

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

INITIAL ORDER ON BRIEF  
ADJUDICATION DISMISSING  
COMPLAINT

NATURE OF PROCEEDINGS: This is a complaint by a certificated solid waste hauler, The Disposal Group, Inc., d/b/a Vancouver Sanitary Service and Twin City Sanitary Service, against Waste Management Disposal Services of Oregon, Inc., d/b/a Oregon Waste Systems, and T & G Trucking & Freight Co., alleging that the respondents are operating without authority in the provision of service that requires solid waste authority under chapter 81.77 RCW.

PROCEDURAL STATUS: Pursuant to WAC 480-09-500, the Commission determined that a brief adjudicative proceeding was appropriate for resolving the issues raised in the complaint. The parties agreed that the matter be heard upon a written record, including stipulated facts. The parties presented memoranda. This initial order resolves the issues.

INITIAL ORDER: This order finds that the activities complained of are not subject to regulation under chapter 81.77 RCW. The transportation complained of involves the transportation of a commodity having value for purposes other than disposal. The complaint is dismissed.

APPEARANCES: Cynthia A. Horenstein, attorney, Vancouver, represents the complainant, The Disposal Group, Inc., d/b/a Vancouver Sanitary Service and Twin City Sanitary Service. William K. Rasmussen, attorney, Seattle, represents respondent Waste Management Disposal Services of Oregon, Inc., d/b/a Oregon Waste Systems. Jack R. Davis, attorney, Seattle, represent respondent T & G Trucking & Freight Co. James K. Sells, attorney, Bremerton, represents intervenor Washington Refuse & Recycling Association. Steven W. Smith, assistant attorney general, Olympia, represents Commission Staff.

## MEMORANDUM

This is a complaint by a certificated solid waste hauler, The Disposal Group, Inc., d/b/a Vancouver Sanitary Service and Twin City Sanitary Service ("TDG"), against Waste Management Disposal Services of Oregon, Inc., d/b/a Oregon Waste Systems ("OWS"), and T & G Trucking & Freight Co. ("T & G" or "T & G Trucking"), alleging that the respondents are operating without authority in the provision of service that requires solid waste authority under chapter 81.77 RCW.

Both OWS and T & G Trucking answered the complaint alleging that the activities covered by the complaint did not constitute activities that were subject to regulation by the Commission under chapter 81.77 RCW.

Pursuant to WAC 480-09-500, the Commission determined that a brief adjudicative proceeding was appropriate for resolving the issues raised in the complaint. It designated as presiding officer Hearings Examiner John Prusia.

Washington Refuse and Recycling Association (WRRRA) was granted leave to intervene.

Through a series of telephone conferences, the parties agreed that the matter be handled upon a written record including stipulated facts and the submission of various written statements and exhibits. The record was closed on December 7, 1994, upon the Commission's receipt of the last reply brief.

### A. RELEVANT FACTS

Complainant TDG is a solid waste collection company which operates in the unincorporated areas of Clark County as authorized by Certificate of Public Convenience and Necessity No. G-65 issued by this Commission.

Respondent T & G is in the business of providing the transportation of cargo containers having a prior or subsequent movement by water or rail. T&G holds operating authority issued by the Interstate Commerce Commission and a permit issued by the Oregon Public Utility Commission. T & G does not hold a certificate from the Commission to operate as a solid waste collection company in this state under chapter 81.77 RCW.

Respondent OWS operates a recycling center and landfill at Arlington, Oregon, known as Columbia Ridge Landfill and Recycling Center ("CRLRC"). OWS is wholly owned by Waste Management, Inc., which in turn is wholly owned by WMX. OWS does not hold a certificate from the Commission to operate as a solid waste collection company in this state under chapter 81.77 RCW.

RUST Remedial Services, Inc. (RUST) performs environmental land remediation and clean up in several states. RUST is majority owned by WMX.

Aluminum Company of America ("ALCOA") operated an industrial facility in an unincorporated area of Clark County near Vancouver. A wastewater containment pond is located on the ALCOA site. The pond contains industrial sludge produced by the facility. The industrial sludge was tested by the environmental firm of Hart Crowser and determined not to be a dangerous or toxic waste. ALCOA put out for bid the cleanup and removal of the sludge.

RUST was the successful bidder for clean up and remediation of industrial sludge at the ALCOA plant. On July 20, 1994, RUST entered into a contract with ALCOA to clean up and remove sludge from waste water impoundment ponds on the ALCOA site. As part of the contract with ALCOA, RUST is required to remove the sludge from the site. RUST removes the sludge from the ponds using heavy equipment and loads it into lined intermodal containers mounted on wheeled trailers or chassis at the ALCOA site. If necessary, while the sludge is still in the pond area and before it is placed in containers, RUST applies a kiln dust additive to reduce the sludge's moisture content.

RUST has contracted with OWS to transport and receive the sludge at OWS's CRLRC for use solely as alternate daily cover ("ADC") at the landfill. RUST intends that the sludge be moved from the ALCOA site to CRLRC in continuous movement. When RUST submitted its bid to ALCOA, it worked with OWS as a subcontractor.

OWS, in turn, has contracted with T & G Trucking for transportation of the loaded containers of sludge from the ALCOA site over the public highways of Washington and Oregon to a railroad siding in Portland, Oregon. The rail siding is located next to T & G's container freight station on North Marine Drive in Portland. OWS has contracted with the Union Pacific Railroad for transportation of the loaded containers from the railroad siding to CRLRC. OWS compensates T & G and Union Pacific for the transportation.

T & G Trucking takes empty containers from the rail siding to the ALCOA plant site, where RUST loads the container with sludge while the T & G driver remains in the truck. T & G then immediately transports the loaded container directly back to the rail siding in Portland and loads it onto flatbed rail cars provided by Union Pacific, using a T & G container loader. T & G does not stop in transit for storage, processing, or transfer to a different container. T & G began transporting the sludge from the ALCOA site on August 22, 1994. T & G has averaged about 72 container loads per day from the ALCOA facility.

OWS is subject to Oregon and federal requirements to provide daily cover at CRLRC. 40 C.F.R. § 258.21; Oregon Administrative Rules ("OAR") § 340-94-040(7) and (8). By letter of August 22, 1994, OWS asked the Oregon Department of Environmental Quality ("ODEQ") for authorization to study the suitability of sludge as alternative daily cover ("ADC") at CRLRC. The ODEQ authorized OWS to proceed with a test study through April 30, 1995. ODEQ rules require that the sludge be included in the tonnage calculation of materials received at the landfill for purpose of calculating the permit compliance fee and per-ton solid waste disposal fee to be paid by the landfill.

OWS uses the ALCOA sludge as ADC at CRLRC.

RUST pays OWS to receive the sludge at CRLRC. OWS accepts the sludge at a rate below its posted gate rate for solid waste; it charges RUST a fixed rate that is between fifty to seventy percent of the posted gate rate.<sup>1</sup> If the sludge were not useable as ADC, OWS would charge RUST a higher fee for receiving the sludge at CRLRC. OWS accepts materials from other sources at CRLRC at rates below the posted gate rates.

The sludge has value to OWS as ADC. If OWS were not allowed to use the sludge as ADC, OWS would need to locate and use other material for ADC at an expense to OWS -- by excavating soil on site, by purchasing ADC material directly, or by offering disposal fee discounts to other generators for receipt of their ADC material.

#### B. STATUTORY AND REGULATORY FRAMEWORK.

The Commission regulates motor carriers which operate for the transportation of property for compensation in this state under chapter 81.80 RCW.

The Commission regulates solid waste collection companies under chapter 81.77 RCW. No solid waste collection company may operate for the hauling of solid waste for compensation without first having obtained a certificate of public convenience and necessity from the Commission. RCW 81.77.040.

A "solid waste collection company" is defined as "every person . . . owning, controlling, operating or managing vehicles used in the business of transporting solid waste for collection and/or disposal for compensation, except septic tank pumpers, over any public highway in this state . . . ." RCW 81.77.010(7).

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<sup>1</sup> The respondents provided the information in the form of a range to protect the confidential nature of the actual price negotiated with RUST.

The phrase "the business of transporting solid waste for collection and/or disposal for compensation" applies "only to those carriers who are primarily in the specialized business of transporting solid waste for collection and/or disposal for all potential customers within a specified area." WAC 480-70-050(7); Order M. V. G. No. 1077, In re Czyhold Truck Lines, inc., App. No. GA-718 (September 1981); Order M. V. G. No. 1201, In re Fedderly-Marion Freight Lines, Inc., App. No. GA-802 (June 1985).

Commission statutes and regulations do not define the term "solid waste." RCW 81.77.010(9) provides: "'Solid Waste' means the same as defined under RCW 70.95.030, except for the purposes of this chapter solid waste does not include recyclable materials except for source separated recyclable materials collected from residences." Chapter 70.95 RCW is the state's comprehensive solid waste management act.

RCW 70.95.030(19) defines "solid waste" as "all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials."

Commission statutes and regulations do not define the term "recycled materials." RCW 70.95.030(15) defines the term as "those solid waste that are separated for recycling or reuse, such as papers, metals, and glass, that are identified as recyclable material pursuant to a local comprehensive solid waste plan."

RCW 81.77.140 provides, in part: "Nothing in this chapter shall be construed as prohibiting a commercial or industrial generator of commercial recyclable materials from selling, conveying, or arranging for transportation of such material to a recycler for reuse or reclamation."

WAC 480-70-050(14) provides: "Solid waste collection does not include . . . collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation. Transportation of these materials is regulated under chapter 81.80 RCW."

The regulation of the transportation of "recovered materials" from a processing facility to an end-use manufacturing site is covered under chapter 81.80 RCW, at RCW 81.80.440 to -460. "Recovered materials" mean "those commodities collected for recycling or reuse, such as papers, glass, plastics, used wood, metals, yard waste, used oil, and tires, that if not collected for recycling would otherwise be destined for disposal or incineration." The term essentially refers to source-

separated recyclable materials other than residential curbside recyclables.

By federal law, the Interstate Commerce Commission has exclusive economic jurisdiction over the transportation by motor carrier of property or passengers between a place in one state and a place in another state. 49 U.S.C. § 10521(a)(1)(A). Waste is not property within the meaning of that statute. Joray Trucking Corp. Common Carrier Association, 99 MCC 109, 110-111 (1965); Transportation of "Waste" Products for Reuse and Recycling, 114 MCC 92, 104 (1971).

The Staggers Rail Act, 94 Stat. 1895, 49 U.S.C. §§ 10101 et seq., authorizes the Interstate Commerce Commission to exempt from state regulation "transportation that is provided by a rail carrier as part of a continuous intermodal movement." 49 U.S.C. § 10505(f). ICC regulations exempt from state regulation both the motor portion and rail portion of trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service. The exemption extends to intrastate shipments on trucks that are a portion of continuous TOFC/COFC transport, regardless of whether the trucks are owned and operated by the railroad. 49 CFR § 1039.13; Improvement of TOFC/COFC Regulation, 364 ICC 731 (1981).

The Commerce Clause of the United States Constitution, Article I § 8, confers on Congress the power to regulate interstate commerce. Although by its terms the Commerce Clause is an authorization for congressional action, the U.S. Supreme Court long has held that the delegation to Congress by the states is also a limitation upon state power to interfere with the movement of goods in interstate commerce. Cooley v. Board of Wardens, 12 How. (U.S.) 229, 13 L.Ed. 966 (1852); H. P. Hood & Sons v. Dumond, 336 U.S. 525, 93 L.Ed. 865, 69 S.Ct. 657 (1949). Solid waste is an article of commerce for purposes of the Commerce Clause. Philadelphia v. New Jersey, 437 U.S. 617, 620, 57 L.Ed.2d 475, 98 S.Ct. 2531 (1978).

#### C. POSITIONS OF THE PARTIES.

The complainant (TDG) and the intervenor (WRRRA) contend that the ALCOA sludge is solid waste, and that its transportation therefore requires solid waste authority under chapter 81.77 RCW.

The respondents contend that the ALCOA sludge is a "recyclable material" under state law, which exempts the operation, under applicable state law, from the requirements of chapter 81.77.

The respondents contend that in addition to the state exemption, federal law prohibits the Commission from regulating the transportation service complained of. They contend that the

service is exempt from state regulation under an Interstate Commerce Commission ("ICC") regulation that exempts from state regulation the intrastate portion of a continuous trailer-on-flatcar/container-on-flatcar (TOFC/COFC) shipment. They also contend that Commission regulation of the service under chapter 81.77 RCW would violate the Commerce Clause, Art. I. § 8, cl. 3 of the U.S. Constitution.

Respondent T & G contends that neither it nor OWS is engaged in activity in this state that requires or justifies regulation under chapter 81.77. It contends that regulation of the service complained of would not further the local health and safety interest that regulation under the chapter is intended to serve.

Commission Staff contends that the ALCOA sludge is property within the meaning of the Interstate Commerce Act, and that regulation of its interstate transportation is subject to the exclusive jurisdiction of the ICC. State regulation of the transportation is preempted.

#### D. STATEMENT OF ISSUES.

The determinative issue in this case is whether the activities of OWS and/or T & G Trucking in relation to the ALCOA sludge require solid waste authority under chapter 81.77 RCW. The answer to that question requires that the Commission determine the following issues:

1. Is the transportation of the ALCOA sludge appropriate for regulation under solid waste rather than motor carrier authority? I.e., what is the proper characterization of the ALCOA sludge for purposes of Commission regulation -- "solid waste," a "recyclable material," or something else?

a. Who is the shipper?

b. Is the ALCOA sludge a "recyclable material?"

c. Does the ALCOA sludge have economic value?

d. Is the ALCOA sludge being disposed of at the CRLRC?

2. Are the activities of OWS and T & G Trucking activities that fall within the intended scope of regulation under chapter 81.77 RCW?

3. Does the Interstate Commerce Commission have exclusive jurisdiction over the regulation of the transportation of the ALCOA sludge?

4. Are the activities of OWS and/or T & G Trucking exempt from state regulation under an Interstate Commerce Commission (ICC) regulation that exempts from state regulation the intrastate portion of a continuous trailer-on-flatcar/container-on-flatcar (TOFC/COFC) shipment?

5. Would Commission regulation of the activities of OWS and/or T & G Trucking in relation to the ALCOA sludge violate the Commerce Clause of the U.S. Constitution?

**E. DISCUSSION OF THE ISSUES.**

1. IS THE TRANSPORTATION OF THE ALCOA SLUDGE APPROPRIATE FOR REGULATION UNDER SOLID WASTE RATHER THAN MOTOR CARRIER AUTHORITY? I.E., WHAT IS THE PROPER CHARACTERIZATION OF THE ALCOA SLUDGE FOR PURPOSES OF COMMISSION REGULATION -- "SOLID WASTE," A "RECYCLABLE MATERIAL," OR SOMETHING ELSE?

Complainant and intervenor contend that by definition and by application of logic, the ALCOA sludge is "solid waste," and therefore its transportation requires solid waste authority. OWS and/or T & G contend that by definition and by application of logic, the ALCOA sludge is a "recyclable material," and its transportation therefore is exempt from regulation under chapter 81.77.

Commission Staff argues that it is the characterization of the sludge for purposes of Interstate Commerce Commission (ICC) jurisdiction that is determinative of whether the transportation is subject to regulation under chapter 81.77 RCW. Commission Staff argues that the interstate transportation of the ALCOA sludge is exempt from state regulation because the sludge would be characterized as "property" within the meaning of the Interstate Commerce Act, and therefore subject to the exclusive jurisdiction of the ICC. That argument is considered in a later section.

Complainant, intervenor, and the two respondents begin their arguments with an examination of whether the ALCOA sludge fits regulatory definitions. The complainant and intervenor review the definitions of "solid waste." The respondents review the definitions of "recyclable materials." Neither set of parties' definitional argument supports the conclusion they advocate.



The complainant/intervenor definitional argument.

The complainant/intervenor argument essentially is that the ALCOA sludge is of a type that is listed as an example of solid waste in a number of definitions of solid waste, therefore the ALCOA sludge is solid waste, and therefore solid waste authority is required for its transportation.

They thoroughly prove the first part of their argument. At the ALCOA site, the sludge is an industrial waste. "Sludge" or "industrial waste" is included in the definition and/or references to solid waste in several RCW and WAC provisions that are relevant to Commission regulation. Among these are RCW 70.95.030, WAC 480-70-050(6), and WAC 173-304-100 (43).

They attempt to bolster their argument by showing that the Oregon agency with regulatory authority over the CRLRC disposal site, the Oregon Department of Environmental Quality (ODEQ), classifies the sludge as solid waste for purposes of fee payment by CRLRC and for purposes of handling at CRLRC.

They also contend that the Commission previously has determined that industrial sludge is "solid waste" for purposes of transportation regulation. They cite Order M. V. No. 142137, In re Inland Transportation, Inc., App. No. E-19946 (October 1990).

The complainant/intervenor definitional argument is not persuasive of the question of whether solid waste authority is necessary for the transportation of the ALCOA sludge. It does not follow from the fact that the sludge matches an example in the definition of solid waste that this particular sludge is solid waste for all purposes. It establishes only that the sludge may be solid waste, not that it can only be solid waste. The sludge is waste if it remains useless. It ceases to be useless if it is identified for a higher use than disposal. That the sludge is "solid waste" when it is in the ALCOA pond does not necessarily mean that it is "solid waste" when it is being transported to CRLRC.

Suppose, taking a different example, that the material being transported were a dead animals. Dead animals are listed as an example of waste in Oregon's definition of solid waste, and in some dictionary definitions of "garbage."<sup>2</sup> But what if the dead animals are being transported to a glue factory for purposes of manufacturing glue, rather than being transported for disposal? A carcass that is waste to a landfill operator may be

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<sup>2</sup> See, Order M. V. No. 133753, In re Sunshine Disposal, Inc. d/b/a Valley Transfer & Storage, App. No. E-19104 (April 1986), page 6.

a valuable resource to a glue factory. Another example would be trees cut down to improve a view. They are waste if they have no use and are hauled off as refuse to a disposal site. They are not waste if they are hauled to a pulp mill for the purpose of manufacturing paper.

Complainant's and intervenor's reliance on the Commission's decision in In re Inland Transportation, Inc., supra, as support for their definitional approach is misplaced. The Commission did not hold that industrial sludge is "solid waste." The Commission stated only that in light of the lack of any evidence that the sludge in question had commercial value, the fact that its end use was disposal, and other evidence of record, it appeared that regulation would be proper under chapter 81.77 RCW rather than chapter 81.80 RCW. In other words, under the facts of the case, the proper characterization of the sludge appeared to be "solid waste" for purposes of transportation regulation. The Commission left open the possibility that additional evidence might persuade it that a different characterization was appropriate for transportation purposes.

The Oregon DEQ's treatment of the ALCOA sludge at CRLRC does not control whether a solid waste collector or a motor carrier may transport it, and is not persuasive on the issue. The ODEQ rule interpretation involves a different context. The Oregon rule is a revenue measure, and the ODEQ rule interpretation is for revenue purposes.

The Commission was presented with a similar argument in In re Safco Safe Transport, Inc., supra. It was argued that Department of Ecology regulations defining the commodities as dangerous waste controlled the authority for their transportation. The Commission rejected the argument. It stated, at page 3:

We consider this argument unpersuasive as well. The Department of Ecology regulations protect the environment from hazards arising from products or byproducts of identified processes. They do not determine which transportation authority Title 81.77 RCW requires.

#### The Respondents' definitional argument.

The question whether the ALCOA sludge has acquired enough economic value to no longer be considered waste is a problem for the respondents in this proceeding. To have the ALCOA sludge characterized as a "recyclable material" would eliminate that issue. "Recyclable materials" have value if they are shipped for recycling, under state law. If a commodity is a "recyclable material" and is transported for purposes of recycling, motor carriage is appropriate for its transportation. WAC 480-70-050(14).

The respondents argue that the ALCOA sludge fits definitions of "recyclable materials. They rely on language in RCW 70.95.030(15)'s definition of the term:

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

and language in the Clark County Plan. The Clark County Plan recognizes (at 5-19) that a material may be recycled if it yields a price in the market or has a beneficial end use. The Plan identifies (at 13-37, 13-38) several ways in which sludge material can be put to beneficial end use, including specifically "as daily cover material at landfills (at 13-38). The ALCOA sludge therefore meets the definition of "recyclable material."

OWS argues that use of the ALCOA sludge as daily cover comports with the Commission's definition of "recyclable," as set out in Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991) at page 3:

For Commission regulation, the term "recyclable" means that the transportation is for recycling, reprocessing, reclamation or for any purpose that extracts or modifies a commodity or elements within it for reuse or for another commercially valuable purpose.

OWS also argues that characterizing the ALCOA sludge as a "recyclable material" is consistent with the legislative policy favoring waste reduction set out in the Waste Not Washington Act.

A problem with the respondents' argument is that industrial sludge is not on any regulatory definition's list of recyclables. Respondents are left with arguing that the ALCOA sludge nonetheless fits the definitions and therefore is identified as a "recyclable material." As is discussed on pages 13-14 of this order, the term "recyclable materials" refers to a fairly limited group of commodities. The ALCOA sludge is not a "recyclable material." Having characteristics of recyclables does not make a material a "recyclable material."

In trying to squeeze the ALCOA sludge into a definition, the respondents cast doubt on some of their other arguments. They also apparently overlook the possibility that the sludge may be neither "solid waste" nor a "recyclable material."

The proper approach.

Determining the appropriate characterization of a commodity for purpose of transportation regulation is not a matter of finding it listed in a definition or fitting it into a definition. Characterizing a commodity for purposes of transportation regulation requires determining which type of authority is appropriate for regulating the transportation of the commodity. When the appropriate authority has been determined, the proper characterization has been determined.

The operative element is the purpose of the transportation. Order M. V. No. 133753, Sunshine Disposal, Inc. v. Valley Transfer & Storage, App. No. E-19104 (April 1986). If the transportation is for disposal, the material is solid waste. If the transportation is to move the item to a location for a higher use than disposal, the material is property for purposes of transportation regulation.

Waste material may be useless to anyone, and if so must be transported under solid waste authority. If the waste has acquired an economic value because it has been identified for a higher end use than disposal, and if it is transported for that use, motor carriage is appropriate. See, Order M. V. No. 143632, In re C & C Transfer Co., Inc., App. No. E-74249 (July 1991). On the other hand, even brand new items that unquestionably have a commercial value may be transported under solid waste authority, if the shipper tenders them to a solid waste collection company for disposal. See, In re Safco Safe Transport, Inc., supra.

The Commission frequently has held that transportation of the same commodity may be appropriate for regulation under either solid waste or motor carrier regulation, depending on the purpose of the transportation. Order M. V. G. No. 1201, In re Fedderly-Marion Freight Lines, Inc., App. No. GA-802 (June 1985); Order M. V. No. 142137, In re Inland Transportation, Inc., App. No. E-19946 (October 1990); Order M. V. No. 143632, In re C & C Transfer Co., Inc., App. No. E-74249 (July 1991); Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991); Order M. V. No. 144465, In re Roger Dralle, d/b/a Rogers Dump Trucking, App. No. P-74586 (January 1992); Order M. V. No. 144941, In re Rissler Contracting Company, App. No. E-75297 (May 1992).

Determining the purpose of the transportation is not always a simple matter. Factors which bear on that determination include whether the commodity has economic value, the end use, and whether the shipper tendered it for disposal or for some other use. If a commodity has no value to the shipper, no value commercially, and is disposed of by the end user, the purpose of the transportation can only be disposal. In other cases, the various factors may not all point to the same conclusion.

"Recyclable materials" have a value by operation of law if they are transported for recycling, regardless of their actual commercial value or lack thereof. Their transportation is appropriate under motor carrier authority if the shipper tenders them for the purpose of recycling. In re Safco Safe Transport, Inc., supra.

a. RUST is the shipper.

A question in this proceeding is whose intention the Commission should examine in determining the purpose of the transportation. RUST and OWS clearly intend that the sludge be used as alternative daily cover. ALCOA regards the sludge as waste, and only wishes to be rid of it. Which company is the shipper?

Complainant contends that only the generator, ALCOA, can be considered the shipper in this case, and that RUST's and OWS's intentions with regard to the end use of the sludge is irrelevant. Complainant argues that the tender for transportation is from ALCOA to T & G Trucking, that ALCOA tenders the sludge for disposal, and that the transportation therefore is subject to chapter 81.77 RCW.

The Complainant is incorrect regarding the identity of the shipper. In an environmental remediation project such as the one RUST is managing at the ALCOA site, the environmental management company, which in this case is RUST, is the shipper. See, Order M. V. No. 130721, In re Crosby & Overton, Inc., App. No. P-66968 (October 1984); Order M. V. G. No. 1708, In re West Pac Environmental, Inc., App. No. GA-77281 (May 1994). See also, Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993), at pages 9-10.

b. The ALCOA sludge is not a "recyclable material."

The transportation of "recyclable materials" transported for the purpose of recycling is not subject to regulation under chapter 81.77 RCW. The respondents' principal argument, summarized on pages 10-11 of this order, is that the ALCOA sludge is a "recyclable material" that is transported for reuse at the CRLRC.

The term "recyclable materials" applies to a limited category of commodities. It principally refers to manufactured goods which once had a value, which have lost their value and ordinarily would be discarded, and which can be re-manufactured into the same or new products at a recycling facility. The materials attain a property value by being set aside for recycling or separated from other waste for recycling. See, In re Safco Safe Transport, Inc., supra; Transportation of "Waste" Products for Reuse and Recycling, 114 MCC 92, 102-104 (1971). Examples listed in Table 5-1 of the Clark County Plan include

newspaper, corrugated containers, high grade paper, glass containers, certain plastic beverage containers, and aluminum cans. The term also has been applied to yard waste, which consists of once-valuable materials that have lost their value and ordinarily would be discarded, which can be reused by being manufactured into new materials having value. See, RCW 81.80.440. That industrial sludge is not found on any list of "recyclable materials" that the respondents cite is a pretty good indication that it does not fit that category of materials.

The purpose of the "recycled materials" exception to the requirement of solid waste authority is to reduce the discarding of such materials by removing regulatory hindrances to their recycling. It removes barriers to the entry of new haulers. An applicant for "recovered materials" authority under 81.80.440 need only demonstrate its fitness and pay a fee in order to obtain the authority.

The ALCOA sludge is not once-valuable property that has lost its value and will be discarded unless recycled. It has never had any value. It has already been deposited in a waste dump. It is not being transported to be remanufactured into the same or a new product. It is simply a waste product of an industrial process that has been found to have a use in its unaltered state. It is like manure in a dairy barn, or waste sludge produced in processing fruit.

OWS argues that a material's nature as a "recyclable" is determined by the purpose of the transportation, based on the shipper's intent. Because RUST orders the transportation for recycling, the material is a "recyclable material." Shipper intent is a factor bearing on the type of transportation that is appropriate for the transportation of a recyclable, as is discussed on pages 12-13 of this order, but a shipper cannot transform any material into a "recyclable material" merely by intending that it be "recycled."

**c. The ALCOA sludge has value when used as alternative daily cover.**

Whether this sludge that is waste in the ALCOA pond has acquired economic value is an issue in this case. If it remains valueless, the purpose of the transportation must be disposal.

OWS charges RUST for receiving the sludge at CRLRC, and the sludge ends up in the landfill. That suggests that the purpose is disposal. On the other hand, OWS charges a rate that is substantially below the posted gate rate for solid waste because the sludge can be used as alternative daily cover. OWS uses the sludge to meet a requirement that it apply daily cover. The assignment of a value and the use for a beneficial and necessary purpose suggest that property having value is being transported for a purpose other than disposal.

It cannot realistically be doubted that the ALCOA sludge has value as alternative daily cover. OWS is required by state and federal law to provide daily cover at the CRLRC. Providing daily cover is a business expense of operating the landfill. If OWS did not use the ALCOA sludge, OWS would have to find daily cover material at an expense to OWS. OWS pays for the ALCOA sludge, through discounts on the receipt of the sludge. In other words, the sludge has value to OWS as a consumer.

Likewise, the ALCOA sludge has economic value to RUST because it can be used as an alternative daily cover. That use reduces RUST's cost of conducting the remediation operation at the ALCOA site. RUST is allowed to pay a lower disposal price than OWS would charge if the sludge were not used as alternative daily cover.

Is that enough "value"? The complainant contends that the ALCOA sludge does not have "value" for purposes of Commission regulation. It argues that Commission case law establishes that industrial sludge may be transported under motor carrier authority only if it has "commercial value," and that whether a commodity has "commercial value" depends on whether any commercially feasible secondary market exists for the sludge. Additionally, it argues that the mere fact that OWS is charging less than the posted gate rate when it receives the ALCOA sludge cannot be used to demonstrate that the sludge has commercial value, because OWS has freely admitted that it charges less than the gate rate for other solid wastes which it receives at CRLRC.

The undersigned's reading of relevant Commission orders<sup>3</sup> is that the controlling element in the Commission's determination is whether the material is without economic value at all. If industrial sludge has no property value, and is transported only for disposal, its transportation requires solid waste authority under chapter 81.77. The ALCOA sludge is not without value.

That reading is consistent with Interstate Commerce Commission's interpretation of its jurisdiction over the interstate transportation of "property" under part II of the

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<sup>3</sup> Order M. V. G. No. 1201, In re Fedderly-Marion Freight Lines, Inc., App. No. GA-802 (June 1985); Order M. V. No. 133753, Sunshine Disposal, Inc. v. Valley Transfer & Storage, App. No. E-19104 (April 1986); Order M. V. No. 142137, In re Inland Transportation, Inc., App. No. E-19946 (October 1990); Order M. V. No. 143632, In re C & C Transfer Co., Inc., App. No. E-74249 (July 1991); Order M. V. No. 143916, In re Safco Safe Transport, Inc., App. No. P-73623 (October 1991); Order M. V. No. 144465, In re Roger Dralle, d/b/a Rogers Dump Trucking, App. No. P-74586 (January 1992); Order M. V. No. 144941, In re Rissler Contracting Company, App. No. E-75297 (May 1992).

Interstate Commerce Act. The interstate transportation of a commodity is subject to ICC economic regulation (and state regulation is preempted) unless the commodity has no property value, and is transported solely for the purpose of disposal. Joray Trucking Corp. Common Carrier Application, 99 MCC 109, 110-111 (1965); Transportation of "Waste" Products for Reuse and Recycling, 114 MCC 92, 104 (1971).

Any argument that the Commission should draw the line between waste and commodities having value at some other point should be addressed to the Commission on review.

The complainant's gate-rate argument is not persuasive. The fact is that OWS has reduced its price to RUST because the ALCOA sludge can be used as alternative daily cover. That is an economic benefit to RUST. The reason for the reduction is what matters in this case.

**d. The sludge is not being disposed of.**

The end use of the ALCOA sludge is not mere disposal. It is used as alternative daily cover. If it were not used, OWS would have to use some other material to serve the same purpose. The ALCOA sludge does not take up space in the CRLRC that otherwise would be available for disposal of waste.

**2. ARE THE ACTIVITIES OF OWS AND T & G TRUCKING ACTIVITIES THAT FALL WITHIN THE INTENDED SCOPE OF REGULATION UNDER CHAPTER 81.77 RCW?**

T & G Trucking contends that neither OWS nor T & G is engaged in activity in this state that requires or justifies regulation under chapter 81.77 RCW. T & G makes this argument in the context of the Commerce Clause issues discussed below, but the argument raises questions of state law that merit consideration.

T & G contends that OWS performs no transportation function with respect to the Alcoa sludge. It argues that OWS has merely contracted with others to provide transportation and does not accomplish any portion of the loading of the containers or the transportation.

That argument mischaracterizes OWS's role. OWS contracted with RUST for the transportation of the ALCOA sludge. It arranges the means to accomplish it, exercises some control over the transportation, and is compensated for the transportation by RUST.

In Order M. V. G. No. 1596, In re Ryder Distribution Resources, Inc., App. No. GA-75154 (January 1993), the Commission held that a company that arranged the collection and transportation of generators' solid waste, having accepted



responsibility for doing so in conjunction with another purpose, is operating as a solid waste collection company. The Commission stated, at page 14:

An entity providing a complete solid waste collection and disposal service including transportation for collection and disposal, and which controls or manages vehicles engaged in the collection and disposal, whether it personally provides the transportation or accomplishes it by contract, is operating as a solid waste collection company. The provider cannot avoid its responsibility under Washington law by subcontracting with another entity to physically perform the transportation services.

This record differs somewhat from that in Ryder in that it is not clear that OWS holds itself out to the public to provide transportation for collection and disposal, and the transportation that OWS arranges is transportation of loaded cargo containers having a subsequent movement by rail. However, the degree of responsibility that OWS has assumed for the transportation of the ALCOA sludge appears to be sufficient activity to make it subject to regulation under chapter 81.77, if the sludge is "solid waste" for purposes of transportation regulation.

T & G Trucking contends that T & G does not perform any functions that could be considered as local intrastate solid waste collection service. It argues that T & G is in the business of providing the transportation of cargo containers having a prior or subsequent movement by water or rail; that it does not hold itself out as a carrier of solid waste; and that it contracted to provide motor carrier transportation of the ALCOA sludge upon the basis that it was tendered as part of a continuous intermodal COFC movement from origin to destination. It argues that it is not in any sense involved in the "collection" of sludge at the ALCOA site.

Certainly any "collection" by T & G is minimal compared to traditional "universal" solid waste collection service to residences and businesses. The public health and safety concerns that are the basis for state economic regulation of solid waste collection companies are minimized by the shipper's containerization of the material before shipment, and by the fact that the activities are for a single shipper on a temporary basis and thus are unlikely to pose a threat to affordable universal service in the territory. From T & G's perspective, the tendered cargo looks no different than any other COFC container, and T & G performs no functions beyond those it performs when transporting other COFC containers.

Nonetheless, T & G Trucking is engaging in collection. The picking up of the loaded containers is "collection." That T & G Trucking is collecting from only one shipper makes no difference. In re Arrow Sanitary Service, Inc., d/b/a Oregon Paper Fiber, Cause No. TG-2197 (December 1989). If the sludge is "solid waste" for purposes of Commission regulation, RCW 81.77.010's definition of "solid waste collection company" is sufficiently broad to encompass T & G's activities.

Whether the Commission should regulate under chapter 81.77 activity which involves only picking up and transporting loaded, sealed containers from a single shipper for hauling out of state is not a question that it would be appropriate for this order to address. Whether the Commission may regulate this activity without violating the Commerce Clause of the U.S. Constitution is discussed in the section beginning on page 20 of this order.

3. DOES THE INTERSTATE COMMERCE COMMISSION HAVE EXCLUSIVE JURISDICTION OVER THE REGULATION OF THE TRANSPORTATION OF THE ALCOA SLUDGE?

T & G's transportation of the ALCOA waste is entirely interstate in nature. By federal law, the Interstate Commerce Commission has exclusive economic jurisdiction over the transportation by motor carrier of property or passengers between a place in one state and a place in another state. 49 U.S.C. § 10521(a)(1)(A). The federal interpretation of what constitutes "property" for purposes of ICC jurisdiction therefore is critical. If the ALCOA sludge is characterized as "property" for purposes of ICC jurisdiction, how the transportation would be characterized under state law is irrelevant.

Commission Staff's brief thoroughly and persuasively analyzes this question. The ICC, in interpreting its regulatory jurisdiction, has determined that waste is not property within the meaning of 49 U.S.C. § 10521 and, therefore, that the agency does not regulate the transportation of waste across state lines. Joray Trucking Corp. Common Carrier Application, 99 MCC 109, 110-111 (1965); Transportation of "Waste" Products for Reuse and Recycling, 114 MCC 92, 104 (1971). The transportation of material that has a negative or no value as a commodity, transported solely for disposal, is not subject to ICC regulation. Conversely, if the waste has property value and is not transported solely for disposal, the movement of the commodity is subject to ICC, but not state, jurisdiction.

That the ALCOA sludge has some value as a commodity, and is not transported solely for disposal, is analyzed above. The ALCOA sludge is "property" for purposes of ICC jurisdiction. Because the ALCOA sludge travels in a continuous movement from Clark County to a rail siding in Oregon, the ICC has exclusive economic jurisdiction over the transportation. A solid waste certificate is not required for the transportation.

4. EVEN IF THE ALCOA SLUDGE IS CHARACTERIZED AS "SOLID WASTE" FOR PURPOSE OF COMMISSION REGULATION, IS ITS TRANSPORTATION VIA SEALED INTERMODAL CONTAINERS EXEMPT FROM STATE REGULATION UNDER AN INTERSTATE COMMERCE COMMISSION (ICC) REGULATION THAT EXEMPTS FROM STATE REGULATION THE INTRASTATE PORTION OF A CONTINUOUS TRAILER-ON-FLATCAR/CONTAINER-ON-FLATCAR (TOFC/COFC) SHIPMENT?

The Staggers Rail Act, 94 Stat. 1895, 49 U.S.C. §§ 10101 et seq., authorizes the Interstate Commerce Commission to exempt from state regulation "transportation that is provided by a rail carrier as part of a continuous intermodal movement." 49 U.S.C. § 10505(f). ICC regulations exempt from state regulation both the motor portion and rail portion of trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service. The exemption extends to intrastate shipments on trucks that are a portion of continuous TOFC/COFC transport, regardless of whether the trucks are owned and operated by the railroad. 49 CFR § 1039.13; Improvement of TOFC/COFC Regulation, 364 ICC 731 (1981).

The transportation service provided in this case, via sealed intermodal containers, meets the ICC definition of TOFC/COFC service. If the ALCOA sludge is property rather than waste, the entire intermodal transportation -- including the trucking portion -- is exempt from Commission regulation.

The complainant argues that the TOFC/COFC exemption would apply, except for the fact that the material being transported is "solid waste." It argues that the ICC does not regulate material not having value. It cites the Joray Trucking decision, supra.

OWS argues that the TOFC/COFC exemption applies whether the material is property or solid waste. It argues that the Joray Trucking decision does not govern this case because it was decided under subchapter II (49 U.S.C. § 10521-31) of the Interstate Commerce Act, dealing with the ICC's motor carrier jurisdiction, while the intermodal rail and truck transportation involved in this case is exempt under subchapter I (49 U.S.C. § 10501-05) of that act, dealing with ICC jurisdiction over transportation by rail carriers. OWS contends that subchapter I (specifically section 10501(a)) grants jurisdiction to the ICC over all transportation, whereas subchapter II (specifically section 10521(a)) grants motor carrier jurisdiction only over passengers and property.

OWS argues that courts have held that the TOFC/COFC exception should be interpreted broadly, citing the following language from American Trucking Ass'n Inc., 656 F.2d at 1121:

We note that Congress has chosen not to define narrowly the Commission's exemption authority but instead has extended that authority to "matters related to a rail carrier providing transportation."

OWS cites no cases holding that ICC jurisdiction under subchapter I is greater than under subchapter II. Commission Staff cites authority for the contrary view. It contends that it is far from clear that ICC jurisdiction under subchapter I extends to waste.

Commission Staff argues that while it is true that the section granting general jurisdiction in subchapter I (§ 10501) differs from the comparable section in subchapter II (§ 10521), at one point section 10501 does refer to "the transportation of passengers or property." 49 U.S.C. § 10501(b)(1). It was on that basis that the U.S. Court of Appeals for the Seventh Circuit stated the following:

The Commission's jurisdiction under the Act is confined to "transportation." 49 U.S.C. § 10501. "Transportation" as defined in 49 U.S.C. § 10501 refers only to the movement of passengers or property or such directly related services as the receipt and storage of goods.

Bloomer Shippers Association v. Illinois Central Gulf Railroad Company, 655 F.2d 772, 778, n.4 (7th Cir. 1981).

The respondents have not demonstrated that the TOFC/COFC exemption is applicable to the transportation of solid waste. If the Commission should find that the ALCOA sludge is "solid waste," it should not base dismissal of the complaint on the TOFC/COFC exemption.

5. **WOULD COMMISSION ECONOMIC REGULATION OF THE ACTIVITIES OF OWS AND/OR T & G TRUCKING IN RELATION TO THE ALCOA SLUDGE VIOLATE THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION?**

The respondents contend that the transportation service performed by T & G Trucking is entirely interstate in nature and therefore is exempt from state regulation under the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3, even if the service is classified as the transportation of waste. Commission Staff does not agree with the respondents' analysis, but does argue that there is a substantial doubt that the Commission may regulate the service performed by T & G Trucking without violating the Commerce Clause. The complainant thoroughly and articulately presents opposing arguments.

The Commission does not need to determine this complaint on the issue of whether the provisions of chapter 81.77 RCW may constitutionally be applied to T & G Trucking's operations. This case may be decided completely on statutory grounds. This initial order will not decide the constitutional issue. The undersigned will, however, reiterate several reasons why commerce clause issues would be raised by requiring T & G to obtain a solid waste permit.

The Commerce Clause confers on Congress the power to regulate interstate commerce. Although by its terms the Commerce Clause is an authorization for congressional action, the U.S. Supreme Court long has held that the delegation to Congress by the states is also a limitation upon state power to interfere with the movement of goods in interstate commerce. Cooley v. Board of Wardens, 12 How. (U.S.) 229, 13 L.Ed. 966 (1852); H. P. Hood & Sons v. Dumond, 336 U.S. 525, 93 L.Ed. 865, 69 S.Ct. 657 (1949).

Solid waste, even if it has no value, is an article of commerce for purposes of the Commerce Clause. Philadelphia v. New Jersey, 437 U.S. 617, 620, 57 L.Ed.2d 475, 98 S.Ct. 2531 (1978).

In the absence of federal preemption or conflicting federal legislation, the states retain a residuum of power to make laws governing matters of legitimate local concern under the police power reserved to them by the Tenth Amendment, even though interstate commerce may be affected, or even, to some extent, regulated. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669, 67 L.Ed.2d 580, 101 S.Ct. 1309 (1981). The Supreme Court has consistently held that a state's power to regulate commerce is never greater than in matters traditionally of local concern. State regulations that touch upon health, safety, and consumer protection are those that the Court has been most reluctant to invalidate. Ibid.

The Supreme Court has adopted a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a statute directly regulates or discriminates against interstate commerce in favor of local economic interests over out-of-state interests, or when its effect is to favor in-state economic interests over out-of-state interests, the Court has generally applied a "virtual per-se" rule of invalidity, striking down the statute without further inquiry on the ground that such regulation amounts to "simple economic protectionism." City of Philadelphia, 437 U.S. 617, 623-624, 57 L.Ed.2d 475, 98 S.Ct. 2571 (1978); C & A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. \_\_\_, 128 L.Ed.2d 399, 114 S.Ct. 1677 (1994).

When a state statute does not directly regulate interstate commerce or discriminate against interstate commerce,

and the statute promotes legitimate legislative objectives, such as health, consumer protection, or conservation, the Court has engaged in a weighing of the state's local interest against the federal interest in the free flow of interstate trade. The Court has applied a balancing test first articulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 25 L.Ed.2d 174, 90 S.Ct. 844 (1970):

Where the statute regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits....

The Commission has considered the constitutionality of the application of Chapter 81.77 RCW to solid waste collection companies which dispose of waste outside the state. Cause No. TG-1859, All County Disposal Services, Inc. (August 1985); Cause No. TG-1911, Evergreen Waste Systems, Inc. (May 1986); Cause No. TG-2197, In re Arrow Sanitary Service, Inc., d/b/a Oregon Paper Fiber (December 1989); Docket No. TG-920304, In re Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants (Kleenwell) (January 1993). The Commission has concluded that it may constitutionally apply the provisions of Chapter 81.77 to solid waste collection service without regard to the location of the ultimate disposal site.

The Commission regulates solid waste collection service, a local service of singularly local concern. Its regulation of transportation for disposal is incidental to regulation of collection service.

Chapter 81.77 RCW does not directly regulate interstate commerce. It directly regulates the local activities of solid waste collection companies. While its requirement that a carrier obtain a certificate of public convenience and necessity in order to operate as a solid waste collection company affects out-of-state economic interests that may wish to provide such service in the state, it does not discriminate against out-of-state carriers or favor in-state economic interests over out-of-state economic interests. It does not prevent the free flow of waste across state borders. Its requirement of a certificate serves legitimate health and safety interests by ensuring universal solid waste collection service in both urban and rural areas at reasonable prices. Any burden that the requirement may impose on interstate commerce is indirect and is outweighed by the legitimate local health and safety interests that the requirement serves.

There are aspects of this particular service that raise concerns about whether chapter 81.77 may constitutionally be applied to it. The local collection aspect of the service is

about as minimal as it is possible to get. T & G's service is limited to hauling containers that the shipper has filled and sealed, and it serves only the one shipper.<sup>4</sup> There is no movement entirely within the state; the ALCOA sludge moves immediately and continuously from Washington to Oregon. The shipper is not indifferent to the location of the disposal site, but rather intends that the material move out of state, for a bona fide commercial reason. The out-of-state movement is not a pretext for avoiding Commission regulation.

On the limited record before the Commission in this case, there is no evidence that the legitimate local interests that generally are furthered by regulation under chapter 81.77 RCW (protection of public health and safety by ensuring universal solid waste collection service in both urban and rural areas at reasonable prices) would be served by regulating T & G's activities. There is no evidence that T & G's activities have any impact on existing rates or universal service in the service territory. Against that background, it would be difficult to establish under the Pike v. Bruce Church balancing test that the local benefits of regulating T & G's activities outweigh the burden imposed on interstate commerce.

#### E. CONCLUSION.

The complaint should be dismissed. When the ALCOA sludge is used as alternative daily cover at CRLRC, it has property value, and its transportation is not for purposes of disposal. It therefore is properly classified as a valuable commodity rather than "solid waste" for purposes of regulation under Title 81 RCW.

Even if the sludge were classified as "solid waste" for purposes of Commission regulation, the Commission cannot require the carrier to obtain a certificate under chapter 81.77 RCW to haul the sludge to Oregon. The ALCOA sludge is "property" for purposes of ICC jurisdiction. Because the ALCOA sludge travels in a continuous interstate movement from Clark County to a rail siding in Oregon, the ICC has exclusive economic jurisdiction over the transportation. State economic regulation of the transportation is preempted.

In Order M. V. G. No. 1536, In re Ryder Distribution Systems, Inc., App. No. GA-75563 (January 1992), at footnote 9, the Commission said: "Specialized needs and services outside the

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<sup>4</sup> In Cause No. TG-2197, In re Arrow Sanitary Service, supra, the Commission ruled that a carrier providing waste collection service to a single customer was required to obtain solid waste authority. There was no Commerce Clause issue raised in that proceeding.

"universal" waste stream and the increasing prevalence of recycling tend to blur the lines between traditional solid waste activity and traditional motor carrier activity." The facts of this case and the excellent arguments of counsel demonstrate how difficult it can be to determine whether a specialized service involving a waste material requires authority under Chapter 81.77 RCW.

## FINDINGS OF FACT

### Stipulated Facts:

1. Rust Remedial Services ("RUST") is a large multi-state environmental company performing land remediation and cleanup operations. It is majority owned by WMX.
2. Waste Management Disposal Services of Oregon, Inc., dba Oregon Waste Systems ("OWS") is the operator of a recycling center and landfill at Arlington, Oregon, commonly known as Columbia Ridge Landfill and Recycling Center ("CRLRC"). OWS is wholly owned by Waste Management, Inc., which is wholly owned by WMX.
3. RUST was a successful bidder for cleanup and remediation of industrial sludge at the Alcoa plant at or near 6200 Old Lower River Road, Vancouver, Washington ("Alcoa site"). RUST entered into a contract with Alcoa on July 20, 1994.
4. Findley Buttes Landfill Co. in conjunction with Tidewater Barge Company submitted a bid to RUST for transportation and disposal services in conjunction with Alcoa industrial sludge. RUST did not accept the bid.
5. The Disposal Group, Inc. ("TDG") did not bid on collection and transportation of the industrial sludge from the Alcoa site.
6. When RUST submitted its bid for the cleanup and remediation, it worked with OWS as a subcontractor. Neither OWS nor RUST included the 4.6% Washington State refuse collection taxes in the bid.
7. As part of the contract with Alcoa, RUST is required to remove the sludge from the Alcoa site.
8. RUST operates construction and land clearing equipment in removing the sludge from the Alcoa site and loads it into top loading containers mounted on wheeled trailers or chassis at the site.



9. RUST contracts with OWS to have the sludge delivered to CRLRC to be used solely as alternate daily cover ("ADC").

10. It has been and at all times continues to be the fixed and persisting intent of RUST that the sludge be moved from the Alcoa site in Vancouver, Washington to the CRLRC in Arlington, Oregon in continuous movement.

11. OWS contracts with the Union Pacific Railroad and with T&G Trucking and Freight Co. ("T&G") for movement of the loaded containers of sludge from the Alcoa site over the public highways of the States of Washington and Oregon to a railroad siding at or near Portland by T&G for loading onto flat cars operated by Union Pacific for movement in container on flat car ("COCF") for delivery to CRLRC in Arlington, Oregon.

12. On or about August 22, 1994, T&G began transporting the sludge from the Alcoa site over the public highways of the States of Washington and Oregon to the railroad siding at or near Portland, Oregon, for loading on Union Pacific rail cars for ultimate delivery at CRLRC.

13. T&G and Union Pacific Railroad are compensated by OWS for such transportation.

14. By letter dated August 22, 1994, OWS requested the Oregon Department of Environmental Quality's ("DEQ") "written notice to proceed with a suitability study for the use of sludge material as an alternative to daily cover (ADC) at CRLRC."

15. By letter dated August 26, 1994, the DEQ authorized "OWS to proceed with an evaluation of sludge as ADC" at CRLRC ("DEQ's authorization").

16. After the sludge from the Alcoa site is delivered to CRLRC, it is used for ADC.

17. DEQ's authorization allows:

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

18. RUST pays OWS a fixed rate to receive the sludge at CRLRC. The price falls within the range of fifty to seventy percent (50-70%) of OWS' posted gate rate for solid waste.

19. OWS accepts materials from other sources at CRLRC at rates below the posted gate rate.

20. OWS is required to provide daily cover at its landfill pursuant to 40 CFR Section 258.21 and OAR Section 340-94-040(7) and (8).

21. The sludge has value to OWS as alternate daily cover.

22. If the sludge material is not useable as ADC, OWS would charge RUST a higher fee for receiving the material at CRLRC.

23. If OWS is not permitted to use the sludge material as ADC, OWS will need to locate alternative material for ADC at an expense to OWS.

24. TDG provides refuse collection services pursuant to Certificate of Public Convenience and Necessity No. G-65 in the unincorporated areas of Clark County. Such authority includes service to the Alcoa site.

25. OWS does not hold a certificate of authority from the Washington Utilities and Transportation Commission to collect and transport solid waste in the State of Washington pursuant to Chapter 81.77 RCW.

26. T&G Trucking does not hold a certificate of authority from the Washington Utilities and Transportation Commission to collect and transport solid waste in the State of Washington pursuant to Chapter 81.77 RCW.

27. The parties stipulate that the foregoing facts are accepted as true and accurate representations without prejudice to the presentation of additional facts at the brief adjudicative proceeding regarding the issues presented.

#### Additional Findings of Fact

28. The sludge was tested by the environmental firm of Hart Crowser and determined not to be a dangerous or toxic waste.

29. The OWS/RUST agreement is entitled "Service Agreement, Non-Hazardous Waste Disposal." It is a standard form contract.

30. RUST and OWS agree and understand that the sludge material will be used as alternative daily cover at the CRLRC. The use of the material as daily cover is reflected in the applicable bills of lading, which provide that the material is "to be recycled as daily cover at Columbia Ridge Landfill and Recycling Center."

31. In transporting the sludge between the ALCOA site and the rail head in Portland, T & G does not stop in transit for storage, processing, or transfer to a different container.

32. T & G has averaged about 72 container loads per day from the ALCOA facility.

33. The Oregon Department of Environmental Quality (ODEQ) has issued an Interpretive Ruling for purposes of calculating the amount of materials received at landfills upon which disposal fees are assessed. The interpretation provides:

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

For the purpose of fee calculation under OAR 340-97-120(3), (4), (5) and (6), the material received by a landfill should be excluded from the tonnage calculation if it does not meet the definition of solid waste, and is "clean fill" as defined in OAR 340-93-030(10).

34. Oregon defines "solid waste" at OAR 340-93-030(75) as:

all useless or discarded putrescible and non-putrescible materials, including but not limited to garbage, rubbish, refuse, ashes, paper and cardboard, sewage sludge, septic tank and cesspool pumpings or other sludge, useless or discarded commercial, industrial, demolition and construction materials, discarded or abandoned vehicles or parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semi-solid materials, dead animals and infectious waste.

35. Chapter 5 of the Clark County Comprehensive Solid Waste Management Plan defines recyclable materials as:

those materials listed in Table 5-1 that:

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

Are separated from non-recyclable material before collection or transport such that the material remaining in the load or container is a recyclable commodity or is material from a residential curbside collection program under the authority of RCW 36.58.040(1) or (2).

Table 5-1 lists the following materials: Newspaper, Corrugated Containers, High Grade Paper, Mixed Waste Paper, Polycoated Containers, Glass Containers, Aluminum Cans, Tin and Bi-Metal Cans, Scrap Metals, PET Beverage Containers, HDPE Beverage Containers, Plastic Packaging, Other Plastics, Yard Waste.

36. Chapter 13 of the Clark County Comprehensive Solid Waste Management Plan deals with special wastes, including municipal and industrial wastewater sludges. In Chapter 13, the Comprehensive Plan identifies several management alternatives that are available for the treatment and disposal of sludges, including application onto agricultural lands; silviculture; composting; and application for land reclamation. At 13-38, the Comprehensive Plan recognizes that "sludge that has been dewatered, when combined with bulking agents, has been successfully used as daily cover material at landfills."

## CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over this proceeding and the parties thereto under RCW 81.04.110.
2. A brief adjudication is appropriate to resolve the issues in this proceeding under RCW 34.05.482 and WAC 480-09-500.
3. The activities of Waste Management Disposal Systems of Oregon, Inc., d/b/a Oregon Waste Systems, and T & G Trucking & Freight Co. against which The Disposal Group, Inc., d/b/a Vancouver Sanitary Service and Twin City Sanitary Service, has complained, are not subject to regulation by the Commission under chapter 81.77 RCW.
4. The complaint should be dismissed.

## ORDER

IT IS ORDERED That the complaint of The Disposal Group, Inc., d/b/a Vancouver Sanitary Service and Twin City Sanitary Service, in this proceeding is dismissed.

DATED at Olympia, Washington and effective this 19th day of December 1994.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



JOHN PRUSIA  
Hearings Examiner

**NOTICE TO PARTIES:** Administrative review of brief adjudications is governed by RCW 34.05.488 and .491 and by WAC 480-09-500(6) through (9). Any party may request review of an initial order in a brief adjudication by stating the request to the Commission within 21 days after service of the initial order. A request for review shall contain an explanation of the party's view of the matter, with a statement of reasons why the initial order is incorrect, and a certificate of service on all parties. Responses may be filed within ten days after service of a request for review. Filing is complete only upon receipt by the Secretary. Receipt in the Commission's telefax machine does not constitute filing.