



Ken Eikenberry

ATTORNEY GENERAL OF WASHINGTON

1400 S Evergreen Park Drive SW • PO Box 40128 • Olympia WA 98504-0128 • (206) 753-2281

October 2, 1992

Paul Curl, Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504

Re: Enoch Rowland d/b/a Kleenwell Biohazards & General
Ecology Consultants
Docket No. TG-920304

Dear Mr. Curl:

Enclosed for filing are the original and three copies of the Answer of Commission Staff to Kleenwell's Petition for Administrative Review in the above-referenced matter.

Very truly yours,

STEVEN W. SMITH
Assistant Attorney General

SWS:rz
Enclosures
cc/enc: Parties of record

RECEIVED
RECORDS MANAGEMENT
92 OCT -2 AM 9:10
STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

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) ANSWER OF COMMISSION
BIOHAZARDS & GENERAL ECOLOGY) STAFF TO KLEENWELL'S
CONSULTANTS.) PETITION FOR
) ADMINISTRATIVE REVIEW
)

INTRODUCTION

The Commission staff answers respondent Enoch Rowland d/b/a Kleenwell Biohazard and General Ecology Consultants (Kleenwell) as set forth below. At the outset we would note that Kleenwell's exceptions are generally a restatement of the arguments Kleenwell made in its post-hearing brief, all of which staff responded to in detail in its post-hearing brief. For ease of reference, the lettering of the answers to specific exceptions corresponds to the lettering of the exceptions.

ANSWER TO SPECIFIC EXCEPTIONS

A. Kleenwell takes exception to that portion of the memorandum decision which states as follows:

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.

Support for this finding is found at pages 57 and 84 of the transcript:

Q So it would be fair to say your customers were indifferent as to whether their medical waste was disposed out of state or within the state of Washington?

A [By Mr. Rowland]. That's true. (Tr. 57). . .

Q Have you ever had the occasion when one of your accounts did designate a point where they wanted the product disposed of?

A [By Mr. Rowland]. I don't remember if there's anyone. (Tr. 84)

There is no support whatsoever in the record for Kleenwell's assertion that "doctors and dentists do insist that the disposal site be outside the State of Washington. . . ." Petition for Administrative Review at p. 5.

B. Kleenwell takes exception to the statement in the proposed order that Kleenwell may not lawfully operate in this state without a certificate and that Kleenwell should be ordered to cease and desist from such operations. Kleenwell makes no reference to any rule, statute or case to support this exception as required by WAC 480-09-780(4).

C. Kleenwell takes exception to that portion of the memorandum decision that states as follows:

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.

Kleenwell makes no citation to the record to support this exception. Moreover, Kleenwell continues to focus on its intention at the time of the shipment. Kleenwell's intentions, while of interest, are of no legal significance because the fixed and persisting intent of the shipper is determinative. Baltimore &

Southwestern R.R. Co. v. Settle, 260 U.S. 166 (1922); Texas v. United States, 866 F.2d 1546 (5th Cir. 1989). As noted above, not one customer requested disposal in California.

D. Kleenwell takes exception to that part of the memorandum decision which states that this case is factually different from the case of Medigen of Kentucky and Medigen of Pennsylvania, Inc. v. Public Service Commission of West Virginia, 787 F. Supp. 602 (S.D. W. Va. 1992).

The Administrative Law Judge, in her proposed order, accurately noted that Medigen did not involve an intrastate movement prior to the shipment out of state, while Kleenwell's operation involves an in-state movement to Des Moines prior to shipment to California. Tr. 31-32, 33. Thus, factually the Medigen case is distinguishable from Kleenwell's operation.¹

Med

E., F. and G. In these three exceptions, Kleenwell essentially argues that the application of RCW 81.77.040 to it is a direct, rather than incidental, burden on interstate commerce and that the state does not have a significant local interest in the collection of waste that is advanced by the certification requirement of chapter 81.77 RCW. These contentions have been thoroughly addressed in the proceedings below and we refer the Commission to our post-hearing brief at pages 10 to 34 in answer to these exceptions.

¹ As we noted in our post-hearing brief, the staff's position is that the Commission has jurisdiction over Kleenwell's operation even if Kleenwell did not carry the waste to an in-state warehouse prior to hauling out of state.

H. There is no argument made nor reference to any statute, rule or case to support this exception as required by WAC 480-09-780(4). Consequently, the staff has no response.

I. This exception simply concludes baldly that it is "plainly at odds with countless federal cases cited herein" for the ALJ to state that even if Kleenwell's operation did not involve a prior intrastate movement the Commission would still have jurisdiction over Kleenwell's operations within Washington. In answer to this exception, we again refer the Commission to pages 10 to 34 of our post-hearing brief.

J. Kleenwell takes exception to the finding that medical waste in the waste stream poses a significant public health risk on the ground that neither Mr. Rowland or Mr. Turnberg was qualified to offer medical testimony.

Mr. Rowland stated that he had a background in the subject matter of infectious waste issues and agreed that there are health risks involved in exposure to infectious waste and that such exposure should be controlled. Tr. 63.

Wayne Turnberg is an Environmental Planner in the Solid Waste Section of the Department of Ecology. A major component of his work involves medical waste issues. Tr. 121. Mr. Turnberg began working with medical waste in 1987 with the Seattle-King County Health Department as a project manager to conduct a risk evaluation of infectious waste in King County. Based on that study the King County Board of Health adopted infectious waste regulations in the fall of 1988. Tr. 121-22.

In 1988 the legislature directed the Department of Ecology to study infectious waste on a statewide level. The study was conducted in 1988 and 1989 and was presented to the legislature together with specific recommendations. Tr. 122. Mr. Turnberg managed that project and was the primary author of the report. Tr. 123-24.

Mr. Turnberg also served as a panel member and advisor to the United States Congress Office of Technology Assessment for its report to Congress on infectious waste as well as an advisor and panel member to the Council of State Governments for its report to the state on infectious waste. Tr. 123. Mr. Turnberg's qualifications to testify on the potential health risks of exposure to infectious waste were well established at the hearing. His testimony is uncontested and is more than ample to support the challenged finding.

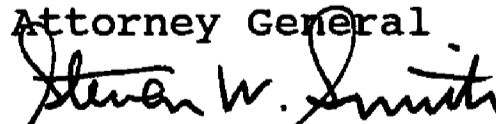
K., L. and M. Kleenwell's exceptions to conclusions 2, 3 and 4 are not supported by reference to any statute, rule or case as required by WAC 480-09-780(4).

CONCLUSION

For the foregoing reasons, the Commission staff requests that the Commission affirm the proposed order of the Administrative Law Judge.

DATED this 2nd day of October, 1992.

KENNETH O. EIKENBERRY
Attorney General



STEVEN W. SMITH
Assistant Attorney General

CERTIFICATE

I certify that on this day I mailed a true and correct copy of the foregoing document to the parties of record listed below via U.S. mail, postage prepaid:

James Sells
Attorney at Law
510 Washington Avenue
Bremerton, WA 98310


Boyd Hartman
Attorney at Law
11000 Main
Bellevue, WA 98004

David W. Wiley
Attorney at Law
1700 Bellevue Place
10500 NE 8th Street
Bellevue, WA 98004

Cindy Horenstein
Attorney at Law
900 WA Street
Suite 900
Vancouver, WA 98660

Richard Finnigan
Attorney at Law
1201 Pacific Avenue
Suite 1900
Tacoma, WA 98402

James T. Johnson
Attorney at Law
Two Union Square, Suite 300
601 Union Street
Seattle, WA 98101-2324



STEVEN W. SMITH

Dated: October 2, 1992.