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December 5, 1994

Mr. Steve McLellan, Secretary
Washington Utilities and
Transportation Commission
P. O. Box 47250
Olympia, WA 98504-7250

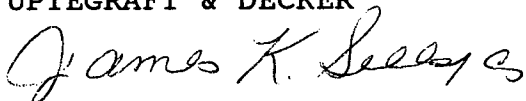
**Re: The Disposal Group, Inc. v. Waste Management Disposal Svc.
Docket No. TG-941154**

Dear Mr. McLellan:

Enclosed for filing in the captioned matter is an original and
three copies of Reply Brief of Intervenor Washington Refuse &
Recycling Association.

Very truly yours,

McCLUSKEY, SELLS, RYAN,
UPTGRAFT & DECKER



JAMES K. SELLS

JKS:cs

encs.

cc: Mr. J. P. Jones

STATE OF WASH.
UTIL. & TRANSP.
COMMISSION

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STATE OF WASH
UTIL & TRANSP
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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THE DISPOSAL GROUP, INC.,)
d/b/a Vancouver Sanitary)
Service 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.)

DOCKET NO. TG-941154

REPLY BRIEF OF INTERVENOR
WASHINGTON REFUSE &
RECYCLING ASSOCIATION

COMES NOW Intervenor Washington Refuse & Recycling Association and respectfully submits the following in reply to Post Hearing Briefs filed herein on behalf of Commission Staff, T & G Trucking & Freight Co., and Oregon Waste Systems:

SUMMARY OF REPLY: Both Respondents and the Commission Staff make essentially the same arguments in their Post Hearing Briefs. These arguments are:

1) The material being transported is not solid waste, rather is a recyclable;

2) The haul is exempt from state regulation by means of the TOFC/COFC exception;

3) Regulation of this activity by the WUTC would violate the Commerce Clause of the United States Constitution.

Intervenor's reply, in summary, is that nothing in the briefs filed by either of the Respondents, nor the Commission Staff, despite heroic, if strained, efforts to the contrary, can change the character of this

ORIGINAL

1 material. It is solid waste, by statutory definition and by application
2 of simple logic. Once the material is understood to be solid waste, by
3 definition, the remainder of the arguments simply do not apply. Solid
4 waste cannot be magically transformed into a commodity merely by saying
5 so, and that is exactly what the Respondents want the Commission to
6 accept here.

7 1) CHARACTER OF MATERIAL: This material is a byproduct of an
8 industrial manufacturing process. It is not "municipal" or "sewer"
9 sludge. It is not a byproduct of a sewage treatment process. It is,
10 very simply, what is left over when whatever is done at the aluminum
11 plant is finished.

12 Respondents themselves refer to the material as waste in Exhibit 1,
13 the contract for the haul. OWS, in its brief, insists that the contract
14 between it and RUST which uses the term "waste" is a "standard form" and
15 "does not represent the reality of the situation". (Brief, p. 6) It is
16 difficult to believe that OWS and RUST, two companies owned by "WMX"
17 (read Waste Management, Inc.), an organization which employs more
18 lawyers than many small countries, would enter into a contract of this
19 magnitude which did not "represent the reality of the situation". In
20 fact, the contract (Ex. 4) does represent the reality of the situation,
21 which is actually very simple. ALCOA has produced a waste byproduct at
22 its plant and hired RUST to dispose of it. RUST located the most
23 profitable way to do so, and has done so. ALCOA wanted to get rid of
24 this waste material, and contracted with RUST. If that is not the
25 "reality of the situation", what is?

26 OWS argues at page 6 that the material is not waste because the
27 4.6% Washington refuse collection tax is not being paid. Hopefully it
28 will not come as a surprise that there are those who seek to avoid
payment of that tax by insisting that solid waste is something else.
There certainly has been nothing from the Washington State Department of
Revenue submitted which supports this claim. It is equally clear that,
should the Commission find in favor of Complainant on the basis that the
material is solid waste, a substantial tax arrearage will be owed and
paid.

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1 OWS argues at page 9 that this industrial sludge "is solid waste
2 for purposes of RCW 70.95", but is "not solid waste for purposes of RCW
3 81.77". This unique argument not only ignores the various applicable
4 statutory definitions and references, but flies in the face of one of
5 the most common rules of statutory construction, that of "impari
6 materia". Different statutes "are to be read together as constituting
7 a unified whole, to the end that a harmonious statutory scheme evolves
8 which maintains the integrity of the respective statutes". Waste
9 Management, Inc. v. WUTC, 123 Wn.2d 621, 630 (1944); see also Employco
10 v. Seattle, 117 Wn.2d 606, 614 (1991).

11 This material cannot statutorily be two different things. It is
12 "industrial waste" and "sludge", and both categories of material are
13 specifically included in the WAC definition of "refuse". WAC 480-70-
14 050(6).

15 If this material were a recyclable, pursuant to RCW 70.95.030(15),
16 it would have to be identified as such in the Clark County Solid Waste
17 Management Plan. (The Plan is not an exhibit, but the Commission has
18 taken "official notice" of same.) As indicated in Complainant's brief,
19 that Plan definition of recyclable materials does not include industrial
20 sludge, and specifies that recyclable materials are those that:

21 [A]re to be remanufactured into a usable product
22 and marketed for any use other than landfill
23 disposal, incineration or fiber based fuels; and
24 are separated from non-recyclable material before
25 collection or transport SWMP, 5-2.

26 No part of the process here fits into Clark County's definition of a
27 recyclable material and, therefore, neither does it fit into the RCW
28 70.95.030(15) definition.

It is also important to remember that the use of this material as
ADC is a test project. If, for whatever reason, the test is not
successful and Oregon does not approve further use of ADC, the material
is still in the landfill. What is it then and what is Complainant's
remedy? It no longer is "cover", it is then obviously what it always
has been -- a waste material that was taken to a landfill for disposal.

There is no other "use" for this material. It goes to the landfill
because there is nothing else to do with it. If it had a commercial

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1 use, or value, as Respondents argue, why must ALCOA pay to have it taken
2 away? Things of value are sold; things of no value are taken by those
3 who are paid to do so.

4 **INTERSTATE COMMERCE:** The "issue" of interstate commerce is nothing
5 more than a "red herring". All parties acknowledge that if this
6 material is a commodity, rather than waste, the Commission cannot
7 regulate its transportation. However, some reply to the positions of
8 Respondents, and particularly that of Commission Staff, is necessity.

9 The "Kleenwell case"¹ is cited as supporting both sides of this
10 argument. The Commission, in that decision, made a relatively simple
11 statement of its jurisdiction over "solid waste collection activity",
12 and that is that its jurisdiction applies to the "collection and
13 transportation of waste" in the state "without regard to the location of
14 the ultimate disposal site". The Commission does not regulate disposal
15 of solid waste, it regulates collection and transportation of solid
16 waste.

17 Some references to Kleenwell, particularly in the Staff's brief,
18 are misleading at best. The Commission, in Kleenwell, made it clear
19 that it had no intention of regulating the interstate portion of a solid
20 waste haul, and it has never attempted to do so. But it was equally
21 clear that its jurisdiction over the collection and movement of solid
22 waste within this state is subject to its regulatory powers. That
23 jurisdiction ends when the movement crosses a state border; in Kleenwell
24 and here. But the fact that the waste crosses a state border on its way
25 to a disposal site does not extinguish that regulation while in this
26 state.²

27 The authority cited relative to the "TOFC/COFC" exemption is not on
28 point if the material is waste. None of the cases cited dealt with
waste, and the Joray³ decision remains good law.

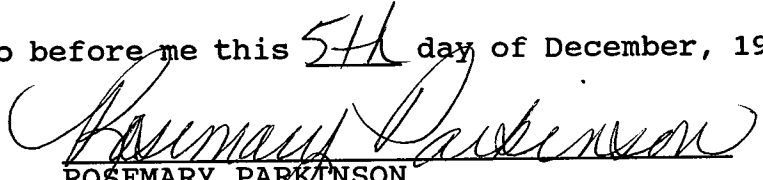
24 ¹ In the Matter of Enoch Rowland, d/b/a Kleenwell Biohazard and General
25 Ecology Consultants, Order M.V.G. No. 1445 (Oct. 1990)

26 ² The Commission Staff argued this concept very effectively in the
Kleenwell case.

27 ³ Joray Trucking Corp. , 99 MCC 110 (1965)

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Subscribed and sworn to before me this 5th day of December, 1994.



ROSEMARY PARKINSON
Notary Public for the
State of Washington
Residing at Mason Co. WA
My commission expires 2/6/97