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December 5, 1994

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 v. Waste Management Disposal
Services of Oregon d/b/a Oregon Waste Systems,
Washington Utilities and Transportation Commission
Docket No. TG-941154

Dear Mr. McLellan:

Enclosed for filing is the original and three copies of
respondent Oregon Waste Systems' Reply Brief in connection with
the above-referenced matter. Thank you for your assistance.

Very truly yours,

DAVIS WRIGHT TREMAINE



William K. Rasmussen

Enclosure

cc: Parties of Record
Mr. John Prusia, Hearing Officer
Mr. William Jeffry
Mr. Norman Wietting
Mr. Doug Coenen

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BEFORE THE UTILITIES AND TRANSPORTATION COMMISSION
OF THE STATE OF WASHINGTON

THE DISPOSAL GROUP, INC., dba
VANCOUVER SANITARY SERVICE and
TWIN CITY SANITARY SERVICE, a
Washington corporation (G-65),

Complainant,

vs.

WASTE MANAGEMENT DISPOSAL
SERVICES OF OREGON, INC., dba
OREGON WASTE SYSTEMS, a
Delaware corporation; and T&G
TRUCKING & FREIGHT CO., an Oregon
corporation,

Respondents,

and

WASHINGTON REFUSE & RECYCLING
ASSOCIATION,

Intervenor.

NO. TG-941154

OREGON WASTE SYSTEMS
REPLY BRIEF

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UTIL. & TRANSP
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1 **I. INTRODUCTION.**

2 The Disposal Group ("TDG") concludes its opening brief with
3 the allegation that respondents' arguments that the sludge has
4 value and/or is transported in interstate commerce are "red
5 herrings." TDG Br. at 20. To the contrary, these arguments --
6 presented by OWS, T&G Trucking and the Commission staff -- are
7 fully supported by the factual record and go to the heart of the
8 issues the Commission must confront in this case.

9 Ironically, it is TDG's brief that is filled with red
10 herrings -- e.g., its reliance upon a revenue rule interpretation
11 of the Oregon DEQ; its speculation about the "conditional" nature
12 of DEQ's approval of the ALCOA sludge as daily cover; its
13 questioning of the timing of DEQ's approval; its unsupported
14 allegations regarding ALCOA's intent; and its unrelenting focus
15 on labels and form rather than on the substance of the operation.

16 The record shows that this case does not involve, as TDG
17 argues, the transportation of solid waste for collection and
18 disposal. Rather, this case involves the transportation of
19 recyclable material for use as daily cover at the CRLRC -- an
20 economically and environmentally beneficial use. The material is
21 not being disposed of as solid waste.

22 In In re Safco Safe Transport, Inc., M.V. No. 143916, App.
23 No. P-73623 (October 1991), the Commission sets forth a reliable
24 guide to determine whether the transportation of a particular
25 material requires solid waste collection authority:

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1 A solid waste collection company may collect
2 and transport materials that shippers intend
3 for disposal. This is true whether or not
4 the label "waste" applies for any other
5 purpose, and whether or not the solid waste
6 carrier sorts or conducts other recycling
7 activity. A shipper may tender brand new
8 items to a solid waste collection company for
9 disposal, if the shipper wants disposal. We
deduce the shipper's intention from its
tender. If the tender is to a solid waste
collection company, the shipper intends
disposal. If the shipper tenders a
recyclable commodity to a motor carrier, the
shipper intends recycling and the
transportation must further recycling.

10 In re Safco at 3-4. The Commission's analysis in Safco can be
11 summed up as follows: if the shipper tenders a material for
12 disposal, and the material is in fact disposed of, the material
13 is solid waste subject to the requirements of RCW 81.77.
14 Conversely, if the shipper tenders the material for a higher
15 purpose than mere disposal, and the material is not in fact
16 disposed of in a landfill in a manner that uses up existing
17 landfill capacity, it is a recyclable material free from the
18 requirements of RCW 81.77. This formulation comports with the
19 statutory definitions of "solid waste" and "recyclable
20 materials," it is consistent with Commission precedent, and it
21 furthers the Legislature's waste reduction and recycling goals
22 set forth in RCW 70.95. It also avoids the strained and absurd
23 results that will necessarily follow if the Commission adopts the
24 ill-considered approach TDG urges in this proceeding. Based on
25

1 the factual record and the applicable state and federal law, the
2 Commission should dismiss TDG's complaint with prejudice.

3 **II. REBUTTAL ARGUMENT AND AUTHORITY.**

4 **A. The ALCOA Sludge is Not "Solid Waste" for Purposes of**
5 **RCW 81.77.**

6 TDG and intervenor Washington Refuse & Recycling Association
7 (the "Association") argue that the ALCOA material is "solid
8 waste" for purposes of RCW 81.77. They arrive at that claim,
9 however, by ignoring key facts -- facts to which all parties have
10 stipulated -- and by misapplying the applicable statutory
11 definitions and Commission precedent.

12 **1. Definition of Solid Waste.**

13 TDG begins its argument by giving a confused and muddled
14 definition of "solid waste." See TDG Br. at 4-5. TDG claims to
15 be quoting RCW 81.77.010(9), when in fact it has taken language
16 from other statutory definitions (in part paraphrased) and
17 concocted its own definition. The terms "source separated" and
18 "commercial generators" which appear in TDG's concocted
19 definition are not in fact found in RCW 81.77.010(9), nor are
20 they found in the definitions of "solid waste" under
21 RCW 70.95.030(19) or in the definition of "recyclable materials"
22 under RCW 70.95.030(15). The actual definition of "solid waste"
23 appears in RCW 81.77.010(9), as follows:

24 Solid waste means the same as defined under
25 RCW 70.95.030, except for the purposes of
this chapter solid waste does not include
recyclable materials except for source

1 separated recyclable materials collected from
2 residences.

3 RCW 81.77.010(9). In short, for purposes of RCW 81.77, "solid
4 waste" does not include any "recyclable materials" at all (except
5 for "source separated recyclable materials collected from
6 residences," not applicable here).

7 **2. The ALCOA Sludge Is a Recyclable Material.**

8 **a. The ALCOA Sludge Is Recycled as Daily Cover
and Is Not Disposed of.**

9 TDG erroneously claims that OWS is charging for the
10 "disposal of the industrial sludge at CRLRC." TDG Br. at 8.
11 This allegation shows that TDG fundamentally misunderstands the
12 factual issues in this case. The ALCOA sludge is not disposed of
13 at the CRLRC; it is used as daily cover. Stip. Facts ¶ 16. It
14 does not use up existing landfill capacity. TDG's argument rests
15 upon the mistaken premise that all landfill space is available
16 for disposal of solid waste. To the contrary, a significant
17 portion of landfill space must go for daily cover, for final
18 cover, for the underlying liner, and so on, all of which
19 constitute uses distinct from the disposal of solid waste in the
20 landfill. Simply because a material is used in a landfill does
21 not mean it is being disposed of as solid waste.

22 **b. Definition of Recyclable Materials.**

23 TDG suggests that "sludge" cannot be a recyclable material
24 because it is not expressly mentioned in the definition of
25 "recyclable materials" under RCW 70.95.030(15). TDG Br. at 13.

1 However, that definition simply gives three examples of
2 recyclable materials -- "such as, papers, metals and glass" --
3 and is clearly not meant to be exhaustive (note the use of the
4 phrase "such as"). For example, Table 5-1 of the Clark County
5 Comprehensive Plan identifies several types of recyclable
6 materials that are neither papers, metals or glass (e.g.,
7 polycoated containers, plastic packaging, other plastics, and
8 yard waste). The Commission should reject TDG's efforts to
9 construe RCW 70.95.030(15) in a way that excludes materials that
10 are obviously recyclable.

11 **c. The Clark County Comprehensive Plan**
12 **Identifies Sludge as Recyclable Material.**

13 TDG claims that the ALCOA sludge is a not a "recyclable
14 material" because it is not listed on Table 5-1 of the Clark
15 County Comprehensive Solid Waste Management Plan. The Commission
16 should reject this argument.

17 Table 5-1 of the Comprehensive Plan does not contain the
18 universe of recyclable materials. Used bedding, used clothing
19 and miscellaneous household items, for example, do not fall
20 within the "designation of recyclable materials" listed in Table
21 5-1 of the Comprehensive Plan. Nonetheless, they are potentially
22 recyclable, meaning they are often (although not always)
23 recycled. If they are sent to a homeless shelter, for example,
24 they have been recycled and are clearly not "solid waste" for
25 purposes of RCW 81.77, even if the homeless shelter does not pay

1 for the items and the shipper pays the cost of the
2 transportation, as is often the case with recyclable materials.
3 In that case, the G-Certificate hauler in the area would lack any
4 basis to complain that the transportation of the used bedding and
5 clothes to the homeless shelter was provided by a hauler lacking
6 a G-certificate. Although not listed in Table 5-1, the reuse
7 potential of old bedding and clothes is "identified" in the Clark
8 County Comprehensive Plan at p. 5-15, thus evidencing that Table
9 5-1 does not contain the totality of "recyclable materials"
10 identified in the Plan.¹

11 The Commission should not let form triumph over substance in
12 determining what constitutes a recyclable material. Solid waste
13 comprehensive plans take many forms, with topics and issues
14 arranged in a multitude of ways. The fact that the recyclable
15 character of a material is not mentioned in a particular chapter
16 or a particular table is not dispositive. Here, the Clark County
17 Plan simply chose to deal with special wastes (like sludges) in
18 another chapter. See Comprehensive Plan at 5-19 ("Materials
19 considered to be special wastes . . . are not included here.
20 Those material are addressed in Chapter 13 (Special Wastes)." In
21 Chapter 13, the Comprehensive Plan "identifies" several ways in
22

23 ¹ Further, the Comprehensive Plan identifies the recycling
24 potential of other materials that are not among the items
25 designated in Table 5-1 -- e.g., Christmas trees and used motor
oil (for which fees are typically charged to recycle these
materials). See Comprehensive Plan at 5-11 and 5-19.

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1 which sludge material can be recycled and put to beneficial end
2 use, including: (1) application onto agricultural lands; (2)
3 silviculture; (3) composting; and (4) application of sludge for
4 land reclamation. See Comprehensive Plan at p. 13-37. In
5 particular, the Plan recognizes that "sludge that has been
6 dewatered, when combined with bulking agents, has been
7 successfully used as daily cover material at landfills." Id. at
8 13-38 (emphasis added). In sum, the Clark County Comprehensive
9 Plan identifies several "recyclable" uses for sludge -- including
10 the very purpose (i.e., daily cover) for which OWS is using the
11 ALCOA material.

12 **d. The Commission Should not Construe the Term**
13 **"Separated" in a Way that Leads to Absurd or**
14 **Strained Results.**

14 TDG also claims that the ALCOA sludge is not a recyclable
15 material because it was not "separated" for recycling or reuse.
16 TDG Br. at 13. This is false both factually and legally.
17 Factually, the ALCOA sludge is "separated" for recycling and
18 reused, in that it is not mixed with non-recyclable material.

19 TDG's argument is legally false to the extent that TDG is
20 arguing that material is recyclable only if it has previously
21 been intermingled with other non-recyclable material and then
22 "separated." TDG does not and cannot cite any authority for such
23 an absurd proposition. Many recycled materials are delivered to
24 a higher end use without having first been intermingled with non-
25 recyclable material.

1 The point of the "separated" requirement is simple: if a
2 recyclable material has been intermingled with non-recyclable
3 material, it must be separated from the non-recyclable so that it
4 can fulfill its recyclable purpose. The "separated" requirement
5 does not mean that if a recyclable material already stands free
6 from non-recyclable material, one must mix it with non-recyclable
7 material and then re-separate it in order to have it qualify as
8 recyclable. It would be hard to imagine a more economically
9 wasteful proposition. Here, the ALCOA sludge was not mixed with
10 non-recyclable material but was fully recyclable as daily cover
11 at the CRLRC. The Commission should reject TDG's efforts to
12 construe the "separated" requirement in a way that would exclude
13 many obviously recyclable materials from the definition and,
14 further, defy common sense.

15 **3. The Commission Looks to Substance, Not Labels.**

16 TDG claims that the ALCOA sludge is not a recyclable
17 material because certain documents use the word "waste" in
18 describing the material. TDG Br. at 16-18. The Commission has
19 rejected such arguments in the past and should reject them here.
20 The Commission makes clear that it looks to substance, not form,
21 and that it will not be bound by labels. See Safco, supra at 3
22 ("Putting the label 'waste' on a commodity does not determine
23 whether a solid waste collector or motor carrier may transport
24 it.").

1 Although the OWS/Rust contract contains the word "waste,"
2 both OWS and Rust understand that the word simply appears on
3 OWS's standard form contract and does not represent the reality
4 of the situation. Ex. 4, ¶ 11; Ex. 5, ¶ 6. Rust and OWS agree
5 and understand that the sludge material has value to OWS and will
6 be recycled as daily cover at the CRLRC and not used for
7 disposal. Id. The recycling of the material as daily cover is
8 reflected in the applicable bills of lading, which provide that
9 the material is "to be recycled as daily cover at Columbia Ridge
10 Landfill and Recycling Center." Ex. 11, Ex. 12. Indeed, because
11 the material is being recycled, OWS did not include the 4.6
12 percent Washington State refuse collection tax in its bid to
13 Rust, nor is OWS otherwise collecting that tax. Ex. 4, ¶ 11; Ex.
14 5, 6.

15 TDG finds it "curious" that, in Exhibit 15, OWS "initially
16 asserted that the transportation of waste is not subject to
17 Commission jurisdiction and then later also asserted that the
18 industrial sludge has value and thus was not subject to
19 Commission jurisdiction." TDG Br. at 17. OWS's position is
20 neither inconsistent nor curious. Exhibit 15 reflects OWS's
21 analysis that the TOFC/COFC exemptions apply regardless of
22 whether the material is solid waste (as also explained in OWS's
23 opening brief at pages 26-28). But like many cases, a
24 transportation service may be exempt from Commission regulation
25 for more than one reason. Here, under the applicable state law,

1 the fact that the ALCOA sludge has value as daily cover provides
2 ample independent grounds for dismissing TDG's complaint, in
3 addition to the TOFC/COFC and Commerce Clause exemptions that
4 apply under federal law.

5 **4. The Commission's Inland Transportation Decision**
6 **Does Not Require that Solid Waste Authority Be**
7 **Obtained for Transporting the ALCOA Sludge.**

8 TDG and the Association argue that the Commission's decision
9 in In Re Inland Transportation, Inc., Order M.V. No. 142137
10 (October 1990), requires solid waste collection authority in this
11 case. Inland Transportation compels no such result. In that
12 case, the Commission emphasized that it arrived at its decision
13 because the factual record was so meager that the Commission
14 could not properly evaluate whether the applicant should be able
15 to perform the service without solid waste carrier authority.
16 See Inland Transportation at 3 ("More questions are asked than
17 answered on this record. . .").

18 For example, the Inland decision contains no indication that
19 the applicant submitted any evidence regarding the "value" of the
20 agricultural sludge to any party. The decision simply states
21 that the agricultural sludge was being spread on a field that had
22 been licensed as a solid waste disposal facility, but contains no
23 evidence that the agricultural sludge served a higher end use (as
24 opposed merely to being disposed of and using up the existing
25 solid waste disposal capacity at the site). Nor does it contain
any evidence that the solid waste disposal facility in that case

1 needed the agricultural sludge to meet federal or state
2 requirements. The Commission expressly recognized the factual
3 deficiencies in the Inland case:

4 In sum, the Commission believes that there
5 are too many unanswered questions to permit a
6 grant of [motor carrier] authority. It may
7 be that the answers to those questions could
8 provide that a grant of motor carrier
9 authority is appropriate. Those answers are
not in the record and the initial order
properly denies the application for
authority. (Emphasis added.)

9 Inland at 4-5.

10 In contrast, the record in this case fully supports a
11 determination that T&G Trucking does not require solid waste
12 collection authority. OWS requires material for daily cover to
13 comply with federal and state mandates. Stip. Facts ¶ 20. The
14 ALCOA material has value to OWS and is being used as daily cover.
15 Stip. Facts ¶¶ 16, 21. And the parties intend for it to be
16 reused and recycled as daily cover. Stip Facts ¶ 9; Ex. 4, ¶ 11;
17 Ex. 5, ¶ 6.

18 Rather than base a decision on Inland Transportation with
19 its host of "unanswered questions," the Commission should instead
20 seek guidance from its more recent decision in the Safco case
21 (discussed above), in which the Commission begins with a reasoned
22 and coherent definition of "recyclable materials" (within which
23 the ALCOA sludge falls) and then correctly holds that the
24 transportation of "recyclable materials" does not require solid
25 waste collection authority under RCW 81.77.

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1 **5. The DEQ Rule Interpretation is Irrelevant.**

2 OWS's opening brief explained the irrelevance of the DEQ
3 rule interpretation TDG offered as Exhibit 3. TDG's brief does
4 nothing to bolster the probative value of that exhibit. The
5 fundamental points remain: (1) not only is the DEQ rule
6 interpretation based on a different definitional scheme, but it
7 is different precisely as it relates to the definition of "solid
8 waste;" and (2) the DEQ rule interpretation is a revenue measure,
9 enacted for different purposes, and clearly has no bearing on
10 whether a material is solid waste or recyclable for purposes of
11 RCW 81.77. See OWS Br. at 18-21.

12 TDG also makes up facts in trying to apply the DEQ rule
13 interpretation to the facts of this case:

14 "The industrial sludge would clearly
15 'otherwise be disposed of' in that it has no
16 commercial value and thus could not be sold
 on the open market."

17 TDG Br. at 10. The fact that TDG gives no record citation for
18 this bald statement can be easily explained: the record contains
19 no such evidence. Furthermore, the argument is a red herring.
20 Here, the undisputed facts show that the ALCOA sludge has value
21 to OWS. Stip. Facts. ¶ 21. As the Commission staff points out,
22 the material also has value to Rust because it allows Rust to get
23 a favorable rate for transporting the material off the ALCOA
24 site. See Commission Staff Br. at 6. TDG cites no authority for
25 the proposition that, in addition to the value the material has

1 to both OWS and Rust in this case, it must also be proved that it
2 would have value to someone else in other contexts.

3 The Commission has expressly held that another agency's
4 definition of a commodity as waste does not determine how the
5 Commission's applies RCW 81.77. In Safco, the Commission found
6 "unpersuasive" the argument that it should let its decision be
7 influenced by how the Washington State Department of Ecology
8 defined the material at issue in that case, reasoning that the
9 Department of Ecology was charged with a different mandate than
10 the WUTC and that Ecology's regulatory definitions were directed
11 toward different objectives.² See Safco, supra, at 3. Here,
12 the DEQ rule interpretation operates under a definitional scheme
13 different from RCW 81.77, and it was formulated for a purpose
14 (i.e., collection of revenues) different from the purposes
15 underlying RCW 81.77. Thus, the Commission should accord the DEQ
16 interpretation no weight.

17 **6. Other TDG Red Herrings.**

18 **a. DEQ's Approval of the ALCOA Sludge as ADC.**

19 TDG points to the fact that DEQ's approval of the ALCOA
20 sludge as daily cover is subject to evaluation during a "test
21 period." TDG Br. at 10-11. That fact, of course, is irrelevant
22

23 ² TDG tries to make an issue from the fact that the DEQ's
24 letter approving the sludge as daily cover also uses the word
25 "waste." But again, this Commission is not governed by how other
agencies may define or refer to a material. See Safco, supra, at
3.

1 today. As of today, DEQ has approved the use of the ALCOA sludge
2 as daily cover and the material is, in fact, being used as daily
3 cover. Stip. Facts ¶ 16. What DEQ may or may not do in the
4 future is pure speculation.

5 **b. The Timing Issues TDG Raises are Irrelevant.**

6 TDG also engages in various speculations regarding the
7 timing of events in this case. TDG Br. at 15-16. But whether
8 OWS received DEQ's approval to use the sludge as daily cover
9 early or later in the process makes no difference. The
10 Stipulated Facts conclusively establish that the sludge has value
11 to OWS and is used as daily cover. Stip. Facts ¶¶ 16, 21. The
12 material is in fact being recycled, making irrelevant the timing
13 issues TDG has tried to raise.

14 **c. ALCOA's Intent is Irrelevant.**

15 TDG complains that the record contains no evidence that
16 ALCOA intended for the sludge to be recycled or reused. TDG Br.
17 at 13. But the definition of "recycling" does not specify who
18 must form the intent to recycle. All that matters is that
19 someone form that intent and that the material actually be
20 transported for a recyclable purpose.

21 For example, consider the hypothetical of a restaurant that
22 wants several boxes of empty beer bottles removed from its
23 warehouse, and does not care whether they are sent to a landfill
24 for disposal or recycled. The restaurant hires another company
25 to clean out the warehouse, but leaves the decision of what to do

1 with the bottles up to the clean-up company. The clean-up
2 company decides to have the bottles shipped to a recycling
3 facility. Under TDG's argument, the beer bottles would not be a
4 recyclable material -- even though they are sent to a recycling
5 facility and in fact recycled -- because the restaurant did not
6 form the intent to recycle. This would be an absurd result.

7 To determine whether a material is "recyclable," the
8 Commission looks to whether the material is actually transported
9 for recycling or simply transported for disposal. See Safco,
10 supra, at 3-4. Here, the ALCOA sludge is transported for a
11 recyclable purpose, it is being recycled, and is thus a
12 recyclable material. Whether ALCOA intended the recycling makes
13 no difference.

14 **B. Neither Respondent Performs In-State Transportation for**
15 **Collection and Disposal in this Case.**

16 T&G Trucking has explained at length why no party to this
17 proceeding is performing the requisite in-state transportation
18 and collection function that would bring this matter within
19 RCW 81.77. See T&G Trucking Br. at 6-12. In contrast, TDG
20 glosses over these issues by concluding "respondents [plural] are
21 engaged in the transportation of solid waste for collection
22 and/or disposal . . . and are solid waste collection companies
23 subject to Commission regulation under Chapter RCW 81.77." TDG
24 Br. at 12. TDG paints with too broad a brush.
25

1 First, respondent OWS is clearly not a "solid waste
2 collection company." OWS operates the landfill and recycling
3 facility and performs no transportation function. It does not
4 own or control the transportation equipment used in the
5 operation. As the Commission expressly recognizes: "The chapter
6 [RCW 81.77] does not authorize the Commission to regulate
7 disposal sites." In re Kleenwell Biohazard and General Ecology
8 Consultants, Docket No. TG-920304 (January 1993).

9 Second, T&G Trucking is also not a solid waste collection
10 company, since it performs no local collection function but
11 simply transports loaded, sealed intermodal containers across
12 state lines in continuous movement. Ex. 13 at 2-3. On these
13 grounds alone, TDG's complaint should be dismissed against both
14 respondents.

15 **C. Federal Law Exempts the Operation from State**
16 **Regulation.**

17 **1. The TOFC/COFC Exemption.**

18 OWS devoted a substantial portion of its opening brief to an
19 explanation of the applicability of the TOFC/COFC exemption. See
20 OWS Br. at 22-28. The record is clear, and TDG does not deny,
21 that the operation is a COFC movement. The only issue is the
22 scope of the ICC jurisdiction. As explained in OWS's opening
23 brief, the TOFC/COFC exemption applies regardless of whether or
24 not the material is solid waste. The ICC has exclusive
25 jurisdiction over all rail carrier transportation, and the case

1 law holds that the motor carrier portion of TOFC/COFC movement is
2 "transportation that is provided by a rail carrier." ICC v.
3 Texas, 479 U.S. 450, 453 (1987).

4 In any event, the ICC undoubtedly has jurisdiction here,
5 because the ALCOA sludge has "value" and therefore is "property"
6 under the ICC's decision in Joray Trucking Corp., 99 M.C.C. 109
7 (1965). The ICC's jurisdiction is further evident because this
8 case involves the transportation of recyclable materials, see
9 e.g., 49 U.S.C. § 10731, meaning "material collected or recovered
10 from waste for a commercial or industrial use whether the
11 collection or recovery follows end usage as a product."
12 49 U.S.C. 10731(a)(1). Regardless of the state law definition of
13 "recyclable material," the use of the ALCOA sludge material as
14 daily cover clearly meets this broad ICC definition. Because the
15 ICC has jurisdiction over the transportation of recyclable
16 materials, it has the authority to exempt such transportation
17 from state regulation, as it has done through the TOFC/COFC
18 exemption.

19 **2. The Commerce Clause.**

20 The opening briefs of OWS, T&G Trucking and the Commission
21 Staff each explain that the Commerce Clause prohibits the
22 Commission from interfering with T&G Trucking's interstate truck
23 haul in this case. Under the Commission's Kleenwell analysis,
24 because T&G Trucking hauls the waste directly from Washington to
25 Oregon (with no in-state stopover) and because Rust has the fixed

1 and persisting intent that the sludge be moved in interstate
2 movement, the Commerce Clause exempts the operation from state
3 regulation. See In re Kleenwell Biohazard and General Ecology
4 Consultants, Docket No. TG-920304 (January 1993) at 8.

5 TDG ignores these crucial facts and simply falls back on the
6 argument that the Commission has previously held that its solid
7 waste regulation advances "legitimate local concerns" and thus
8 does not violate the Commerce Clause (citing Evergreen Waste
9 Systems, All County Disposal Services Inc., and Kleenwell). But
10 TDG fails to reassess those prior Commission decisions in light
11 of the U.S. Supreme Court's recent decision in C&A Carbone, Inc.
12 v. Town of Clarkstown, 511 U.S. ___, 128 L. Ed. 2d 399, 114 S.Ct.
13 1677 (May 1994). Carbone prohibits the Commission from enforcing
14 RCW 81.77 in a manner that discriminates against out-of-state
15 interests (such as T&G Trucking) in favor of a "favored operator"
16 (such as TDG). It is no longer sufficient for the Commission
17 simply to contend that its solid waste regulation advances local
18 health and safety concerns. Carbone now requires that the
19 Commission advance those local health and safety concerns
20 directly -- for example, through uniform safety regulations --
21 and not in a manner that deprives interstate interests of access
22 to the market. See Carbone, 128 L. Ed. 2d at 409.

23 III. CONCLUSION.

24 The Commission can avoid the absurd results of TDG's
25 arguments by following its reasoning in the recent Safco


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1 decision. If material is sent to a landfill and disposed of in a
2 way that uses up existing landfill capacity, it is solid waste.
3 But if material is sent to a landfill and used as daily cover --
4 or used as a liner, or final cover, or any other useful purpose
5 apart from disposal -- the material is not "solid waste" by
6 virtue of its ultimate use. This approach is consistent with the
7 statutory definitions of solid waste and recyclable materials,
8 consistent with Commission precedent, and furthers the
9 Legislatures waste reduction and recycling goals set forth in
10 RCW 70.95. It also comports with common sense. OWS respectfully
11 requests that the Commission dismiss TDG's complaint with
12 prejudice.

13 Dated this 5th day of December, 1994.

14 DAVIS WRIGHT TREMAINE
15 Attorneys for Waste Management
16 Disposal Services of Oregon, Inc.,
17 d/b/a Oregon Waste Systems

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19 _____
20 William K. Rasmussen
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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 same, postage prepaid, to:

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