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September 25, 1992

Paul Curl, Secretary
Washington Utilities and Transportation Commission
P.O. Box 9022
Olympia, Washington 98504-9002

Re: Enoch Rowland d/b/a Kleenwell Biohazard
Docket No. TG-920304

Dear Secretary Curl:

Enclosed please find the original and three copies of the petition for administrative review of the findings of fact, conclusions of law and initial order served August 31, 1992.

Very truly yours,

James T. Johnson

Enclosure

cc: Enoch Rowland
Steven W. Smith
Richard A. Finnigan
James Sells
Boyd Hartman
David Wiley
Cindy Horenstein

BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION Commission

In the Matter of Determining the Proper Carrier Classification of:	DOCKET NO. TG-920304
ENOCH ROWLAND d/b/a KLEENWELL BIOHAZARD AND GENERAL ECOLOGY CONSULTANTS.	PETITION FOR ADMINISTRATIVE REVIEW OF INITIAL ORDER

COMES NOW the respondent Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, and pursuant to WAC 480-09-780 petitions the Commission for administrative review of the Findings of Fact, Conclusions of Law and Initial Order of Lisa D. Anderl, Administrative Law Judge, served August 31, 1992.

I

FACTS

History of Proceedings

Kleenwell Biohazard and General Ecology Consultants, Inc., is engaged in the transportation of medical waste from various physicians' and dentists' clinics and offices in King County.

Enoch Rowland, the owner of Kleenwell, is a microbiologist and a pharmacist. Through affiliated companies he sells medical supplies and renders laboratory services for most of the physicians and dentists he serves in the disposition of their medical waste. (T28, 29) He and his daughter, whom he has trained to exercise

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proper precautions in picking up medical wastes, make the pick-ups of medical wastes at the offices and clinics of the physicians and dentists he serves approximately once every ten days. (T30) After the pick-up is made, the material is brought to a refrigerated warehouse where it is kept at zero degrees Fahrenheit until a load has been accumulated for movement to California. (T31) Kleenwell has a permit from the Seattle King County Health Department reflecting its qualifications to handle medical waste (Exhibit 5). The storage facility utilized has also been approved by the Seattle King County Health Department. (T33, Exhibit 6)

At one time, Kleenwell held temporary authority from the Commission authorizing intrastate transportation in the state of Washington of medical waste. However, in 1991 Kleenwell's application for permanent authority was denied on the basis of the applicant's alleged failure to demonstrate its fitness to receive common carrier authority.

During the time it held temporary authority, Kleenwell disposed of its medical waste in the state of Washington. However, after its application for permitting authority was denied, Kleenwell began making final disposition of its medical waste by shipping it to Security Environmental Systems in Los Angeles, California. (T31)

On January 3, 1992, the Commission levied penalty assessment number 2157 in the amount of $6,000 against Kleenwell for alleged violations of RCW 81.77.040 for failure to have a certificate of convenience of necessity issued by the Washington Utilities and

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Transportation Commission. Kleenwell sought mitigation of those penalties relying on a recently issued decision of the U.S. District Court for the Southern District of West Virginia at Charleston in the case of Medigen of Kentucky, Inc., and Medigen of Pennsylvania, Inc. v. Public Service Commission of West Virginia, et al., Civil Action No. 2:90-0761, 787 F. Supp. 602 (S.D. W. Va. 1992).

In response to Kleenwell's petition for mitigation, the Washington Utilities and Transportation Commission issued its complaint, order and notice of hearing in Docket No. TG-920304. This was a proceeding on the Commission's own motion to determine whether Kleenwell was in the business of transporting solid waste for collection and disposal or compensation over the public highways of this state for which it is allegedly required to hold a certificate as per RCW 81.77.040 and WAC 480-70-070.

RCW 81.77.040 provides that no solid waste collection company shall operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity requires such operation.

WAC 480-70-070 provides:

> No solid waste collection company shall operate, establish or begin operation of a line or route or serve any territory, or any extension, for the purpose of transporting solid waste on the public highways of this state, without first having obtained from the Commission a certificate declaring that public convenience and necessity requires, or will require, the establishment and operation of such line or route in such territory.

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The order served April 8, 1992, required Kleenwell to appear before it to give testimony and evidence as to its operation and placed on Kleenwell the burden of proving that the alleged operations are not subject to the provisions of RCW 81.77.040 and WAC 480-70-070.

Kleenwell argues that the transportation in which it is engaged is interstate in nature and that the Washington statutes do not apply to such interstate operations.

The matter was the subject of hearings held Kent, Washington, on May 13 and June 11, 1992. Ryder Distribution Resources, Inc., Washington Waste Management Association, American Environmental Management Corp., Rabanco Company, Clark County Disposal, Inc., and Buchmann Sanitary Servicing of Vancouver, Washington, all intervened. Most of these parties along with the assistant attorney general representing the Commission offered testimony.

In an order served August 31, 1992, the administrative law judge to whom the matter was assigned made Findings of Fact, Conclusions of Law, and entered an Initial Order. The order recommends directing Kleenwell to cease and desist from operating motor vehicles for the collection or transportation of solid waste for compensation over the public highways of the state of Washington.

Kleenwell believes the order to be inconsistent with applicable law and requests administrative review.

The case of Medigen of Kentucky and Medigen of Pennsylvania, Inc. v. Public Service Commission of West Virginia, et al., 787 F.

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Supp. 602 (S.D. W. Va. 1992), has virtually identical facts and reached the opposite conclusion even going so far as not only enjoining the state from enforcing its certificate requirements against Medigen, but finding for Medigen as having a valid claim under Title 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

II

SPECIFIC EXCEPTIONS

A. Exception is taken to the memorandum portion of the order at page 3 which states:

> The doctors and dentists who generate the waste have no interest in where the ultimate disposal site is located and do not care whether the waste is shipped out of state for disposal or not.

TR 57 and 84.

Argument

The testimony relative to this point makes it clear that the doctors and dentists do insist that the disposal site be outside the state of Washington if that is what is necessary to make the Kleenwell operation legal. If both are legal, then the site is immaterial to the customers. This is all the record reflects on the point.

B. Exception is taken to the statement on page 5 that Kleenwell does not have a certificate and may not lawfully operate

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and that pursuant to its authority in RCW 81.04.510 the Commission should order the respondent to cease and desist operating as a solid waste collection company.

Argument

It is the position of respondent that under the applicable case law a certificate may not be required by the state of Washington to conduct the interstate operations performed by Kleenwell and that therefore there should be no cease and desist order issued.

Further argument on this issue will be presented in the general argument presented in this petition.

C. Exception is taken to the statement on page 5 that,

> The shippers have no intent regarding the waste other than that it is removed from their premises. Presumably, they are concerned with proper disposal, but Mr. Rowland's testimony establishes that they do not care whether it goes out of state or remains in state. Therefore, the transportation from the doctors or dentists offices to the warehouse in Des Moines is intrastate commerce and wholly subject to state regulation.

The statement to which this exception is directed is clearly wrong. When Kleenwell makes the pick-ups at its customers' offices or clinics, it does so with the full intention that the medical waste picked up will go to a storage facility where it will be held until a load has been accumulated and then will be transported to California for disposal. The physicians and dentists involved are aware of the procedure and the intent from the time of the first pick-up is that the waste proceed to an out-of-state destination. Clearly, we are here involved with interstate commerce, not

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intrastate. Baltimore & Southwestern R.R. Co. v. Settle, 260 U.S. 166 (1922), has long been cited to establish that to determine the essential character of transportation between two points in the same state (i.e., whether it is simply intrastate traffic or whether it is interstate traffic because of its prior or subsequent movement across state lines) was the shipper's fixed and persisting intent at the time the shipment is determinative.

The administrative law judge cited that case but failed to recognize that the intent with regard to each of these shipments is always that it move from a point in Washington to a point in California. Accordingly, the judge's finding that the commerce was intrastate in character is simply wrong. In connection with other traffic, the commission is well aware that a pick-up and movement to a storage location where the shipment is merely kept awaiting consolidation and movement outside the state is interstate commerce.

D. Exception is taken to the conclusion that the instant case is factually different from the Medigen case in that the Medigen court noted that neither of the solid waste companies involved was engaged in intrastate commerce.

The instant case is identical to the Medigen case in that Kleenwell also is not engaged in intrastate commerce and that it is clear that the Kleenwell movements from the offices of physicians and dentists it serves are also interstate in nature.

E. Exception is taken to the statement on page 7 of the order that the requirements of RCW 81.77.040 are not a direct

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burden on interstate commerce and that thus there is only an incidental or indirect burden on interstate commerce.

The argument in support of this exception is combined with the argument in support of exception F.

F. Exception is taken to the finding on page 7 that the testimony of both Mr. Rowland and Wayne Turnberg established that there is a significant public health risk imposed by medical waste and that the state and local governments have a strong interest in regulating the companies who collect and transport the waste for disposal. As was the case in Medigen, there is no medical testimony to support that view. In any event the requirement of a certificate of public convenience and necessity does not address health issues but address economic issues and issues of competition. As it was held in Buck v. Kuykendall, 45 S.Ct. 324, where the laws of Washington prohibits use of state highways by buses transporting passengers for hire over regular routes without certificate from the Director of Public Works and prohibiting issuance of certificate where a territory is adequately served, it was held a violation of the Commerce Clause of the United States Constitution. In City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531 (1978), the appellants, who prevailed, strenuously contended that while the law, which was outwardly cloaked in the currently fashionable garb of environmental protection, was actually no more than a legislative effort to suppress competition and stabilize the cost of the solid waste disposal for New Jersey residents. It had to fail.

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Kleenwell contends that the state statutes at issue here are per se invalid because they are an attempt to effect direct regulation of interstate commerce and because their purpose and effect is economic protection. The principal cases relied upon by plaintiffs in the Medigen case and Kleenwell here are Buck v. Kuykendall, 267 U.S. 307 (1925), and George W. Bush & Sons v. Malloy, 267 U.S. 317 (1925) (both decided on the same day).

Both before and after Buck and Bush, it has been consistently held that a state may not require a certificate of convenience and necessity from a carrier engaged exclusively in interstate commerce before it can operate within the state's borders. E.g., Sprout v. South Bend, 277 U.S. 163, 171 (1928) ("the privilege of engaging in interstate commerce is one which a state cannot deny"); Interstate Buses Corp. v. Holyoke St. Ry. Co., 273 U.S. 45, 51 (1927) ("no certificate of public convenience and necessity is required in respect to transportation that is exclusively interstate"); Barnett v. New York, 232 U.S. 14, 31 (1914). Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license.

It was held in the case of Port of Seattle v. Washington Utilities & Transportation Commission, 597 P.2d 383, 390 (Wash. 1979), that "state's certification requirements for carriers cannot be applied to a common carrier engaged in exclusively interstate commerce."

Brown-Foreman, 476 U.S. at 579, indicates that state statutes

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which directly regulate interstate commerce or discriminate against interstate commerce are generally invalid per se.

In the Medigen case the court concluded that the defendants' requirement of a certificate of convenience and necessity as a condition of allowing plaintiffs to operate in interstate commerce is a direct rather than an incidental burden on interstate commerce. The validity of the requirement can be upheld only if the state meets its burden of showing both that the requirement of the certificate serves a legitimate purpose and that no other means can adequately serve that purpose. The record contains no such proof.

The administrative law judge fails to recognize or acknowledge that regardless of the outcome of this case the requirements at issue here would still obtain with respect to the intrastate transportation of medical waste. A proper decision would simply prohibit the laws and regulations applying to intrastate operations being applied to interstate carriers. The requirement of a certificate of public convenience and necessity has no bearing on health issues.

Magnuson v. Kelly, 35 F.2d 867, 969 (E.D. Ky. 1927), held that the requirement of a certificate of convenience and necessity,

> Is in violation of the provisions of the federal Constitution conferring on Congress power to regulate interstate commerce. The state has no power absolutely or conditionally to deny [an interstate motor] carrier the rights to use its public highways

The testimony of Professor Dempsey and of the intervenors AEMC and Clark County Disposal addressed purely economic issues simply

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support our contention that the regulations represent an attempt by the state of Washington to regulate interstate commerce--an attempt which violates the Commerce Clause of the United States Constitution.

G. Exception is taken to the use of the standard set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), which holds that statutes which burden interstate commerce only incidentally are invalid only if the burden is clearly excessive in relation to the local benefits. That case and the reasoning behind it do not apply to this situation where we are dealing with a direct rather than an incidental burden on interstate commerce. The requirement of a public convenience and necessity showing has always been treated as a direct, not an incidental, burden.

H. Exception is taken to the conclusion on page 9 of the order that Kleenwell is operating as a solid waste collection company subject to the provisions and requirements of RCW 81.77.

I. Exception is taken to the statement on page 9 of the order that even if Kleenwell's operations involved transporting solid waste directly from the generators in Washington to the incinerator in California, the operations in the state of Washington are subject to state regulation and that regulation is not contrary to the Commerce Clause. That statement is plainly at odds with countless federal cases cited herein.

J. Exception is taken to the Finding of Fact No. 4 that the testimony of Mr. Rowland and Mr. Turnberg establish that medical waste in the waste stream poses a significant public health risk.

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Neither was qualified to offer medical testimony.

K. Exception is taken to Conclusion No. 2 that the respondent is operating as a solid waste collection company within the state of Washington as defined in RCW 81.77.010 and is required by that statute to have a certificate of public convenience and necessity to conduct those operations, notwithstanding the fact that the solid waste is ultimately transported out of state for disposal and that respondent should be ordered to cease and desist those operations until it obtains such a certificate from the commission.

L. Exception is taken to Conclusion No. 3 that the transportation which Kleenwell provides from the customer's premises to the Seattle warehouse location is wholly intrastate. The shippers have no intent regarding out-of-state shipment of the waste, a decision which is made by the carrier in this case and over which waste generators have no control.

M. Exception is taken to Conclusion No. 4 that RCW 81.77 may be applied to respondent without violation of the Commerce Clause of the United States Constitution.

N. Exception is taken to the order portion ordering that Enoch Rowland and Kleenwell Biohazard and General Ecology Consultants are directed to cease and desist from operating motor vehicles for the collection or transportation of solid waste for compensation over the public highways of the state of Washington.

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III

RECOMMENDED FINDINGS OF FACT

A. Respondent recommends adoption of Finding No. 1 as set out in the Initial Order.

B. Respondent recommends adoption of Finding No. 2 as set out in the Initial Order.

C. Respondent recommends adoption of Finding No. 3 as set out in the Initial Order.

D. The record fails to establish that health issues are in any way addressed by the requirements for a certificate of public convenience and necessity.

E. Professor Paul Dempsey testified regarding the impact of unregulated transportation but demonstrated no significant study or understanding as to the impact of unregulated entry in the field of solid waste collection. Also, this case involves only interstate transportation and the decision herein would have no bearing on intrastate transportation of solid waste.

IV

PROPOSED CONCLUSIONS OF LAW

Respondent proposes the adoption of the following Conclusions of Law:

A. The Washington Utilities and Transportation Commission has jurisdiction over the parties to this proceeding but not over the subject matter of interstate transportation of medical waste.

B. The respondent is operating in the interstate transportation of solid waste. Those operations are not subject to

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the certificate requirements set forth in RCW 81.77.040.

C. Whether transportation is interstate or intrastate is determined by the fixed and persisting transportation intent at the time of the shipment. Baltimore & Southwestern R.R. Co. v. Settle, 260 U.S. 166 (1922). The transportation which Kleenwell provides from the customers' premises to the Seattle warehouse location is a portion of an interstate trip. The fixed and persisting intent is that the shipment move to an out-of-state destination for disposal.

D. The provision of RCW Chapter 81.77 may not be applied to respondent without violation of the Commerce Clause of the United States Constitution.

V

PROPOSED ORDER

IT IS HEREBY ORDERED that the operation of Enoch Rowland and Kleenwell Biohazard and General Ecology Consultants, being interstate in character, are not subject to RCW Chapter 81.77.

DATED this 25th day of September, 1992.

James T. Johnson
Attorney for Enoch Rowland and
Kleenwell Biohazard and General
Ecology Consultants

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CERTIFICATE OF SERVICE

I, James T. Johnson, counsel for Enoch Rowland and Kleenwell Biohazard and General Ecology Consultants, do hereby certify that I have served a copy of the foregoing Petition for Administrative Review of Initial Order on each party of record, mailing by first class mail properly addressed with postage prepaid on the 25th day of September, 1992.

DATED this 25th day of September, 1992.

James T. Johnson

JJ BG080102

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