communication with ALCOA and OWS on the
24 project. Respondents have simply not provided any clear and
25 convincing evidence that the industrial sludge at the heart of this
26 dispute is exempt from Commission jurisdiction.

27 C. Interstate Commerce.

28 It is anticipated that Respondents will make the claim that the
29 transportation of the industrial sludge from ALCOA is exempt from
30

1 Commission regulation because of the interstate movement of the
2 material.

3 It is well settled that the interstate transportation of solid
4 waste is not subject to the jurisdiction of the Interstate Commerce
5 Commission ("ICC") because solid waste is not "property" as defined
6 by ICC regulation. Joray Trucking Corp. Common Carrier Application,
7 99 MCC 109, 110 (1965). Accordingly, Respondents' interstate
8 movement of solid waste is not subject to ICC regulation.

9 This Commission has noted that RCW 81.77.100 makes it "crystal
10 clear" that the Commission's purpose "is to regulate all refuse
11 collection companies operating in this state." All County Disposal
12 Services, Inc., Cause No. TG-1859, at 4, fn. 3 (August 1985);
13 Evergreen Waste Systems, Inc., Cause No. TG-1911, at 3 (May 1986).
14 In fact, "whether the [solid waste] service is intra or interstate
15 in nature is not relevant to the statutory concerns." All County at
16 8. Accordingly, any intent offered by Respondents, that the sludge
17 is to be transported in interstate commerce, is irrelevant.

18 The Commission, in Kleenwell Biohazard and General Ecology
19 Consultants, Docket No. TG-920304, at 4 (January 1993), succinctly
20 summarized the Commission's regulatory jurisdiction over solid waste
21 collection companies under the Interstate Commerce Clause,

22 state regulation of [solid waste collection] activity is
23 not preempted; any burden on interstate commerce is at
24 most incidental; the state statute advances legitimate
25 local concerns; and the provisions of Chapter 81.77 RCW,
26 including the requirement of a certificate of public
27 convenience and necessity, can constitutionally be applied
28 to the collection of solid waste in this state for
29 disposal out of state.

30 Any claim by Respondents that their transportation is exempt
31 from Commission regulation because of the interstate nature of the
32 movement, has been previously addressed and dismissed by the

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing the same, postage prepaid, to:

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Dated this 23rd day of November, 1994 at Vancouver, Washington.


CYNTHIA A. HORENSTEIN