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Mr. Steve McLellan, Secretary
Washington Utilities and
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1300 Evergreen Park Drive South
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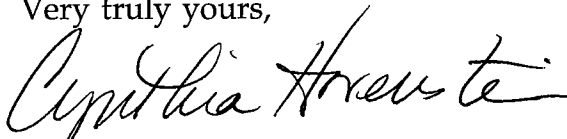
Re: The Disposal Group, Inc. v. Waste Management Disposal Services of
Oregon, Inc., et al
Cause No. TG-941154
Our File No. 144-3

Dear Mr. McLellan:

Enclosed for filing is the original and four copies of the Reply 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.
UTIL. & TRANSP.
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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);)	REPLY BRIEF OF
)	COMPLAINANT, THE
Complainant,)	DISPOSAL GROUP, INC.
)	
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.)	

Complainant, The Disposal Group, Inc. ("TDG"), through its attorneys Cynthia A. Horenstein and Horenstein & Duggan, P.S., respectfully submits this Reply Brief.

ISSUES

Respondents, T & G Trucking and Freight Co. ("T & G") and Waste Management Disposal Services of Oregon, Inc., dba Oregon Waste Systems ("OWS"), and Commission Staff ("Staff") raise similar issues in their Opening Briefs in opposition to Complainant's position that the industrial sludge from the Alcoa facility is a solid waste, the

1 transportation of which is subject to this Commission's
2 jurisdiction. These issues are summarized below.

3 I. **Classification of the Sludge.**

4 A. **Identity and Intent of the Shipper.** Various
5 assertions have been made as to the identity of the "shipper" in the
6 pending matter and that the shipper's intent as to the
7 classification of the materials is relevant to the Commission in its
8 determination of whether the sludge is a solid waste or recyclable
9 material.

10 There are assertions that Rust Remedial Services ("RUST")
11 is the shipper (Staff Brief at page 5; OWS Brief at page 30, line
12 21) and because RUST is paying less than the posted tip fee, the
13 material has value to RUST (Staff Brief at page 5; OWS Brief at
14 page 7, line 13) and is thus a "property" not subject to regulation
15 under Chapter 81.77 RCW.

16 Assertions are also made that the shipper is OWS and
17 because OWS has a use for the sludge, the material has value to OWS,
18 is therefore a recyclable material and thus not subject to the
19 Commission's jurisdiction under Chapter 81.77 RCW (Staff Brief at
20 page 5; OWS Brief at pages 6, 9, 25-26).

21 There are even assertions that the transporter's intent is
22 relevant in this decision (T & G Brief at page 7, line 18 and
23 page 12, line 14).

24 It is noteworthy that Respondent T & G concludes, "There
25 is absolutely no question that insofar as ALCOA is concerned, the
26 material is waste" (T & G Brief at page 3, line 10; see also OWS
27 Brief at page 9, line 9) but goes on to conclude, "The fact that
28 ALCOA may consider the matter as a waste is not determinative of
29 this issue." (T & G Brief at page 3, line 24). The Commission must
30 question the selective reasoning by Respondents and Staff of OWS',
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1 T & G's and RUST's intent as to the character of the sludge while
2 completely discounting ALCOA's intent as irrelevant.

3 B. **Tests and Standards for Defining Recyclable**
4 **Materials.** Various standards and tests, other than the statutory
5 and regulatory definitions offered by Complainant, have been
6 propounded by Respondents and Staff for determining whether the
7 sludge is a recyclable, including:

8 "A standard that the material had to have a value in
9 excess of its cost of transportation and handling in order to be
10 classified as a recyclable material" (T & G Brief at page 5,
11 line 13);

12 A claim that the Clark County Solid Waste Management Plan
13 ("SWMP") "'identifies' several ways in which sludge material can be
14 recycled and put to beneficial end use" (OWS Brief at page 10,
15 line 19);

16 A claim that the SWMP "expressly recognizes" one of the
17 beneficial uses for the Alcoa sludge as alternative daily cover
18 ("ADC") (Id. at page 14, line 13); and

19 The assertion that "if the sludge has value to either, or
20 both, of the shippers then the WUTC would be preempted by Federal
21 law from the economic regulation of the movement of the sludge
22 across state lines." (Staff Brief at page 5).

23 C. **Parties' Understanding.** Respondents claim that RUST
24 and OWS have an "understanding" with regard to disposition of the
25 sludge as ADC at Columbia Ridge Landfill and Recycling Center
26 ("CRLRC") and that the tip fee for receipt of the sludge at CRLRC
27 will be below posted rates (OWS Brief at page 6, lines 13 and 16,
28 and page 7, line 3; T & G Brief at page 10, line 11), and thus
29 presumably the Commission is not to give weight to OWS' written
30 Waste Disposal Agreement (Exhibit "1") but that selective written
31

1 material (i.e., the bills of lading [Exhibits "11" and "12"]) should
2 be persuasive in classifying the materials. (T & G Brief at page 7,
3 line 22; OWS Brief at page 6, line 19).

4 D. **Department of Environmental Quality's Interpretative**
5 **Ruling.** Respondents argue that the Department of Environmental
6 Quality's ("DEQ") classification of the material is irrelevant to
7 the Commission in its classification of the materials. (OWS Brief
8 at page 19, line 2).

9 II. **Solid Waste Collection Activities.**

10 Respondents are also claiming that their activities do not
11 constitute solid waste collection activities, as regulated by
12 Chapter 81.77 RCW (T & G Brief at page 7, line 10, and page 12,
13 line 22).

14 III. **Interstate Commerce Clause Preemption.**

15 A. **Economic Protectionism.** Respondents and Staff assert
16 that even if the Commission classifies the sludge as solid waste,
17 any regulation of the transportation from ALCOA's site would
18 constitute economic protectionism and thus violate the Commerce
19 Clause of the United States Constitution (Staff Brief at page 8; OWS
20 Brief at page 32, line 1).

21 B. **TOFC/COFC.** Respondents are also asserting that
22 regardless of the classification of the material, State regulation
23 of the sludge is preempted due to trailer-on-flatcar/container-on-
24 flatcar ("TOFC/COFC") provisions. (OWS Brief at page 26, line 19;
25 T & G Brief at page 14, line 1; Staff Brief at page 7).

1 **ARGUMENT**

2 Complainant submits that many of the arguments offered by
3 Respondents and Staff are unsubstantiated and should thus be
4 dismissed. These issues are addressed in turn below.

5 I. **Classification.**

6 A. **Identity and Intent of the Shipper.**

7 1. **Identity of the Shipper.** If the shipper's
8 intent is a factor for consideration by the Commission in making its
9 determination as to the classification of the sludge, the identity
10 of the shipper must be determined.

11 Complainant refers the Commission to its analysis in
12 Ryder Distribution Resources, Inc. (subsequently Stericycle of
13 Washington, Inc.), Cause No. GA-75154, Order M.V.G. No. 1596
14 (January 1993) and urges the Commission to conclude that Alcoa, the
15 generator of the industrial sludge, is the "shipper" in this
16 proceeding. Respondents have not offered any evidence that this
17 status has been shifted to the entity arranging for disposal (i.e.,
18 Rust or OWS). In that neither RUST nor OWS are shippers, the fact
19 that the sludge may have value to them is irrelevant in the
20 Commission's classification of the material. Clearly, the intent of
21 the transporter, T & G, should not be considered. Their intent must
22 be wholly disregarded. It is Alcoa's intent that must be
23 considered.

24 2. **Intent of the Shipper.** Respondent T & G cites
25 at page 4, line 5 of its Brief to In re Safco Safe Transport, Inc.,
26 App. P-73625, Order M.V. No. 143916, (October 1991) ostensibly for
27 the purpose that the industrial sludge is a recyclable commodity due
28 to its ultimate use by OWS as ADC.

29 While Safco did address how to deduce from the tender
30 of a material whether it is waste or a recyclable, that

1 characterization involved linking the intent of the generator of the
2 material (i.e., Alcoa) to the transportation company involved,
3 reasoning if the tender was to a solid waste collection company the
4 activity intended was disposal, while if tendered to a motor freight
5 carrier, the shipper intended recycling. However Safco is factually
6 different from the current proceeding. In Safco,
7 generators/shippers testified about their production of solvent
8 products and at least one witness described receiving the paint
9 thinner he initially generated back as a recycled thinner product
10 for reuse. (Id. at 9). It was thus relatively easy to conclude the
11 purpose of the tender for transportation in that proceeding. When
12 applied to this proceeding, Safco unquestionably places Alcoa as the
13 source of that characterization. Thus, under Commission case-law,
14 the operative decision-maker in this equation is Alcoa. Respondents
15 both conclude that Alcoa's intent is that the industrial sludge is
16 solid waste. (T & G Brief at page 3, line 24, "Alcoa may consider
17 the matter as [solid] waste"; see also OWS Brief at page 9, line 9).

18 As the Commission also found in In re Sunshine
19 Disposal, Inc., Application No. E19104, Order M.V. No. 133753 (April
20 1986) "[t]he operative distinction is the purpose of the
21 transportation. If the transportation is for disposal, the material
22 is garbage." Alcoa tendered the industrial sludge to T & G to get
23 rid of it as a "cleanup and remediation" project (Stipulated Fact
24 3), and paid for the sludge to be removed. The tender by Alcoa to
25 T & G (which is neither a permitted Washington motor freight carrier
26 or a certificated solid waste carrier) is for transportation for
27 disposal. Transportation of the industrial sludge over the public
28 highways of this state for compensation is thus subject to RCW 81.77
29 jurisdiction.

1 B. Tests and Standards for Defining Recyclable
2 Materials. Complainant's Brief, beginning at page 13, provided an
3 in depth analysis of the statutory and regulatory definitions of
4 recyclable materials as they relate to Commission regulation under
5 Chapter 81.77 RCW. Complainant unquestionably demonstrated that the
6 sludge at issue is a solid waste and not a recyclable. The sludge
7 is not separated for recycling or reuse and is not identified as a
8 recyclable material pursuant to the SWMP and, thus, the industrial
9 sludge is not a recyclable but rather remains a solid waste.

10 Respondent T & G apparently argues that because the sludge
11 is being used by OWS at the landfill, this material should be
12 classified as a recyclable outside of the Commission's regulatory
13 ambit in Chapter 81.77 RCW. (T & G Brief at page 5, line 7).
14 However, merely using a solid waste does not convert it to a
15 recyclable material. As noted in Complainant's Brief at page 13,
16 there are statutory and regulatory definitions of recyclables which
17 are incorporated into Chapter 81.77 RCW and thus define the
18 Commission's regulatory jurisdiction over the transportation of
19 those materials. As has been repeatedly demonstrated, industrial
20 sludge does not meet those definitions. A mere assertion that the
21 sludge has a further use will not satisfy those definitions.
22 Accordingly, the sludge is not a recyclable, but rather remains a
23 solid waste, the local collection and transportation of which is
24 subject to Commission regulation under Chapter 81.77 RCW.

25 Complainant agrees that compliance with Washington's waste
26 management priorities (as enumerated in T & G's Brief at page 5,
27 line 2) is a laudable goal. However, if this Commission is to
28 classify the industrial sludge, which is being paid to be taken away
29 and deposited at a landfill, as a recyclable material, Respondents
30 must petition a legislative body which has authority to modify the

1 statutory or regulatory definitions of recyclable materials, to
2 include sludge as a recyclable. As noted in Sunshine Disposal
3 (supra), nothing in a common carrier permit prevents a County from
4 defining its waste shed. "If the city or county wish to change the
5 definition of solid waste for their own purposes, their concern is
6 not with the transportation of property but with the property they
7 are trying to redefine." (Id. at 7.) Clearly, if the SWMP
8 identified industrial sludge as a recyclable commodity, then Clark
9 County would have defined its waste shed to exclude industrial
10 sludge. However, this is not in fact what occurred. Complainant
11 respectfully submits that this Commission, in this proceeding, does
12 not have rule-making authority to make Respondents' requested change
13 to existing statutory and regulatory definitions. In that the
14 sludge does not meet the existing definitions of a recyclable, it
15 remains solid waste and fully subject to the Commission's
16 jurisdiction.

17 T & G is requesting that the Commission dismiss a standard
18 for classification of the sludge which T & G proposed, to wit: that
19 the material has "to have a value in excess of its cost of
20 transportation and handling in order to be classified as a
21 recyclable material." (T & G Brief at page 5, line 13).
22 Complainant is not advocating that this standard be adopted by the
23 Commission. To the contrary, Complainant is suggesting that the
24 Commission look to existing statutory and regulatory definitions, as
25 thoroughly discussed in Complainant's opening Brief, and apply those
26 standards to the facts in this proceeding to conclude that the
27 industrial sludge is solid waste subject to Commission regulation.

28 OWS claims that "under the express language of the
29 applicable statutory law. . . the use of the ALCOA sludge material
30 as daily cover exempts the operation from the requirements of
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1 RCW 81.77." (OWS Brief at page 8, line 8). OWS then proceeds to
2 set forth the statutory definition of solid waste and concludes that
3 "the definition of 'solid waste' under RCW 70.95.030(19) includes
4 sewage sludge and industrial waste and thus would cover the ALCOA
5 sludge material." (Emphasis added). (Id. at page 9, line 7). OWS
6 goes on to correctly note that Chapter 81.77 RCW does not regulate
7 the transportation of commercial recyclables. OWS' logic then takes
8 a giant leap by claiming that because "OWS uses the ALCOA sludge"
9 and "the material has value to OWS," the material miraculously
10 becomes a commercial recyclable. (Id. at line 15). OWS overlooks
11 the "express language of the applicable statutory law" which defines
12 recyclable materials, and attempts to fashion a definition of
13 recyclable materials based merely on the recipient's subjective,
14 proposed end use of the sludge.¹ A mere assertion that the material
15 is used or has value does not satisfy the "express language of
16 applicable statutory law" as to what constitutes a recyclable
17 material. Rather, the material continues its solid waste character
18 (as noted in OWS' Brief at page 9, line 9) subject to Commission
19 regulation.

20 Respondent OWS does eventually refer to the statutory
21 definition of recyclable materials, found at RCW 70.95.030(15):
22 "recyclable materials . . . [are] those solid wastes that are
23 separated for recycling or reuse . . . that are identified as a
24 recyclable material pursuant to a local comprehensive solid waste
25 management plan." (OWS Brief at page 10, line 5). In attempting to
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27 ¹ As also discussed in Complainant's Brief (at page 10), the
28 use of the sludge as ADC has only received conditional approval
29 from the Oregon Department of Environmental Quality ("DEQ") and
30 thus the question remains, will OWS reclassify the sludge as solid
31 waste if DEQ withdraws its approval?

1 fashion an argument that the sludge has beneficial use and is thus
2 "identified as a recyclable material" in the SWMP, OWS refers to
3 page 5-19 of the SWMP which provides that, "a material may be
4 recycled if it yields a price in the market or has a beneficial end
5 use." (Emphasis added) (OWS Brief at page 10, line 16). OWS
6 however fails to point out that this language is taken from the
7 section of the SWMP entitled, "[Recyclable] Materials Under
8 Consideration." Materials which are under consideration to be
9 identified in the SWMP as a recyclable are listed in this section of
10 the SWMP; however, industrial sludge does not even appear in the
11 list of items under consideration. Rather, sludge is addressed in
12 Chapter 13, entitled "Special Wastes." As noted in Complainant's
13 opening Brief, at page 14, industrial sludge is not identified as a
14 recyclable in the SWMP, thus is not a recyclable material but
15 remains a solid waste, subject to Commission jurisdiction.

16 OWS goes on to refer (OWS Brief, page 10 at line 21) to
17 numerous provisions within Chapter 13 (the Special Wastes Chapter)
18 of the SWMP in attempting to make an argument that industrial sludge
19 is "identified as recyclable material" in the SWMP and thus is a
20 recyclable material pursuant to RCW 70.95.030(15), not subject to
21 Commission regulation under Chapter 81.77 RCW. However, a complete
22 review of Chapter 13 reveals that "[t]his chapter describes the
23 management and disposal systems for special wastes in Clark
24 County Special wastes addressed in this chapter are:
25 . . . Municipal and industrial wastewater sludges and septage."
26 (Emphasis added) (SWMP at 13-1). OWS asserts that the SWMP
27 "'identifies' several ways in which sludge material can be recycled
28 and put to beneficial end use." (OWS Brief at page 10, line 19,
29 citing SWMP at page 13-37). To the contrary, the Plan does no such
30 thing. Rather, the SWMP lists "[s]everal management alternatives
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1 [that] are available for the treatment and disposal of sludges.
2 These include: (1) Land application of sludges onto agricultural
3 lands; (2) Silverculture-application of sludges to forested lands;
4 (3) Composting . . ." (Emphasis added) (SWMP at page 13-37).
5 Apparently, OWS is attempting to claim that the alternate "treatment
6 and disposal" options set out in Chapter 13 of the SWMP, which
7 addresses "special wastes," somehow "identifies" the sludge as a
8 recyclable material and thus converts it to a recyclable material.
9 This bootstrapping is illogical and should be disregarded by the
10 Commission.

11 Chapter 5 of the SWMP specifically identifies recyclable
12 materials. (see Complainant's Brief at page 14). Industrial sludge
13 is not contained in that list. Chapter 13 of the SWMP discusses
14 alternative treatment and disposal options of special wastes,
15 including sludges. Chapter 13 in no way attempts to identify
16 recyclable materials. OWS' argument that its alternate disposal of
17 the sludge (i.e., used as ADC) somehow classifies the material as a
18 recyclable identified in the SWMP should be disregarded.

19 OWS' argument reappears beginning at page 14, line 8 of
20 its Brief. OWS claims that the SWMP "expressly recognizes" use of
21 the sludge as ADC as a "beneficial use" and therefore the material
22 is a recyclable (citing SWMP at page 13-38). As previously noted,
23 Chapter 13 of the SWMP addresses "treatment and disposal" of special
24 waste. It does not identify recyclable materials; recyclable
25 materials are identified in Chapter 5 of the SWMP. Reappearance of
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1 the argument does not make it correct. The sludge continues to be
2 a solid waste, subject to Commission regulation.²

3 OWS is also proposing that the Commission look to
4 legislative findings to classify the sludge as a recyclable
5 material. (OWS Brief at page 15, line 12). The legislative
6 findings enumerated by OWS include:

7 • "waste reduction." (Id. at line 21.) It cannot be
8 argued that placing the sludge in a landfill constitutes waste
9 reduction;

10 • "source separation." (Id. at line 23.) There is no
11 evidence that the sludge was separated for recycling; and

12 • "[disposal] of [the] remaining waste in a manner that
13 is environmentally safe and economically sound." (Id. at page 16,
14 line 5). By putting the sludge into or on top of CRLRC, it appears
15 that OWS is disposing of the sludge in an environmentally safe and
16 economically sound manner. The only legislative finding with which
17 OWS has complied is proper disposal. The legislative findings
18 offered by OWS in no way convert the solid waste to a recyclable
19 material.

20 In summary, the parties have not provided the Commission
21 with any persuasive authority that the sludge at issue is in fact a
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23 ² In attempting to buttress its argument that the sludge is a
24 recyclable, OWS claims that because the sludge is a recyclable, it
25 "is not disposed of - i.e., it does not use up existing landfill
26 capacity." (OWS Brief at page 15, line 1). Complainant suggests
27 that the law of physics dictates that anything placed in a
28 landfill, into or on top of a landfill, uses up landfill capacity.
29 OWS may be charging a reduced tip fee for the sludge, as it does
30 for other wastes (Stipulated Fact 19), but the fact remains that
31 the final resting place for the sludge is in a landfill (which
32 consumes landfill space), for which a tip fee has been paid. This
constitutes disposal, not recycling.

1 recyclable. Complainant's request that the sludge be classified as
2 solid waste should be granted.

3 C. **Parties' Understanding.** In Respondents' protracted
4 attempt to persuade this Commission that the sludge is a recyclable
5 material, they offer as evidence the fact that OWS charges less than
6 the posted gate rate for receipt of the sludge at CRLRC. (T & G
7 Brief at page 6, line 1). However, OWS has previously admitted that
8 it charges differential rates at its landfill. (Stipulated Fact
9 19). To extend Respondents' argument, all waste received at CRLRC
10 below the posted tip fee would "have value to OWS" and would thus be
11 classified as recyclable material. It is doubtful that OWS treats
12 all such material as recyclables. This argument fails and should be
13 dismissed.

14 Respondents continue to assert that "[b]ecause OWS was
15 going to recycle the sludge as daily cover, it could offer Rust a
16 favorable rate, which was a material factor in Rust's decision to
17 have the material delivered to the CRLRC in Oregon." (OWS Brief at
18 page 7, line 12). However, the timing of events is perplexing and
19 troubling. Complainant continues to question how OWS knew it was
20 going to "recycle the sludge as daily cover" and therefore offered
21 RUST "a favorable rate" when OWS did not receive DEQ approval to use
22 the sludge as ADC until four (4) days after transportation of the
23 material began.

24 Respondents continue to offer selective written
25 documentation in support of their position that the industrial
26 sludge will be used as ADC at CRLRC. For instance, the bills of
27 lading, which support their position, are offered as credible
28 evidence (Exhibits "11" and "12"), yet Respondents argue that the
29 written Waste Disposal Agreement between RUST and OWS (Exhibit "1"),
30 which addresses disposal of approximately 50,000 tons of solid waste
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1 at CRLRC, should be discounted because the parties had "an
2 understanding" as to actual use of the material. Although
3 Complainant addressed this dichotomy in its opening Brief,
4 Complainant continues to question why the written agreement for
5 receipt of such a substantial volume of material does not comport
6 with the "parties' understanding." Clearly, the Waste Disposal
7 Agreement contradicts that reading of the "parties' understanding."
8 The Respondents' selective offering of written documentation should
9 be disregarded. Rather, Complainant submits that the Commission
10 consider all written documentation (e.g., Exhibit "1," "11" and
11 "12") in making its determination as to the classification of the
12 sludge.

13 D. **Department of Environmental Quality's Interpretive**
14 **Ruling.** Respondent OWS asserts in its Brief (at page 19) that
15 Exhibit "3" is irrelevant for the following reasons:

16 1. "Exhibit '3' does not constitute rule-making by
17 the DEQ. . . TDG's use of the policy statement in an effort to
18 create rights and benefits in its favor in this proceeding directly
19 violates the express terms of the Disclaimer and the intent of the
20 policy statement." (Id. at line 3).

21 Complainant agrees that the guidance document is not
22 an agency rule. No claim has been made that DEQ engaged in
23 rule-making when it adopted this guidance document. It is well
24 settled that agency policies do not undergo the Administrative
25 Procedures Act rigors of adopting a rule, hence the reason for the
26 disclaimer in Exhibit "3." The document is a guidance document used
27 internally by a governmental agency, similar to documents used by
28 the Commission's Staff. The policy is offered to show that the
29 agency with regulatory oversight of CRLRC classifies the sludge as
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1 solid waste. Exhibit "3" is not offered "to create rights and
2 benefits in TDG's favor."

3 2. OWS claims that the status of the Interpretative
4 Ruling is uncertain. (Id. at line 14).

5 This is not the case. The declaration of Patricia
6 Vernon (Exhibit "19") clarifies that the interlineation appearing on
7 Exhibit "3" was done to correct a typographical error. OWS calls
8 into question DEQ's timing in correcting this error. It is obvious
9 that DEQ is a large governmental agency and the time frame in which
10 it takes the agency to make a correction is irrelevant to the reason
11 the Interpretative Ruling was offered, especially given that DEQ is
12 applying the Interpretative Ruling as if the correction had been
13 made. (See Exhibit "19"). In summary, DEQ made an inadvertent
14 typographical error, it is being corrected, and the policy is being
15 applied as if the error had not been made. There is no confusion
16 here.

17 3. OWS is also claiming that because Oregon's
18 definition of solid waste "is fundamentally different from the
19 definition of solid waste" in Washington, Exhibit "3" should be
20 given no weight. (Id. at page 20, line 13).

21 In reviewing the text of the Interpretation, it
22 provides that all materials received at a landfill will be treated
23 as solid waste if: (1) the material meets the definition of solid
24 waste; and (2) would otherwise be disposed of. This second element
25 excludes recyclables from the material DEQ considers as solid waste
26 because recyclables would not otherwise be disposed of.
27 Accordingly, pursuant to Exhibit "3," DEQ does not treat commercial
28 recyclables as solid waste (just as the definition of solid waste in
29 Chapter 81.77 RCW excludes commercial recyclables). There is no
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1 fundamental difference in the States' definitions and thus OWS'
2 argument should be disregarded.

3 4. OWS has claimed that "the record contains no
4 evidence that if the ALCOA sludge were not delivered to OWS for use
5 as daily cover it 'would otherwise be disposed of.' No evidence
6 exists that the Alcoa sludge would not have been put to one of the
7 several other beneficial uses identified for sludge in the [SWMP]."³
8 (Id. at pages 20-21, lines 24-4).

9 Obviously OWS is somewhat confused about its burden
10 of proof in this proceeding. Complainant brought this proceeding
11 alleging that the industrial sludge is solid waste. Complaint has
12 satisfied its burden in this regard (see Complainant's Brief at
13 page 5 *et seq.*). Respondents then asserted that the sludge is
14 excluded from the definition of solid waste in Chapter 81.77 RCW
15 because it is a commercial recyclable. It is Respondents' burden to
16 establish this allegation. The fact that Complainant did not
17 directly disprove Respondents' claim that the material is a
18 recyclable cannot be used to satisfy Respondents' burden of proof
19 which clearly shifts to Respondents on establishment of
20 Complainant's burden.

21 5. OWS also asserts that DEQ's assessment of
22 disposal fees on the sludge received at CRLRC "is irrelevant to the
23 issue of whether the material is classified as solid waste or a
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26
27 ³ Note that OWS continues to refer to "beneficial uses
28 identified for sludge in the [SWMP]." As previously noted, the
29 uses to which OWS has referred are set out in the SWMP as
30 alternative treatment and disposal options for special waste. The
31 SWMP in no way defines industrial sludge as a recyclable material.

1 recyclable material under Washington law." (OWS Brief at page 21,
2 line 6).

3 The Rule Interpretation is not offered by Complainant
4 to show that Oregon assesses disposal fees. The assessment of
5 disposal fees is not an issue in this proceeding. What is at issue
6 is classification of the sludge. DEQ classifies the industrial
7 sludge received at CRLRC as solid waste; that is the purpose for
8 which the Rule Interpretation is offered.

9 **II. Solid Waste Collection Activities.**

10 Respondent T & G Trucking collects loaded containers from the
11 ALCOA site just as Complainant collects loaded drop boxes; in both
12 instances the containers/drop boxes are filled by someone other than
13 the transporter. Both T & G and Complainant transport those
14 materials over the public highways of the State of Washington for
15 compensation. T & G's activities are no different from
16 Complainant's and, thus, T & G is engaged in the collection of
17 material for compensation. In that the sludge is solid waste,
18 T & G's activities fall within the Commission's regulatory powers
19 set forth in Chapter 81.77 RCW.

20 T & G questions "what activity involved in this proceeding
21 would be considered by the Commission as the local activity of solid
22 waste collection." (T & G Brief at page 10, line 3). T & G has
23 answered its own question in its Brief when it refers to Enoch
24 Rowland, dba Kleenwell Biohazard and General Ecology Consultants,
25 Cause No. TG-920304 (January, 1993) wherein the Commission stated
26 "[a] collection company's election to follow the purely local
27 function of collecting waste with an interstate movement of the
28 collected waste does not make the collection process an interstate
29 service." (Emphasis added). (Id. at page 9). To answer T & G's
30
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1 inquiry, the local activity of solid waste collection, in which T &
2 G is engaged, is the "local function of collecting waste."

3 T & G's Brief (at page 10) attempts to separate and isolate the
4 activities of RUST, OWS and T & G and claim that none of these
5 segregated activities constitutes solid waste collection activities.
6 Complainant concedes that RUST's activities are not regulated by the
7 Commission. RUST has not been named as a party in this proceeding.
8 OWS was named as a party because Complainant understood that OWS has
9 a contractual obligation to transport the sludge from ALCOA's
10 facility.⁴ T & G was named as a party to this proceeding at OWS'
11 suggestion after advising Complainant that it is T & G that is
12 engaged in the actual transportation of the sludge over the highways
13 of the State of Washington. In that the sludge is solid waste and
14 T & G is compensated for this service, T & G's activities squarely
15 fall within the purview of a "solid waste collection company."

16 **III. Commerce Clause Preemption.**

17 **A. Economic Protectionism.**

18 1. **Introduction to Commerce Clause.** Article 1,
19 Section 8 of the United States Constitution provides Congress with
20 the power to regulate commerce among several states. The United
21 States Supreme Court has interpreted the Commerce Clause to give
22 Congress the exclusive power to regulate purely interstate commerce.
23 United States v. E.C. Knight Co., 156 U.S. 1 (1895). The Commerce
24 Clause was included in the United States Constitution to ensure that
25 the United States would exist as one economic union and to avoid the
26

27 ⁴ Note, however, that no written documentation has ever been
28 offered into evidence in this proceeding to demonstrate that OWS
29 has this responsibility. To the contrary, the only written
30 contract between OWS and RUST offered by Respondents is for Solid
31 Waste Disposal at CRLRC (Exhibit "1").

1 protectionist economic policies between the states that were common
2 between nations and had threatened to destroy the union of the
3 states after the American Revolution. H.P. Hood & Sons v. DuMond,
4 336 U.S. 525 (1949).

5 The Commerce Clause, however, does not restrict all
6 state regulation of interstate commerce. In the absence of a
7 conflicting federal legislation, states retain the power to regulate
8 matters of legitimate local concern under the police power reserved
9 to the states by the Tenth Amendment to the Constitution. Raymond
10 Motor Transportation v. Rice, 434 U.S. 429 (1978).

11 2. **The Federal Government has not Preempted the**
12 **Regulation of Interstate Transportation of Solid Waste.** The
13 Interstate Commerce Commission ("ICC") has determined that the
14 interstate transportation of solid waste is not subject to its
15 jurisdiction. Joray Trucking Corp. Common Carrier Application, 99
16 MCC 109, 110-11 (1965).

17 In that the regulation of solid waste has not been
18 federally preempted, we must turn to the analysis of whether the
19 Commission's regulation is unconstitutional because it is tantamount
20 to economic protectionism or an impermissible burden on interstate
21 commerce.

22 3. **Commission Regulation does not Constitute**
23 **Economic Protectionism.** There is no attempt in this proceeding to
24 discriminate against foreign haulers. Chapter 81.77 RCW does not
25 prevent an out of state corporation from doing business in the State
26 of Washington to the benefit of Washington businesses. Rather,
27 foreign as well as domestic businesses are treated similarly under
28 the Solid Waste Collection Act; Chapter 81.77 RCW visits its effects
29 equally upon both domestic and foreign businesses. The Commission
30 noted in In the Matter of All County Disposal Services, Inc., Cause
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1 No. TG-1859 (August 1985), at page 5, "Chapter 81.77 RCW is not an
2 instance of patent economic protectionism. Any applicant is
3 entitled to consideration irrespective of its citizenship."
4 Evidence that regulation under the Solid Waste Collection Act is
5 even-handed is demonstrated by the fact that several foreign
6 companies have certificates to operate as solid waste collection
7 companies in Washington, some to the exclusion of Washington
8 businesses.

9 Respondent OWS cites to C&A Carbone, Inc. v. Town of
10 Clarkstown, New York, 511 U.S. _____, 128 L.Ed. 399, 114 S.Ct. 1677,
11 (1994) to support its argument that Chapter 81.77 is protectionist
12 legislation. However, the Solid Waste Collection Act is applied in
13 an even-handed manner to both in-state and out-of-state interests in
14 an effort to protect public health and safety. There are numerous
15 reported cases upholding the authority of local governments to
16 monopolize and regulate local garbage collection by eliminating or
17 controlling competition among carriers. Annotation, Regulation and
18 Licensing of Private Garbage or Rubbish Removal Services, 83 ALR 2nd
19 799, Smith v. Spokane, 55 Wash. 219, 221-22, 104 P.2d 249 (1909).
20 Thus, the statutory scheme of favoring exclusive service territories
21 is not unique to Chapter 81.77 RCW. What the Solid Waste Collection
22 Act does on a state-wide level is to provide for solid waste
23 collection regulation in unincorporated areas of the state, and in
24 the cities and towns who have not undertaken to regulate that
25 service.⁵ RCW 81.77.020.

26
27 ⁵For constitutional purposes, there is no difference between
28 exclusive service territories granted by a state agency under a
29 state statute, and exclusive territories granted by contract with
30 the city or even collection by a city itself in carrying out its
31 governmental functions. Consequently, the historical role of

1 Regulation under Chapter 81.77 RCW does not
2 constitute economic protectionism and thus the Commission's
3 regulation is clearly constitutional.

4 4. **Chapter 81.77 RCW Serves a Legitimate Public**
5 **Interest While Not Impermissibly Burdening Interstate Commerce.**

6 Because the Commission's regulation is neither federally preempted
7 nor does it constitute economic protectionism, we turn to the next
8 factor in analyzing interstate commerce issues, namely: whether the
9 Commission's regulation serves a legitimate public interest which
10 imposes only an incidental burden on interstate commerce.

11 The United States Supreme Court, in City of
12 Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978), stated:

13 The opinions of the court throughout the years
14 have reflected an alertness to the evils of
15 "economic isolation" and protectionism, while
16 at the same time recognizing that the
17 incidental burden of interstate commerce may be
18 unavoidable when a state legislates to
19 safeguard the health and safety of its people.
20 Thus, where simple economic protectionism is
21 effected by state legislation, a virtually per
22 se rule of invalidity has been erected.
23 [Citations omitted] The clearest example of
24 such legislation is a law that overtly blocks
25 the flow of interstate commerce at a State's
26 borders. [Citations omitted] But where other
27 legislative objectives are credibly advanced
28 and there is no patent discrimination advanced
29 against interstate trade, the court has adopted
30 a much more flexible approach, the general

31
32 cities, such as Vancouver, of providing waste collection service
within their corporate limits by exclusive contracts is implicated
by OWS' Commerce Clause assertion. If the Commerce Clause
prohibits the state from controlling market entry by out-of-state
disposers, it also limits cities and towns from doing so.

1 contours of which were outlined in Pike v.
2 Bruce Church, Inc., 397 U.S. 137, 142 (1970):

3 Where the statute regulates
4 even-handedly to effectuate a
5 legitimate local public interest, and
6 its effects on interstate commerce
7 are only incidental, it will be
8 upheld unless the burden imposed on
9 such commerce is clearly excessive in
10 relation to the putative local
11 benefits. [Citations omitted] If a
12 legitimate local purpose is found,
13 then the question becomes one of
14 degree. And the extent of the burden
15 that will be tolerated will of course
16 depend on the nature of the local
17 interest involved, and on whether it
18 could be promoted as well with a
19 lesser impact on interstate
20 activities.

21 It is well settled that the transportation of solid
22 waste is a legitimate local concern subject to the state's police
23 power. Smith v. Spokane, at page 220-21; City Sanitary Service v.
24 Rausch, 10 Wn.2d 446, 448-49, 117 P.2d 225 (1941); Spokane v.
25 Carlson, 73 Wn.2d 76, 436 P.2d 454 (1968); All County Disposal, at
26 pages 3 and 6; Kleenwell, at page 10. The only method for the State
27 of Washington to serve this legitimate public interest is through
28 the regulation of solid waste transporters. This regulation is not
29 an impermissible burden on interstate commerce. In fact, Staff's
30 position in Evergreen Waste Systems, Inc., Cause No. TG-1911
31 (wherein the Commission addressed the interstate movement of solid
32 waste), was that,

few matters are of greater local concern to a
community, such as Clark County, than the
reliable removal of garbage from all parts of
the county. Such county-wide service is
accomplished under the [Solid Waste Collection]

1 act by the grant of exclusive certificates
2 within service territories.

3 (Memorandum of Commission Staff at page 9.)

4 Staff argues here that,

5 [t]he purpose of chapter 81.77 RCW, of
6 providing universal service at reasonable
7 rates, would not appear to be frustrated in the
8 case of T & G transporting sludge from ALCOA.
9 This is not to say that the cream-skimming of
10 one or a few customers could never frustrate
11 the legitimate statutory purpose of universal
12 service at reasonable rates. . . however, there
13 is no evidence that T & G's activities have any
14 impact on existing rates or universal service
15 in T & G's [sic] service territory.

16 (Staff Brief at page 10).

17 The Waste Disposal Agreement (Exhibit "1") entered
18 into between OWS and RUST contemplates that OWS will receive
19 approximately 50,000 tons of sludge from the ALCOA site. The
20 Commission will note from the annual reports filed with it by TDG
21 that TDG transported approximately 128,683 tons of solid waste in
22 1993. The ALCOA sludge represents approximately 39% of TDG's (and
23 its affiliate, Buchmann Sanitary Service's) 1993 operations. To
24 speculate that the cream-skimming engaged in by Respondents in this
25 proceeding will not impact TDG is grossly inaccurate. Increasing
26 TDG's waste stream volume by 50,000 tons would unquestionably
27 beneficially impact TDG's existing operations.

28 OWS refers the Commission to Kleenwell for the
29 proposition that "it is not necessary to request permission from the
30 Commission to transport waste across state lines and in fact the
31 Commission has no power to grant authority of that nature." (OWS
32 Brief at page 31, line 11). A closer review of the Kleenwell
decision reveals that the Commission ruled that solid waste

1 collection is a local service not affecting interstate commerce,
2 "[a] collection company's election to follow the purely local
3 function of collecting waste with an interstate movement of the
4 collected waste does not make the collection process an interstate
5 service." (Kleenwell at page 9). It is precisely this aspect of
6 Respondents' activities, namely the local solid waste collection
7 service increment, which Complainant is requesting this Commission
8 regulate.

9 The fact that Respondents combine the primarily local
10 function of supplying waste collection service with an interstate
11 movement does not remove that operation from state regulation. In
12 Arkansas Electric Cooperative Corp. v. Arkansas Public Services
13 Commission, 461 U.S. 375, 103 S. Ct. 1905 (1983), a rural power
14 cooperative challenged an order of the Arkansas Public Service
15 Corporation which asserted jurisdiction over the wholesale rates
16 charged by the cooperative to its member rural power cooperatives.
17 The challenge was based, in part, on the Commerce Clause since the
18 cooperative was tied into an interstate grid arrangement with other
19 producers. In rejecting the challenge, the Court stated:

20 Moreover, state regulation of the
21 wholesale rates charged by AECC to its
22 members is well within the scope of
23 "legitimate local public interests,"
24 particularly considering that although
25 AECC is tied into an interstate grid, its
26 basic operation consists of supplying
27 power from generating facilities located
28 within the State to member cooperatives,
29 all of which are located within the State.

30 Id. at 394. Like the cooperative in Arkansas Electric Cooperative,
31 Respondents' basic operations consist of supplying a local service
32 in the State of Washington. That is an area of "legitimate local

1 public interest." Crossing a state line does not change the
2 essentially local nature of that service.

3 It is well founded that the Commission has authority
4 to regulate both the intrastate and interstate transportation of
5 solid wastes for compensation provided the latter does not
6 impermissibly interfere with interstate commerce. Accordingly, once
7 the Commission determines that Respondents are engaged in the
8 transportation of solid waste for collection over the public
9 highways of the State of Washington for compensation, Respondents'
10 activities would be subject to Commission jurisdiction pursuant to
11 Chapter 81.77 RCW, regardless of the fact that Respondents are
12 engaged in interstate commerce.

13 B. TOFC/COFC.

14 1. Joray.

15 OWS claims that Joray "is distinguishable from this
16 case both factually and legally." (OWS Brief at page 25, line 18).
17 As this Commission is well aware, Joray stands for the proposition
18 that material which does not have value (i.e., solid waste as
19 defined in Chapter 81.77 RCW) is not regulated by the ICC.
20 Respondents apparently believe that Joray somehow defines materials
21 when OWS concludes that "even under Joray, the material is
22 "property" for purposes of ICC motor carrier jurisdiction."
23 Complainant is at a loss to determine how Respondent made the leap
24 from the Joray holding of the lack of federal regulation over an
25 item in commerce to Respondent's conclusion regarding the
26 classification of industrial sludge.

27 2. The Interstate Commerce Commission's Regulation is
28 Not Applicable to the Transportation of Solid Waste.

29 Respondents and Staff contend that the Congress and
30 the ICC have exempted all TOFC/COFC service from State regulation.

1 As support for this proposition, Respondents cite to 40 C.F.R. §
2 1090.2, which was promulgated by the ICC under the statutory
3 authority of 49 U.S.C. § 10505. (OWS Brief at page 22, line 9; T &
4 G Brief at page 13, line 23; Staff Brief at page 7).

5 The deficiency in Respondents' contentions is that the ICC has
6 never exercised jurisdiction over the transportation of solid waste
7 by motor carriers. Complainant has not found and, apparently,
8 Respondents have also not located any case in which the cited rule
9 of the ICC, 49 C.F.R. § 1090.2, has ever been applied to the
10 transportation of solid waste or even a situation in which the ICC
11 has exercised jurisdiction over or exempted from interstate
12 regulation the intermodal transportation by motor carriers of solid
13 waste.

14 The cases cited by Respondents do not stand for Respondents'
15 proposition that the transportation by TOFC/COFC service is
16 applicable to the transportation of solid waste. Although in ICC v.
17 Texas, 479 U.S. 450 (1987), cited by Respondent OWS, the Supreme
18 Court overturned a decision by the Court of Appeals for the Fifth
19 Circuit which allowed regulation of TOFC/COFC service that was
20 entirely intrastate, importantly, that decision did not address the
21 transportation of solid waste. Central State Motor Freight Bureau,
22 924 F.2d 1099 (D.C. Cir. 1991), also cited favorably by Respondent
23 OWS did not specifically address the transportation of solid waste.

24 The most recent legislative session of Congress serves to
25 confirm Congress' intent that the transportation of solid waste
26 continue to be exempt from regulation by the federal government. In
27 August, Congress passed the Aviation Infrastructure Investment Act
28 of 1993, P.L. 103-305, 103rd Cong., 1st Sess. (September 1994),
29 whose Section 601 deregulated intrastate trucking, except for those
30 provisions explicitly excluded (such as solid waste).

1 The Conference Committee's report to the Act confirms
2 Congressional intent that solid waste transported by motor carriers
3 continues to be subject to State and/or local regulation:

4 . . . the motor carrier preemption provision does not
5 preempt State regulation of garbage of refuse collectors.
6 The managers have been informed by the Department of
7 Transportation that under ICC case law, garbage and refuse
8 are not considered "property." Thus, garbage collectors
are not considered "motor carriers of property" and are
thus not affected by this provision.

9 Aviation Infrastructure Investment Act of 1993, Conference Report
10 (to accompany HR 2739), Report 103-677, at page 85.

11 Thus, under the current state of federal law, as recently
12 rearticulated by Congress and clearly expressed in the Conference
13 Committee report, solid waste collectors remain subject to
14 regulation by the States and/or local governments. In deregulating
15 the intrastate trucking industry, Congress specifically stated its
16 intention that solid waste collection remain subject to State
17 control. Extending Respondents' rationale, if Congress had intended
18 to allow the ICC to link the exemption from intrastate regulation to
19 solid waste when transported in TOFC/COFC service, there would
20 clearly have been no need for Congress to distinguish "garbage" as
21 unaffected by the preemption of intrastate motor freight carrier
22 service in the just-enacted legislation's conference report. As
23 noted above, this was not done.

24 In that the cases relied upon by Respondents do not address the
25 ICC's regulation, or lack of regulation, over solid waste and
26 because the Congress, in the cited conference report, recently
27 reiterated that the transportation of solid waste is not the
28 movement of "property", this Commission should reject Respondents'
29 attempt to apply an ICC regulation that has never before been
30 applied by the ICC or a federal court to the transportation of solid

1 waste and thereby exempt the movement of industrial sludge over the
2 state highways from Commission regulation.⁶

3 The ALCOA sludge has no value and is thus, not subject to
4 regulation by the ICC but rather remains subject to the Commission's
5 jurisdiction.

6
7 **CONCLUSION**

8 In summary, Complainant is here attempting to prevent erosion
9 of its "G" Certificate by the unauthorized transportation of solid
10 waste in Complainant's service territory. It has been, and
11 continues to be, Complainant's established position that industrial
12 sludge sent to a permitted landfill for which a tip fee is assessed
13 is transportation of solid waste for disposal. When conducted by a
14 solid waste collection company over the public highways of this
15 state for compensation, that transportation and/or collection
16 operation is regulated under Chapter 81.77 RCW. Complainant has
17 certificate authority pursuant to Chapter 81.77 RCW to transport the
18 industrial sludge, Respondents do not. Complainant therefore urges
19 the Commission to order Respondents to cease and desist from further
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24
25 ⁶Complainant is frankly surprised that Commission Staff has
26 now taken the position that 40 C.F.C. § 1090.2 exempts the
27 transportation of solid waste by rail and motor carrier in a
28 continuous intermodal freight movement, particularly considering
29 that the logical extension of this argument could effectively
30 eliminate the Commission's ability to continue to regulate the
31 intrastate collection and transportation of solid waste that is
32 bound for long haul disposal which is obviously a growing segment
of the solid waste industry.

1 transportation of solid waste without securing the requisite
2 Certificate of Public Convenience and Necessity from the Commission.

3 DATED this 5th day of December, 1994.

4
5 

6 CYNTHIA A. HORENSTEIN, WSBA #17830
7 Of Attorneys for Complainant
8 The Disposal Group, Inc.
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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 5th day of December, 1994 at Vancouver, Washington.


Cynthia A. Horenstein