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October 7, 1992

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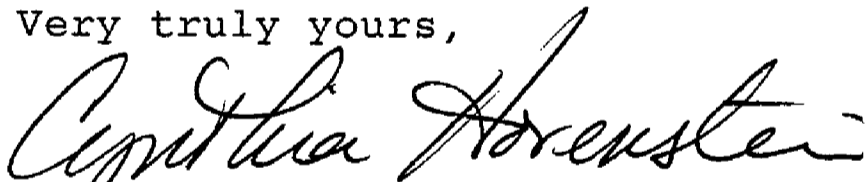
Paul Curl, Secretary
Washington Utilities and
Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250

Re: In the Matter of Determining the Proper Carrier
Classification of: Enoch Rowland, dba Kleenwell Biohazard
and General Ecology Consultants
Docket No. TG-920304
Our File No. 144-3

Dear Mr. Curl:

Enclosed please find an original and three copies of a Response to
Petition for Administrative Review for filing on behalf of
Intervenors Clark County Disposal, Inc. and Buchmann Sanitary
Service, Inc.

Very truly yours,


CYNTHIA A. HORENSTEIN

ss

Enclosures

cc w/enclosures:

WUTC Regulatory Affairs Office
Steven W. Smith, Esq., Asst. Attorney General
James K. Sells, Esq.
Richard Finnigan, Esq.
James T. Johnson, Esq.
David W. Wiley, Esq.
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WASHINGTON
UTILITIES AND
TRANSPORTATION
COMMISSION

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2 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

3 In the Matter of Determining the)
4 Proper Carrier Classification of:) Docket No. TG-920304
5 ENOCH ROWLAND, dba KLEENWELL)
6 BIOHAZARD AND GENERAL ECOLOGY) RESPONSE TO PETITION FOR
7 CONSULTANTS.) ADMINISTRATIVE REVIEW
8

9 COMES NOW, CLARK COUNTY DISPOSAL, INC. ("CCDI") and BUCHMANN
10 SANITARY SERVICE, INC. ("Buchmann," or collectively referred to with
11 CCDI as "Intervenors"), by and through their attorney, Cynthia A.
12 Horenstein of Horenstein & Duggan, P.S., and respectfully reply to
13 certain exceptions to the Findings and Fact, Conclusions of Law, and
14 Initial Order set forth by Respondent ENOCH ROWLAND, dba KLEENWELL
15 BIOHAZARD AND GENERAL ECOLOGY CONSULTANTS ("Kleenwell" or
16 "Respondent"), as follows:

17 Exception A: Respondent asserts that "the testimony . . .
18 makes it clear that doctors and dentists do insist that the disposal
19 site be outside the state of Washington." However, Respondent cites
20 no testimony in evidence to support this conclusion. Rather, as is
21 cited at page 3 in the memorandum portion of the Initial Order, the
22 testimony in evidence is that "[t]he doctors and dentists who
23 generate the waste have no interest in where the ultimate disposal
24 site is located and do not care whether the waste is shipped out of
25 state for disposal or not." Tr. 57 and 84.

26 Exception B: Respondent claims that the Washington Utilities
27 and Transportation Commission ("Commission") may not regulate
28 Respondent's interstate operations. However, the Initial Order is
29 not proposing to regulate "the interstate operations performed by
30 Kleenwell." Rather, the Initial Order properly notes that the
31 "shipper's fixed and persisting intent at the time of shipment is
32 determinative" of whether the traffic is interstate or intrastate.

1 Because Respondent has not pointed to any evidence that its shippers
2 have any intent regarding the ultimate disposal site of the
3 infectious waste, the local carriage from the shippers' offices to
4 Respondent's warehouse in Des Moines is intrastate. The Commission
5 has rightfully asserted jurisdiction over Respondent's
6 transportation.

7 Exception C: Respondent accurately notes that whether commerce
8 is intrastate or interstate is determined by the shipper's fixed and
9 persistent intent. However, Respondent attempts to change
10 application of this test by substituting its intent for that of its
11 shippers' by claiming that it "makes the pickups at its customers'
12 offices or clinics . . . with the full intention that the medical
13 waste . . . will be transported to California for disposal."

14 Respondent claims that this is also the physicians' and
15 dentists' intent. Yet, Respondent points to no evidence as to its
16 customers' (i.e., the shippers') intent.

17 Respondent goes on to state that "the administrative law judge
18 . . . failed to recognize that the intent with regard to each of
19 these shipments is always that it move from a point in Washington to
20 a point in California." Again, Respondent offers no evidence to
21 support this conclusion.

22 Exception D: This exception goes to Respondent's failure to
23 recognize that its collection of medical waste is an intrastate
24 movement, properly regulated by the Commission.

25 Exceptions E and F: Substantial evidence was provided in this
26 matter to support the finding that Chapter 81.77 RCW serves a
27 legitimate public interest while not impermissibly burdening
28 interstate commerce. The testimony of Wayne Turnberg clearly sets
29 forth the need for state control of infectious waste through health
30 and safety regulations. Professor Dempsey's testimony highlighted
31 that state regulation of commodities with negative value ensures
32 universal service to even rural generators at a reasonable rate.

1 The effect of no regulation in this area would certainly pose a
2 threat to public health and safety.

3 Respondent relies on Buck v. Kuykendall, 267 U.S. 307 (1925),
4 and George W. Bush and Sons v. Molloy, 267 U.S. 317 (1925), for the
5 holding that a state may not require a certificate of convenience
6 and necessity from a carrier "engaged exclusively in interstate
7 commerce" before it can operate within the state's borders.
8 Respondent goes on to cite Port of Seattle v. Washington Utilities
9 and Transportation Commission, 597 P.2d 383 (Wash. 1979), for the
10 proposition that the state's certification requirements for carriers
11 cannot be applied to a common carrier "engaged in exclusively
12 interstate commerce." However, Respondent fails to recognize that
13 its transportation is not purely interstate. Even if the Commission
14 does not view the Respondent's transportation as bifurcated between
15 collection for disposal and the long haul (i.e., deems that
16 Respondent's carriage is continuous), Intervenor's defer to their
17 post-hearing brief wherein there is detailed discussion supporting
18 the position that Chapter 81.77 RCW serves a legitimate purpose
19 which imposes only an incidental burden on interstate commerce.

20 Exception G: Respondent claims that the tests set forth in
21 Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), are not applicable
22 "to this situation where we are dealing with a direct rather than an
23 incidental burden on interstate commerce. The requirement of
24 public convenience and necessity showing has always been treated as
25 a direct, not an incidental, burden." However, Respondent does not
26 cite any authority to support its proposition.

27 Exception H: Respondent provides no argument in support of its
28 exception to the conclusion portion of the Initial Order and thus
29 Intervenor's rest on their post-hearing brief.

30 Exception I: As Respondent refers to the "countless federal
31 cases cited herein" in support of its exception, Intervenor's rely on
32

1 their argument set forth in their post-hearing brief in response to
2 this exception.

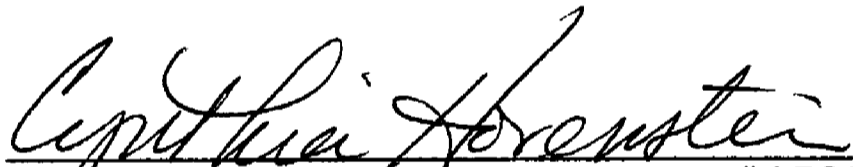
3 Exception J: Mr. Turnberg was established as an expert to
4 testify on the potential health risks of exposure to infectious
5 waste at the hearing. Tr. 121-23. As well, Intervenors reiterated
6 several of these qualifications in their post-hearing brief.
7 Mr. Turnberg was qualified to offer medical testimony. Note that
8 this testimony was uncontroverted.

9 Exceptions K, L and M: These exceptions are merely
10 reiterations of prior exceptions. Intervenors rest on prior
11 arguments set forth herein as well as their post-hearing brief.

12
13 **CONCLUSION**

14 For the reasons set forth herein, Intervenors respectfully
15 request the Commission approve the Initial Order as proposed.

16 DATED this 7th day of October, 1992.

17
18 
19 CYNTHIA A. HORENSTEIN, WSBA #17830
20 Of Attorneys for Clark County Disposal,
21 Inc. and Buchmann Sanitary Service, Inc.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Response to Petition for Administrative Review of Clark County Disposal, Inc. and Buchmann Sanitary Service, Inc. on October 7, 1992, by mailing a copy contained in a sealed envelope, with postage prepaid, addressed to the following at their regular office addresses, to wit:

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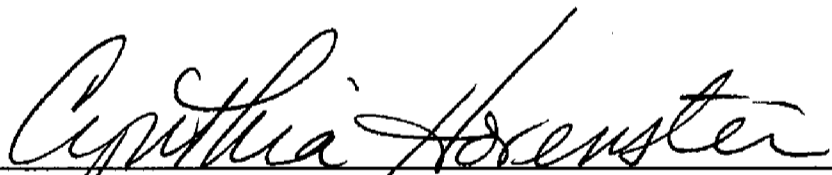
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Dated: October 7, 1992.


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Disposal, Inc. and Buchmann Sanitary
Service, Inc., Intervening Parties