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October 12, 1992

The Office of the Secretary
Washington Utilities & Transportation
Commission
1300 S. Evergreen Park Dr. S.W.
P. O. Box 9022
Olympia, Washington 98504-9022

RE: TG-920304 Enoch Rowland d/b/a Kleenwell Biohazard and General Ecology Consultants

Dear Mr. Curl:

Enclosed please find an original and three copies of the Answer of Intervenor AEMC to the Petition for Administrative Review for filing in the above-captioned matter.

Please contact the undersigned if you have any questions.

Yours truly,

WINDUS, THOMAS, CALMES & WILEY

David W. Wiley

DWW/khs
Enclosures

cc: James T. Johnson
Enoch Rowland
Cindy Horenstein
Steve Smith
Boyd Hartman
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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re the Matter of Determination the Proper Classification of ENOCH ROWLAND d/b/a KLEENWELL BIOHAZARD AND GENERAL ECOLOGY CONSULTANTS	)	TG-920304 ANSWER OF INTERVENOR AEMC TO PETITION FOR ADMINISTRATIVE REVIEW

COMES NOW Intervenor American Environmental Management Corporation, G-231, hereinafter ("Intervenor or "AEMC"), and for answer to the Petition for Administrative Review filed against the Initial Order of Administrative Law Judge Lisa A. Anderl under WAC 480-09-780, files the following:

CHARACTERIZATION OF PETITION FOR ADMINISTRATIVE REVIEW

I. Kleenwell's Argument in Introduction

The Petition for Administrative Review of Respondent Enoch Rowland d/b/a Kleenwell Biohazard and General Ecology Consultants ("Kleenwell" or "Respondent") is the only Petition for Administrative Review to challenge the Initial Order's ultimate conclusion that Respondent is operating in violation of RCW 81.77.040 and which requires Kleenwell to cease and desist from such practices prior to obtaining a solid waste certificate from this Commission.

Kleenwell's Petition through page 5 purports to recount the facts surrounding this proceeding and concludes with a reference to Medigen of Kentucky, Inc. v. Public Service Commission of West

Virginia, 787 F.Supp. 602 (S.D. W. Va. 1992), claiming that *Medigen* "has virtually identical facts" and should control.

Nowhere in Kleenwell's Petition does the Respondent even attempt to respond to the Intervenor's and staff's discussion in brief that draw factual distinctions with the *Medigen* case and the case on review. (See page 10-12 and footnote 3 of Intervenor's post-hearing brief at 10-11). Such glaring omission in analysis of the facts typifies Respondent's casual approach to the facts throughout these proceedings. Its apparent legal position is that whenever a movement of material crosses state lines, magically all preceding shipments of material consolidated into an ultimate remote-in-time movement out of state usurp state jurisdiction of those previous movements, even if that jurisdiction is exercised pursuant to broad state police power actions. Curiously, this arbitrary, retroactive state jurisdiction preemption power would be exercised even where the generator-shipper of the material had no destination intent. This position curiously is expressly contrary to the character of commerce line of cases Respondent cited in opening statement and on brief in support of its now halting position in this proceeding.

II. Response to Specific Exceptions of Respondent.

Respondent at pp. 5-13 sets forth supposedly 14 separate exceptions to the Initial Order. As will be discussed, some are without citation to the finding or conclusion allegedly objected to and are therefore deficient under WAC 480-09-780(4).

1. Answer to Exception A, Page 5 of Petition. Here, Kleenwell excepts to the memorandum portion of the Order, but under

WAC 480-09-780(4), fails to provide a statement as to how the exception affects the findings of fact, the conclusions of law or the ultimate decision. This procedurally defective exception attempts to impeach the undeniable evidence of record at Tr. 57 and 84 that Kleenwell's customers have no intent as to where their material is disposed. Kleenwell never supports its premise that generators "do insist that the disposal site be outside the State of Washington if that is what is necessary to make the Kleenwell operation legal." (Petition at 5). Without more than bare assertion by Respondent, AEMC believes this argument needs no further response and should be summarily denied.

2. Answer to Exception B, Pages 5 and 6 of Petition. Again, Kleenwell fails to adhere to the provisions of WAC 480-09-780(4) on exceptions to memoranda portions of orders, and inexplicably objects to a finding that is focal to conclusion of law number 2 in the Initial Order addressed in its exception "K." This ultimate issue should be appropriately addressed in answer to exception K.

3. Answer to Exception C, Pages 6 and 7 of Petition. As discussed in answer to exception A above, this argument retroactively seeks to invest generators with "shipper intent" that the evidence reveals they clearly do not have. The Respondent may seek to change the evidence of record to better fit its argument, but such transparent repair effort fails. While Respondent might seek to superimpose interstate commerce intent on its customers, under the case law Respondent itself relies upon, it is apparent that it is the shipper's fixed and persisting intent at the tender for shipment which ultimately characterizes commerce. Again, the

flaw in Respondent's argument preliminarily here is that it never justifies the contradictions between generator and customer, one who assiduously seeks to develop a shipping intent and the latter who so lacks it that Respondent's argument is without merit.

4. Answer to Exception D, Petition Page 7. Once again, Respondent takes exception to an unspecified portion of the memorandum section of the Initial Order without reference to the Order's conclusion and here without even a reference to the section of the Order where it is discussed. AEMC would here expressly incorporate by reference its discussion in post-hearing brief at pp. 10-11 and particularly footnotes 3 and 4, and would finally simply respond that Kleenwell has never overcome the correct conclusion that the act of collecting and transporting waste is intrastate commerce[1] and that the out-of-state movement is wholly severable, remote-in-time and lacking any destination intent on the tendered waste material to draw any interstate characterization of commerce. *Medigen*, as argued by AEMC on brief, is factually and legally distinguishable, and Kleenwell has attempted no defense of those obvious distinctions.

5. Answer to Exceptions E, F and G of Petition pp. 7-11. These exceptions are combined for response as Kleenwell essentially has in its argument on Petition. These exceptions focus on the alleged burden on interstate commerce posed by the legislature's certification requirement at RCW 81.77.040. This, of course, is a

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[1] See also for analogous treatment under the motor carrier rules, WAC 480-12-320, and the discussion in Order M.V. No. 141041, In re Silver Eagle Company, App. E-19774 (Mar. 1990) at 4.

critical premise to Kleenwell's position herein and is symptomatic of the Respondent's total inability to successfully apply the facts adduced on this record to the state statute and fit within the unconstitutional burden argument it strives for.

This issue was also addressed extensively by AEMC at pages 6 and 7 of its post-hearing brief incorporated herein by reference. As the Initial Order correctly emphasized, the burdens imposed by RCW 81.77.040 are equally imposed on any party wishing to collect and transport waste within Washington in conduct qualifying as that of "a solid waste collection company." The jumbled analysis of Respondent on these exceptions once again involves a complete ellipsis of rationale as to how the regulatory requirements of RCW 81.77.040, as applied to Kleenwell's operations on this record, constitute an impermissible burden on interstate commerce.

In alluding to the Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), precedent, the Respondent again fails to explain how the Initial Order's correct conclusion that any burden imposed by RCW 81.77.040 is an incidental or indirect burden on interstate commerce clashes with the unrefuted finding and testimony that Kleenwell's in-state collection and transportation movements are isolated and separately divisible moves in intrastate commerce completely disassociated from any interstate commerce character. No matter how much Kleenwell would like to distract the legal analysis by alluding to character of commerce case law which establish impermissible burdens on interstate commerce, there is absolutely no nexus between those precedents, Kleenwell's established operations, and the certification requirements of RCW

81.77.040 which all "solid waste collection companies" that operate in this state are subject to.

6. Answer to Exception H, page 11 of Petition. AEMC and other intervenors provided careful analysis in their post-hearing briefs,[2] under RCW 81.77.010(3) and RCW 81.77.010(7), as to why Kleenwell is operating as a "solid waste collection company" in violation of law, and did so with specific references to the transcript. In this exception, literally all Kleenwell does is "take exception" to the Initial Order's concurrence on that point. Without any support for this wholly superficial exception then, it should be summarily denied.

7. Response to Exception I, page 11 of Petition. This exception in the context of this proceeding is truly a "distinction without a difference." The Initial Order's statement here objected to by Kleenwell is a conditional statement acknowledging a hypothetical not presented by the evidence which conclusively establishes under law the preceding intrastate jurisdiction over the collection and local transportation activity. While Intervenor Ryder Distribution Resources, Inc. ("Ryder"), for some unspecified purpose, seems obsessed with the ramifications of this statement in the Initial Order in its own Petition for Administrative Review, the context in which it is raised by the administrative law judge here is one of dicta, which neither the Commission or the parties in this record need here contest. Moreover, the Respondent has not even properly put this in issue in failing once again to support

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[2] See i.e. AEMC's Post-Hearing Brief at 4 and 5.

its premise except for the catch-all of "countless federal cases cited herein." Based on that type of conclusory premise addressed to an alternate evidentiary point not raised by these facts, AEMC sees no need to advance a response.

8. Answer to Exception J, page 11 of Petition. This is the first exception to a specific finding or conclusion by Kleenwell. Here, Kleenwell incredibly seeks to impeach its own witness' testimony and that of Wayne Turnberg of the Washington Department of Ecology which led to finding of fact number 4 that medical waste in the waste stream poses significant public health risks. (See Tr. 63, 125-129). In now claiming inadequate foundation for the testimony, Kleenwell clearly has tried to bootstrap itself into the realm of the plaintiff's expert testimony in *Medigen* and somehow overlooks the fact that the uncontroverted testimony in this record conclusively establishes the potential risk of harm posed by medical waste in the solid waste stream. Indeed, Mr. Rowland even endorsed the Commission's safety regulations for biomedical waste transporters as tending "to promote public health and the environment." (Tr. 73). Kleenwell's attempt on Petition to remake the record and impeach its own testimony in ringing endorsement of finding of fact number 4 should be rejected.

9. Response to Exception K, Page 12 of Petition. Again, all Respondent provides on exception here, (presumably the heart of its appeal), is a conclusory restatement of an exception and an apparent focus on its position that solid waste "is ultimately transported out of state for disposal." The construction of this exception without reference to case law or facts which suggest the

conclusion is wrong, leaves Intervenor guessing at what point Kleenwell here is making. Suffice it to say that this critical conclusion in the Initial Order is not specifically critiqued or analyzed by Kleenwell, leaving this Intervenor the generalized defense of the conclusion that the evidence adduced and the previous analysis on post-hearing brief of the case law and statutes pertinent to these facts lead to no other conclusion. Kleenwell has provided no basis to overturn conclusion of law number 2, and the Commission should strongly endorse same.

10. Response to Exception L, Page 12 of Petition. Here Kleenwell objects to conclusion of law number 3 at page 10 of the Initial Order which cites the seminal, Baltimore & Southwest P.D. Co. v. Settle case, 260 U.S. 166 (1922), for the character of commerce test which Kleenwell itself has cited with approval. Now Kleenwell argues (apparently) that you cannot use *Settle* to find a persisting intent to characterize commerce, but instead may have the carrier substitute its supposed intent for the shipper. This novel rationale for a significant variation on the character of commerce theme is never explained by Kleenwell. Again, both the facts and law developed in this proceeding seem to converge on the Respondent whose only response then is to unilaterally modify those facts without explanation. Exception L misstates the law in attempt to apply the established fact that Kleenwell's generators/shippers have no intent that waste material flow into

interstate commerce.[3] It should similarly be rejected out of hand.

11. Response to Exceptions M and N, Page 12 of Petition. In Kleenwell's final exceptions to conclusion of law number 4 and the concluding order portion of the Initial Order (which finds that RCW 81.77 as applied to the operations of Kleenwell is constitutional and orders that Kleenwell cease and desist from operations without requisite authority), again Kleenwell does not provide *any* argument supporting why these conclusions are erroneous. Apparently we are to refer to earlier arguments by the Respondent to ascertain that explanation. Even if that form of exception qualified procedurally under WAC 480-70-780(4), there previously has been no successful argument offered to refute conclusion of law number 4 or the cease and desist order. Relying specifically on its previous discussion in post-hearing brief of pp. 5-7, AEMC would merely state that RCW 81.77 as applied to Kleenwell's operations here is fully constitutional, and that it must be ordered to cease and desist pending a certificate to operate, under RCW 81.77.040 and WAC 480-70-180.

CONCLUSION

Ever since the original certificate application under GA-907 of Kleenwell Biohazard was denied, this Respondent has conducted operations in transparent circumvention and contravention of law.

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[3] Respondent here seems to contradict itself. At page 5 of its Petition, it previously argued "dentists and doctors do insist that the disposal site be outside the state and that is what is necessary to make the Kleenwell operation legal." Again, Kleenwell can surely be accused of wanting it both ways on shipper intent.

Its belated attempt to justify those actions by the "square peg/ round hold" bootstrapping of the United States District Court of the Southern District of West Virginia *Medigen* decision (now on appeal), based on a differing statutory scheme and vastly different facts, cannot obscure the obvious. The Respondent is "a solid waste collection company" conducting operations in intrastate commerce without certificate authority. Its operations detrimentally impact universal service by existing biomedical waste transporters as aptly demonstrated in this proceeding, and those operations directly thwart the jurisdiction of this Commission and the Washington State Legislature. Intervenor AEMC therefore urges that the Petition for Administrative Review of Enoch Rowland d/b/a Kleenwell Biohazard and General Ecology Consultants be denied, and the Initial Order in TG-920304 be fully affirmed by the Commission.

DATED this 12 day of October, 1992.

WINDUS, THOMAS, CALMES & WILEY

By: David W. Wiley

David W. Wiley
Of Attorneys for Intervenor
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Answer to Petition for Administrative Review of the Initial Order by mailing, first class, postage prepaid to the

following parties of record:

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DATED at Bellevue, Washington this 12 day of October, 1992.

David W. Wiley
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October 13, 1992

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RE: Classification of Enoch Roland d/b/a Kleenwell Biohazard and General Ecology Consultants -- Docket No. TG-920304 -- Response of Sureway Medical Services, Inc. to Petition for Administrative Review

Dear Mr. Curl:

Enclosed you will find the original and three copies of the Response of Sureway Medical Services, Inc. in the above-referenced proceeding. A copy of the Response has been served on all parties of record.

Sincerely,

RICHARD A. FINNIGAN

RAF:KMN
7921.422
Enclosure
cc Dick Ramsey
Stan Robinson
Steve Banchero
Parties of Record

E\0027KMN.RAF