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December 1, 1994

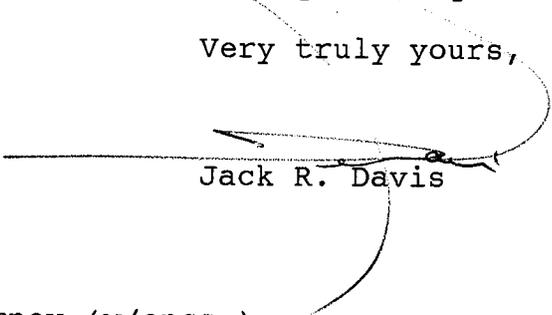
Steve McLellan, Secretary  
Washington Utilities and  
Transportation Commission  
PO Box 47250  
Olympia, WA 98504-7250

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

Dear Secretary McLellan:

On behalf of Respondent, T & G Trucking & Freight Co., in the  
above matter, we are enclosing original and two copies of  
Responsive Brief of Respondent, T & G Trucking & Freight Co.

Very truly yours,

  
Jack R. Davis

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Encs.  
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cc: Cynthia Horenstein, Attorney (w/encs.)  
William Rasmussen, Attorney (w/encs.)  
James Sells, Attorney (w/encs.)  
Steve Smith, Assistant Attorney General (w/encs.)

STATE OF WASH.  
UTIL. & TRANSP.  
COMMISSION

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BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THE DISPOSAL GROUP )  
d/b/a VANCOUVER SANITARY SERVICE ) Docket No. TG-941154  
and TWIN CITY SANITARY SERVICE, )  
a Washington corporation (G-65), )  
Complainant, )  
vs. )  
WASTE MANAGEMENT DISPOSAL )  
SERVICES OF OREGON, INC., )  
d/b/a OREGON WASTE SYSTEMS, )  
a Delaware corporation; and )  
T & G TRUCKING & FREIGHT CO., )  
an Oregon corporation, )  
Respondents. )

RESPONSIVE BRIEF OF  
RESPONDENT, T & G  
TRUCKING & FREIGHT CO.

STATE OF WASH.  
UTIL. & TRANSP.  
COMMISSION

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COMES NOW, T & G Trucking & Freight Co., an Oregon corporation ("T & G" or "Respondent"), and in response to the Post Hearing Briefs of Complainant, The Disposal Group, Inc., and the Post Hearing Brief of Intervenor, Washington Refuse & Recycling Association, states as follows:

I.

RESPONSE

Intervenor argues essentially two issues, namely:

1. Industrial sludge is not solid waste by definition; and
2. Interstate commerce is not an issue in this proceeding.

In respect to Issue No. 1, Intervenor takes a definitional approach citing RCW Chapter 70.95; Chapter 70.95(j); RCW 81.77.010(9); RCW 81.77.015; and WAC 480-70-050(6) as controlling this Commission's determination of the issue. Based upon the various language of the referenced statutes, rules and regulations, Intervenor proposes that the sludge being transported in the instant proceeding is solid waste for the

1 purposes of WUTC regulation. These definitions, however, totally  
2 fail to take into account the requirement that the WUTC must make  
3 its own determination and classify transportation services as  
4 involving "solid waste" or "recyclable materials". As  
5 specifically stated by the Commission in *Order M.V. No. 143916,*  
*Safco Safe Transport, Inc., App. No. P-73623 (Oct. 11, 1991):*

6 "Protestants contend that because supporting witnesses  
7 called the commodity 'waste', only a solid waste  
8 carrier may transport it."

9 "[2] The Commission considers that argument singularly  
10 unpersuasive. Putting the label 'waste' on a commodity  
11 does not determine whether a solid waste collector or  
12 motor carrier may transport it. Order M.V. No. 130721,  
13 In re Crosby & Overton, Inc., App. No. P-66968 (Oct.  
14 1984). Nearly all recyclable commodities, by  
15 definition, are the product of an initial process or  
16 cycle that they ended as waste. Except for the  
17 recycling, all recyclables would be subject to  
18 disposal. The label waste in this context is therefore  
19 meaningless."

20 \* \* \*

21 "[4] A motor carrier may transport a recyclable  
22 commodity if the shipper orders the transportation for  
23 recycling, rather than for disposal. Order M.V. No.  
24 133753, In re Sunshine Disposal d/b/a Valley Transfer &  
25 Storage, App. No. E-19104 (Apr. 1986)."

26 Similarly, both Intervenor and Complainant urge that the  
27 State of Oregon, Department of Environmental Quality ("DEQ")  
28 classifies the sludge as "solid waste" citing OAR 340-93-030(75),  
Oregon Administrative Rule (OAR) 340-97-110 and Complainant's  
Exhibit 3. A close analysis of these cited statutes, regulations  
and interpretations establishes conclusively that they are  
totally unrelated and unapplicable to the requirements of the  
WUTC to apply the provisions of RCW Chapters 81.77 and 81.80 to  
the transportation of solid waste and property. Obviously, in  
the mind of Alcoa, the sludge that we are dealing with was an  
industrial waste as contained within the statutory definition of  
solid waste in RCW 81.77.010(9). Similarly, there cannot be any  
question that the material is received by a landfill and is  
subject to tonnage and fee calculation as material deposited in

1 the landfill under the interpretation of DEQ. The material  
2 obviously is industrial sludge as contained within Oregon's  
3 definition of solid waste in OAR 340-93-030(75). The material is  
4 not "sewage sludge" as defined in RCW 70.95.030(18), is not  
5 generated from a waste water treatment system nor is it a "bio-  
6 solid" or "municipal sewage sludge" under RCW Chapter 70.95J.  
7 The material has not been physically separated from other solid  
8 waste as defined in RCW 70.95.030(15). None of the referenced  
9 definitions, however, have any bearing whatsoever upon regulation  
10 of this material by the WUTC. As noted at page 3 of *Order M.V.*  
11 *No. 143916, Safco Safe Transport, Inc., (supra):*

12 "[3] Protestants urge that the Department of Ecology  
13 regulations, defining the commodities as dangerous  
14 waste, control the authority required for their  
15 transportation. We consider this argument unpersuasive  
16 as well. The Department of Ecology regulations protect  
17 the environment from hazards arising from products or  
18 byproducts of identified processes. They do not  
19 determine which transportation authority Title 81 RCW  
20 requires."

21 Both Intervenor and Complainant cite *Order M.V. No. 142137,*  
22 *Inland Transportation, Inc., App. No. E-19946 (Oct. 1990),* as  
23 ruling that industrial sludge is solid waste. Such case,  
24 however, has no application to the facts involved in this  
25 proceeding. In *Inland*, the Commission held:

26 "[4] Solid Waste Carriage. There is a substantial  
27 issue as to whether this service may be provided under  
28 motor carrier regulation or whether it should be  
provided under solid waste regulation. There is no  
evidence that the commodity has any commercial value at  
all; there is evidence that the shipper must pay the  
destination site to allow 'application' of the  
commodity; the destination is listed in its permit and  
is regulated by the local health authority as a solid  
waste disposal facility; and the applicant's witness  
referred to the disposal site as a 'dump' even after  
prodding from counsel.

The regulation and apparent operation of the  
destination as a waste disposal facility may not  
determine the issue, but in light of the other evidence  
of record and the lack of evidence that the commodity  
has commercial value, it appears that regulation is  
proper under Chapter 81.77 RCW rather than Chapter

1 81.80 RCW."

2 In fact in Footnote 4 at page 5 of *Order M.V. No. 142137*,  
3 the Commission noted that evidence that the commodity had  
4 commercial value and was taken to a site for further processing  
5 or use was necessary to a determination that authority to  
6 transport property under RCW Chapter 81.80 was appropriate. In  
7 this proceeding, all parties stipulated:

8 "The sludge has value to OWS as alternate daily cover."  
9 (SF-21)

10 Such evidence is consistent with regulation under RCW  
11 Chapter 81.80 under the *Inland* decision.

12 A case that is even more in point is *Order M.V. No. 144465*,  
13 *Roger Dralle, d/b/a Roger's Dump Trucking, App. No. P-74586 (Jan.*  
14 *1992)*, which held:

15 "Hauling of contaminated soil for disposal is properly  
16 done by a hauler holding solid waste from the  
17 Commission. Hauling of soils for use is properly done  
18 by a common carrier. . . ." (p. 6)

19 The significant test as established in the cases cited above  
20 is whether or not the material has a value and is going to be  
21 used rather than just disposed of. In this proceeding, by  
22 stipulation, there is no question that the material has value and  
23 will be used as alternate daily coverage ("ADC") rather than just  
24 co-mingled with waste and disposed of. (SF-16, 20)

25 In addition to the standard definitional argument,  
26 Complainant, at page 8 of its brief, urges that the existence of  
27 a "secondary market" is essential to establishment that the  
28 material has "commercial value". This argument, however, fails  
entirely in light of the stipulated facts in this proceeding.  
The parties stipulated that the material has value, has a  
secondary use, and that OWS would have to obtain ADC elsewhere if  
it did not have the sludge from Alcoa. (SF-21, 23) OWS pays  
consideration for the material by reducing the amount that it  
charges for transportation and processing. (SF-22) Perhaps  
Complainant would view the transaction differently if it was to  
transport the material to CRLRC at a fee and OWS, in turn, was

1 then to pay Alcoa consideration for the material as ADC. The  
2 fact that the consideration for the material is deducted from the  
3 transportation and processing costs, rather than being paid as  
4 separate consideration, should not be used as a basis for arguing  
5 that the sludge has no value.

6 At page 12 of its brief, Complainant urges that T & G is  
7 involved in the "collection" of solid waste in the same manner as  
8 any garbage and refuse collection company that collects solid  
9 waste in drop boxes. This argument totally ignores the evidence  
10 of record in respect to the services which T & G holds itself out  
11 to perform. As noted in the Declaration of Douglas J. Walters, T  
12 & G does not hold its services out to transport solid waste. It  
13 provides chassis and tractors for the movement of loaded  
14 containers from Alcoa to a railroad siding. (D-DW, p. 2) The  
15 bills of lading under which T & G transports the sludge specify:

16 "To be recycled as daily cover at Columbia Ridge  
17 Landfill and Recycling Center." (OWS, Ex. H & I)

18 There is absolutely no evidence in this record that Respondent, T  
19 & G, has at any time held itself out or performed functions  
20 consisting of collecting and transporting solid waste in drop  
21 boxes over the highways of the State of Washington.

22 At page 14 of its brief, Complainant urges that industrial  
23 sludge is not identified as a recyclable material in the Clark  
24 County Comprehensive Solid Waste Management Plan and accordingly  
25 should not be so classified by the WUTC. Whether or not Clark  
26 County defines the material as solid waste in its comprehensive  
27 plan is not really material to a determination by the WUTC as to  
28 whether or not operating authority is required under either RCW  
Chapter 81.77 or 81.80. See, Crosby & Overton, Inc. (supra). It  
does not appear that the Clark County Comprehensive Solid Waste  
Management Plan identifies reusable soil as a recyclable  
material, however, this Commission has specifically ruled that  
the hauling of soils for re-use is properly done by a common  
carrier. Roger Dralle, d/b/a Roger's Dump Trucking, (supra).  
Complainant urges that the sludge is not remanufactured and,  
accordingly, does not fall within Clark County's Comprehensive

1 Plan. The same argument would apply to soil for reuse as ruled  
2 by this Commission to constitute property for transportation. In  
3 *Order M.V. No. 144941, Rizler Contracting Co., App. No. E-75297*  
4 *(May 1992)*, and *Roger Dralle, d/b/a Roger's Dump Trucking,*  
5 *(supra)*.

6 Complainant also urges that the material is not separated  
7 from non-recyclable materials before being transported and  
8 therefore cannot qualify as a recyclable. This argument appears  
9 to be totally unfounded. The sludge in question is already  
10 separate and apart from any other material. It would be absurd  
11 to believe that either Clark County or the WUTC would require a  
12 generator of different types of waste to co-mingle all of the  
13 waste and then separate the recyclable materials from the non-  
14 recyclable materials prior to transportation. The obvious intent  
15 of the language in the plan regarding separation is that the  
16 recyclable and non-recyclable material are not co-mingled at the  
17 time of collection and/or transportation. If there has never  
18 been any co-mingling of the recyclable with waste, then there is  
19 no reason for separation. Obviously, if recyclable cardboard is  
20 kept separate and baled and shipped to a recycling center, it is  
21 going to be considered as a recyclable material despite the fact  
22 that it was never co-mingled and then separated from non-  
23 recyclable materials.

24 The issues argued at pages 15 to 18 of Complainant's brief  
25 regarding the timing of OWS's application to DEQ to use the  
26 sludge as ADC, the contents of the form contracts and the  
27 responses of OWS to Complainant in any 1994 correspondence have  
28 really nothing to do with the transportation services performed  
by Respondent, T & G. T & G did not transport any loads until on  
or about August 22, 1994. (SF-12) The bills of lading under  
which it transported the material each identified the material  
as:

"To be recycled as daily cover at Columbia Ridge  
Landfill and Recycling Center." (OWS Ex. H & I)

T & G does not consider the material as solid waste, but as  
freight in a container to be moved on a flat car. (D-DW, p. 3)

1 From the beginning of the project, the Project Manager of Rust  
2 understood that the sludge material was being taken by OWS as ADC  
3 and not for disposal. (D-CZ, p.2) There is no evidence on this  
4 record that the material was ever tendered to or accepted by T &  
5 G to be transported as solid waste. Whatever is contained in the  
6 standard form contracts of OWS or the correspondence between OWS  
7 and/or its attorneys and other parties has no relevance or  
8 materiality whatsoever as to the knowledge and understanding of  
9 Respondent, T & G, in accepting the sludge as recyclable material  
10 for transportation in interstate commerce as part of a container  
11 on flat car ("COFC") intermodal movement.

12 Both Intervenor and Complainant argue that the  
13 transportation services being performed by T & G are not exempt  
14 from Commission regulation by reason of their interstate nature  
15 citing Joray Trucking Corp. Common Carrier Application, 99 MCC  
16 109, 110 (1965). As noted in Respondent's Initial Brief,  
17 however, the Joray case is not applicable to this proceeding as  
18 the motor carrier transportation service performed by T & G is  
19 part of a through motor-rail intermodal COFC service which would  
20 normally be regulated under Part I of the Interstate Commerce  
21 Act, under Title 49 United States Code, Subtitle IV, Subchapter  
22 I, but which has been exempted from regulation under 49 CFR  
23 1090.2. The application of a similar exemption to state  
24 regulation has been determined in ICC v. Texas, 479 US 450, 93  
25 L.Ed.2d 809, 107 S.Ct. 787 (1987).

## 26 II.

### 27 CONCLUSION

28 The initial issue to be determined in this proceeding is  
whether the sludge being transported from Alcoa to CRLRC is  
"solid waste" or "property" for the purpose of regulation under  
RCW Chapter 81.77 or 81.80. The primary test to resolve this  
issue is whether or not the sludge has any commercial value.  
Order M.V. No. 143632, C & C Transportation Co., Inc., App. No.  
E-74249 (July 1991). In this case, the parties stipulated that  
the sludge in issue has value. (SF-21) A similar test is whether  
the transportation is for recycling, reprocessing, reclamation or

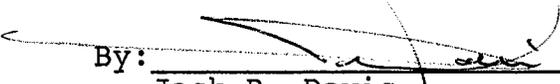
1 for any purpose that extracts or modifies the commodity or  
2 elements within it for reuse or for another commercially valuable  
3 purpose. *Order M.V. No. 143916, Safco Safe Transport, Inc., App.*  
4 *P-73625 (Oct. 1991)*. The parties have stipulated that the  
5 material is reused for ADC. (SF-16) Under all prior  
6 determinations of this Commission, the sludge that is being  
7 transported in this proceeding should be classified as property  
8 for transportation under RCW Chapter 81.80.

9 A secondary issue relates to whether or not this Commission  
10 has jurisdiction over the transportation even if the material was  
11 classified as waste due to the fact that it is part of an  
12 intermodal motor-rail container on flat car movement in  
13 interstate commerce. The Interstate Commerce Commission has  
14 exempt railroad and truck transportation as part of a continuous  
15 intermodal movement under 49 CFR 1090.2. It has been judicially  
16 determined that such an exemption preempts intrastate regulation  
17 of TOFC/COFC traffic. *ICC v. Texas, 479 US 450, 93 L.Ed.2d 809,*  
18 *107 S.Ct. 787 (1987)*. The cases of *Joray Trucking Corp. Common*  
19 *Carrier Application, 99 MCC 109 (1965)*, and *Transportation of*  
20 *"Waste" Products for Reuse and Recycling, 114 MCC 92 (1971)*, have  
21 no application to the facts of this proceeding in that they  
22 related only to motor carrier transportation under Subchapter II  
23 of the Act wherein services performed in this proceeding relate  
24 to intermodal COFC service under Subchapter I of the Interstate  
25 Commerce Act.

26 Based upon the evidence of record, the prior rulings of this  
27 Commission, the ICC, and the U. S. Supreme Court, the Complaint  
28 herein must be dismissed.

Respectfully submitted,

DAVIS, BALDWIN & HAFFNER

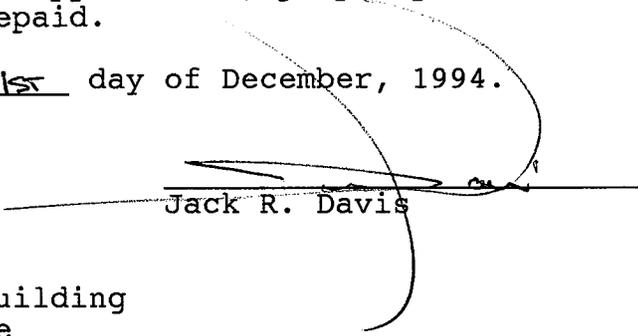
By: 

Jack R. Davis  
Attorney for Respondent  
T & G Trucking & Freight  
Co.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing Responsive Brief of Respondent, T & G Trucking & Freight Co., upon William Rasmussen, Attorney, 2600 Century Square, 1501 4th Avenue, Seattle, WA 98101; Cynthia Horenstein, Attorney, 900 Washington Street, Ste. 900, PO Box 694, Vancouver, WA 98666; James Sells, Attorney, 510 Washington, Bremerton, WA 98310; and Steve Smith, Assistant Attorney General, Heritage Plaza Building, 1400 S. Evergreen Park Drive SW, Olympia, WA 98504, Mail Stop FY-11, by mailing a copy thereof, properly addressed, with first class postage prepaid.

DATED this 1st day of December, 1994.

  
Jack R. Davis

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