SERVICE DATE

JAN 25 1993

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Determining the Proper Carrier Classification of: ENOCH ROWLAND, d/b/a KLEENWELL BIOHAZARD AND GENERAL ECOLOGY CONSULTANTS	)	DOCKET NO. TG-920304 COMMISSION DECISION AND ORDER DENYING ADMINISTRATIVE REVIEW; AFFIRMING INITIAL ORDER; DIRECTING COMPANY TO CEASE AND DESIST

NATURE OF PROCEEDING: This is a classification proceeding pursuant to RCW 81.04.110 and 81.04.510. Its purpose is to determine whether the respondent is operating as a solid waste collection company without first having obtained a certificate of public convenience and necessity from the Commission authorizing such operations, and whether the carrier is subject to Commission regulation under Chapter 81.77 RCW or is exempt from state regulation because it is engaged in interstate commerce.

INITIAL ORDER: An initial order by Lisa A. Anderl, Administrative Law Judge, would conclude 1) that Kleenwell is operating as a solid waste collection company within the state as defined in RCW 81.77.010 and is required by RCW 81.77.040 to have a certificate of public convenience and necessity from the Commission in order to conduct its operations; 2) that Kleenwell engages in intrastate collection and transportation; and 3) that the Commission can require Kleenwell to obtain a certificate of public convenience and necessity before engaging in operations without violating the federal Constitution or laws. The initial order would direct Kleenwell to cease and desist its operations until it obtains a certificate from the Commission.

ADMINISTRATIVE REVIEW: The respondent requests administrative review. It contends that it is engaging in interstate transportation, and that its operations are not subject to the certificate requirements of RCW 81.77.040 because state regulation of its operations violates the Commerce Clause of the U.S. Constitution.

COMMISSION: The Commission denies the petition and affirms the initial order. The initial order properly characterizes and evaluates the evidence. Kleenwell's operations are subject to Commission regulation under Chapter 81.77 RCW. Its activities constitute the common carrier activities of a solid waste collection company, and it has failed to secure the required certificate for lawful operation and should cease and desist from engaging in solid waste collection. Kleenwell is engaging in purely intrastate activity in collecting waste and in the transportation for collection. The collection of solid waste

is a local function of singularly local concern. If subjecting Kleenwell's operations to regulation under Chapter 81.77 RCW in any way affects interstate commerce, the effect is indirect and minimal, and is wholly incidental to the operation of the statute in protecting legitimate state health and safety interests.

[1]* The traditional test for determining whether motor freight transportation of valuable commodities between two points in the same state is simply intrastate traffic or is a leg in an interstate movement is the shippers' fixed and persisting intent at the time of shipment.

[2] The movement of solid waste from in-state generators' premises to an in-state storage facility, where the solid waste collection company accumulates the waste for later shipment out of state, is intrastate activity subject to Commission regulation under Chapter 81.77 RCW. RCW 81.77.030; 81.77.100.

[3] The collection of solid waste is a local function of singularly local concern. RCW 81.77.100.

[4] The Commission's jurisdiction under Chapter 81.77 RCW is primarily the regulation of the local service of collecting solid waste for disposal; disposal is incidental to the transportation for collection. RCW 81.77.010; 81.77.030; 81.77.100.

[5] The purpose of Chapter 81.77 RCW is to protect public health and safety and to ensure that solid waste collection services are provided to all areas of the state where incorporated cities have not acted to regulate collection. RCW 81.77.100.

[6] The provisions of Chapter 81.77 RCW, including the requirement of a certificate of public convenience and necessity, can constitutionally be applied to the collection of solid waste in this state for disposal out of state. RCW 81.77.040; 81.77.100.

APPEARANCES: Steven W. Smith, assistant attorney general, Olympia, represents the Commission. James T. Johnson, attorney, Seattle, represents the respondent, Enoch Rowland d/b/a Kleenwell Biohazard & General Ecology Consultants. Boyd Hartman, attorney, Bellevue, represents intervenor Ryder Distribution Resources, Inc. James Sells, attorney, Bremerton, represents intervenor Washington Waste Management Association. David W.

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* Headnotes are provided as a service to the readers and do not constitute an official statement of the Commission. That statement is made in the order itself.

Wiley, attorney, Bellevue, represents intervenor American Environmental Management Corporation. Richard A. Finnigan, attorney, Tacoma, represents intervenor Rabanco Companies. Cynthia A. Horenstein, attorney, Vancouver, represents intervenors Clark County Disposal, Inc. and Buchmann Sanitary Service, Inc.

MEMORANDUM

This is a classification proceeding, initiated by the Commission on its own motion pursuant to RCW 81.80.110 and 81.04.510, to determine whether the respondent, Enoch Rowland d/b/a Kleenwell Biohazard and General Ecology Consultants ("Kleenwell")[1], is operating as a solid waste collection company without first having obtained a certificate of public convenience and necessity from this Commission authorizing such operations; and, if so, whether Kleenwell's operations are subject to regulation under Chapter 81.77 RCW or are exempt from regulation by operation of federal Constitution and law.

An initial order would conclude that Kleenwell is operating as a solid waste collection company within the state as defined in RCW 81.77.010, and is required by RCW 81.77.040 to have a certificate of public convenience and necessity from the Commission in order to conduct its operations. It would conclude that Kleenwell engages in intrastate collection and transportation. It would conclude that the Commission can require Kleenwell to obtain a certificate of public convenience and necessity before engaging in operations without violating the federal Constitution or laws. The initial order would direct Kleenwell to cease and desist its operations.

Kleenwell requests administrative review of the initial order. On review, it contends that it is engaging in interstate transportation, and that its operations are not subject to the certificate requirements of RCW 81.77.040 because state regulation of its operations violates the Commerce Clause of the U.S. Constitution.

Kleenwell raises fourteen exceptions to the initial order's findings and conclusions. One group relates to findings that there is a lack of shipper (waste generator) intent to have the waste transported in interstate commerce. A second group relates to findings and conclusions that the Commission may regulate the intrastate collection of medical waste even though the waste is subsequently transported out of state. The

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[1] The complaint was brought against Mr. Rowland as an individual operating under a d/b/a. Mr. Rowland incorporated the business in 1990, as Kleenwell Biohazard Waste and General Ecology Consultants, Incorporated.

remainder of the exceptions focus on Kleenwell's primary argument that the Commission's regulation of Kleenwell's activities would establish an impermissible burden on interstate commerce.

Kleenwell relies heavily on Medigen of Kentucky, Inc., Medigen of Pennsylvania, Inc. v. Public Service Commission of West Virginia, 787 F.Supp. 590 (S.D.W.Va. 1991), and Medigen of Kentucky, Inc., Medigen of Pennsylvania, Inc. v. Public Service Commission of West Virginia, 787 F.Supp. 602 (S.D.W.Va. 1991) (collectively referred to as "Medigen"). West Virginia has a regulatory scheme that is similar to Washington's in requiring that transporters of medical waste obtain a certificate of convenience and necessity prior to engaging in the activity, and in granting service territories. In Medigen, the court held that West Virginia's requirement that motor carriers make a showing of convenience and necessity prior to engaging in the transportation of medical waste violates rights, under the Commerce Clause of the U.S. Constitution, of out-of-state corporations which engage solely in the interstate transportation of waste. Kleenwell claims that Medigen has virtually identical facts and should control the Commission's decision in this proceeding.

The Commission finds no merit in Kleenwell's contentions. The initial order properly finds that Kleenwell is operating as a solid waste collection company, and that it is engaging in intrastate operations which are subject to Commission regulation. It correctly distinguishes Medigen.[2] Its commerce clause analysis is consistent with the Commission's previous analysis: state regulation of the activity is not preempted; any burden on interstate commerce is at most incidental; the state statute advances legitimate local concerns; and the provisions of Chapter 81.77 RCW, including the requirement of a certificate of public convenience and necessity, can constitutionally be applied to the collection of solid waste in this state for disposal out of state.

The petition for review should be denied. The initial order directing Kleenwell to cease and desist its operations should be adopted by the Commission.

I. Factual Background

The respondent operates a medical waste collection and disposal business in the greater King County area. The business is a Washington corporation and its sole shareholders and employees are Mr. Rowland and his daughter, both of whom are residents of Washington. The company provides a medical waste

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[2] In any event, a federal district court decision in another jurisdiction is not binding upon the Commission.

collection and disposal service for doctors and dentists. Kleenwell does not have a certificate from the Commission to engage in waste collection operations.

Mr. Rowland and his daughter are also the only shareholders in another Washington corporation which provides a consulting and laboratory service and sells medical supplies. Kleenwell chooses the customers it will serve primarily based on the business considerations of the medical supply corporation; ninety percent of Kleenwell's customers are also customers of the medical supplies company. If a customer of the medical supplies company requests removal of medical waste, Kleenwell provides the removal service. The Kleenwell collection and disposal service does not make a profit; the cost of the service is subsidized by Mr. Rowland's medical supplies business.

Kleenwell collects medical waste from the waste generators weekly. It provides its customers with disposal containers and instructions on the proper handling of medical waste. It prices the service according to container size. Kleenwell has no tariffs filed with any regulatory body.

Kleenwell transports the waste to a warehouse in the Seattle area where the waste is held in cold storage for up to 90 days until Kleenwell accumulates enough to justify transporting it out of state for disposal. Kleenwell transports the waste to California for disposal by incineration. The doctors and dentists who generate the waste have no interest in where the ultimate disposal site is located and do not care whether or not the waste is shipped out of state for disposal. The decision to dispose of the waste out of state is Kleenwell's, and Kleenwell would refuse a generator's request for in-state disposal.

In 1990, Mr. Rowland applied for certificate authority to collect medical waste pursuant to RCW 81.77.040, under Application GA-907. The Commission denied that application, concluding that the applicant failed to demonstrate his fitness to receive common carrier authority. Among the findings upon which a conclusion of unfitness was based was that Mr. Rowland had knowingly violated state health department regulations in storing medical waste. See, Exhibit 13. Respondent did not appeal that decision, and has no application for authority pending.

While Application GA-907 was pending, Kleenwell operated under temporary authority from the Commission. At the hearing in the present proceeding, respondent conceded that his company's operations are no different now from that period, with the exception that the waste he now collects is ultimately transported out of the state for disposal; when Kleenwell operated under temporary authority, the waste it collected was transported to Ferndale, Washington, for disposal.

Kleenwell began hauling waste to California immediately after the Commission denied application GA-907. The only reason Kleenwell changed to the out-of-state disposal site was to attempt to avoid Commission regulation. The decision to dispose out-of-state was Kleenwell's alone. None of Kleenwell's customers objected to in-state disposal and none requested out-of-state disposal. It is twice to three times as expensive to dispose of medical waste at the California facility Kleenwell uses as it would be at Ferndale. There is nothing different in the handling and disposal of medical waste at the California facility that would justify, on business grounds, Kleenwell's change in disposal site.

II. APPLICABLE STATE LAW

Medical waste falls within the broader statutory definition of solid waste. RCW 81.77.010(9) and 70.95.030.

Chapter 70.95 RCW establishes a comprehensive state-wide program for solid waste handling to protect the public health and safety. It assigns primary responsibility for adequate solid waste handling to local government, reserving to the state those functions necessary to assure effective programs throughout the state.

Chapter 81.77 RCW assigns the Commission a role in the regulation of solid waste collection companies. RCW 81.77.030 directs the Commission to supervise and regulate every solid waste collection company in this state; RCW 81.77.020 exempts from Commission regulation operations under a contract of solid waste disposal with any incorporated city or town. With respect to foreign or interstate commerce, RCW 81.77.100 asserts the Commission's jurisdiction up to federal preemption.

RCW 81.77.100 states that the purpose of Commission regulation of solid waste collection companies is "to protect public health and safety and to ensure solid waste collection services are provided to all areas of the state."

RCW 81.77.020 provides that no one who is subject to chapter 81.77 RCW may operate as a solid waste collection company in this state without complying with the provisions of the chapter. RCW 81.77.040 requires the holding of a certificate of public convenience and necessity from the Commission prior to conducting operations, and specifies some of the factors upon which a Commission determination to issue a certificate must be based. RCW 81.77.040 also provides that when an applicant requests a certificate to operate in a territory already served by a certificate holder, the Commission may issue the requested certificate only if the existing solid waste collection company serving the territory will not provide service to the satisfaction of the Commission.

RCW 81.77.010(7) defines a "solid waste collection company" as follows:

> 'Solid waste collection company' means every person . . . owning, controlling, operating or managing vehicles used in the business of transporting solid waste for collection and/or disposal for compensation . . . over any public highway in this state whether as a 'common carrier' thereof or as a 'contract carrier' thereof. (emphasis added)

In implementing Chapter 81.77 RCW, the Commission has adopted a comprehensive set of rules on the collection and transportation of medical waste. See, WAC 480-70-500 et seq. These rules require any hauler handling biohazardous, infectious, or medical waste to follow certain procedures and to comply with training requirements, packaging and handling requirements, record-keeping, insurance, and other requirements.

III. COMMISSION ANALYSIS

A. Kleenwell is Operating as a Solid Waste Company in Violation of RCW 81.77.040

The initial order properly concludes that Kleenwell is a "solid waste collection company" as defined by RCW 81.77.010(7). Kleenwell owns and operates vehicles used in the business of transporting medical waste for collection and/or disposal for compensation over the public highways of this state.

In light of the factual and statutory background, without considering Kleenwell's Commerce Clause claim, it is clear that Kleenwell is operating as a solid waste collection company without complying with chapter 81.77 RCW.

B. Kleenwell is Engaging in Intrastate Operations

Kleenwell claims that it is exempt from Commission regulation because it is operating in interstate commerce when it transports waste from Washington to California for disposal. It asserts that the initial movement from the generator to the Seattle storage facility is also interstate commerce.

The initial order concluded that Kleenwell's initial movement of waste from the waste generator to a Seattle area storage facility is intrastate in nature and wholly subject to state regulation. The initial order's conclusion is based on the particular facts of this case, and applies tests used in determining the essential character of motor carrier transportation.

The Commission affirms the initial order's analysis, but also reaches the same conclusion based on considerations peculiar to solid waste, without regard to the particular facts or traditional motor freight rules on which the initial order relies.

[1] The initial order bases its conclusion that Kleenwell is engaging in intrastate commerce on two facts. First, Kleenwell does not transport waste directly from Washington to California, but hauls it to an in-state warehouse where it stores and accumulates the waste; and, second, the waste generators do not care where the waste is taken. The traditional test for determining whether motor freight transportation of valuable commodities between two points in the same state is simply intrastate traffic or is a leg in an interstate movement is the shippers' fixed and persisting intent at the time of shipment. Baltimore & Southwestern R.R. Co. v. Settle, 260 U.S. 166, 57 L.Ed. 189, 43 S.Ct. 28 (1922). Because the testimony establishes in this case that the waste generators do not care whether the waste goes out of the state or remains in the state, the essential character of the initial movement from the doctors' and dentists' offices to Kleenwell's in-state warehouse is intrastate rather than interstate. This character-of-commerce analysis is consistent with prior Commission decisions in motor freight carrier cases. See, Order M. V. No. 141041, In re Silver Eagle Company, App. No. E-19774 (March 1990); Order M. V. No. 137178, In re Tim's Transfer, Inc./Steven D. Simon, App. No. P-71108 (February 1988).

Kleenwell contends that the initial order's findings with regard to shippers' intent at the time of shipment are erroneous. We find no error. The waste generators in this case clearly are indifferent to whether the waste is disposed of in-state or out-of-state. Kleenwell seeks to invest its customers with its own intent. Kleenwell's intent is of no legal significance.

The Commission believes that the particular facts of this case require a conclusion that Kleenwell is engaging in intrastate transportation for two additional reasons. First, the alleged interstate commerce is neither real nor bona fide. Kleenwell's medical waste collection service is strictly local in nature. Kleenwell could choose to dispose of the waste within the state, and could dispose of it more cheaply in the state. Kleenwell has chosen to take the waste across the state line for only one reason -- to evade state regulation of the service.

[2] Secondly, if there is any interstate commerce at all, it does not begin until the waste has begun to move as an article of trade from one state to another. Although Kleenwell may anticipate that it will later haul the waste it gathers out of state, there is no commitment to commerce out of state until

the waste has been collected in sufficient quantities. The carrying of commodities to a collection point where an interstate journey is to commence is not part of the interstate journey. See, Burlington Northern v. Weyerhauser Co., 719 F.2d 304 (9th Cir. 1983); Sumitomo Forestry Co. Ltd. of Japan v. Thurston County, 504 F.2d 604, 608 (9th Cir. 1974), cert. den. 423 U.S. 831 (1976). Under the facts of this case, Kleenwell's in-state collection operations are an intrastate activity.

[3] A more fundamental reason for reaching the conclusion that Kleenwell is engaging in intrastate activity lies in considerations peculiar to solid waste, and does not depend on the particular facts of this case. Solid waste collection is a local service not affecting interstate commerce. The citizens of other states have no interest in the collection of waste in localities in Washington. The basic function of a solid waste collection company is the removal of unwanted waste. The principal concern of the "shipper" (waste generator) is not where the waste goes, but that it does go; there is no customer on the other end.[3] Unlike the transportation of freight having value, where the transportation is the essence of the transaction between the shipper and the hauler, the transportation of waste for disposal is incidental to the collection process, and irrelevant to the purposes of the "shippers." A collection company's election to follow the purely local function of collecting waste with an interstate movement of the collected waste does not make the collection process an interstate service.

[4] Chapter 81.77 RCW directs the Commission to regulate the "transportation for collection and/or disposal" of solid waste (emphasis added). It establishes criteria for entry into business in the territory of collection. The activity the statute references is local collection service; disposal is incidental to the transportation for collection. The chapter does not concern the adequacy of transportation facilities for conducting interstate commerce. The chapter does not authorize

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[3] Moreover, by the very nature of the service, the waste is commingled, precluding a shipper-by-shipper selection of specific disposal sites. Also, the state, through county comprehensive solid waste plans, has largely preempted any individual determination regarding disposal sites. See, chapter 70.95 RCW.

the Commission to regulate disposal sites.[4] Under Chapter 81.77 RCW, we are concerned with the adequacy and reliability of local solid waste collection service, a particularly local concern.

The Commission has consistently interpreted its jurisdiction under Chapter 81.77 RCW as primarily the regulation of the local service of collecting solid waste for disposal. In Cause No. TG-1859, All County Disposal Services, Inc. (August 1985), the Commission stated:

> . . . The activity here referenced is the transportation for collection; the disposal of the garbage and refuse thus collected may be at any point and the location of the disposal site is incidental to the transportation for collection. (Page 6)
>
> . . . Here, the state does not regulate the means of interstate commerce, but rather regulates the in-state aspects of the carrier's business which are central to the health, safety and welfare of the public. (Page 6)

The Commission made clear in All County Disposal and in Order M. V. G. No. 1451, In re Sure-Way Incineration, Inc., App. No. GA-868 (November 1990), that the disposal site of collected waste is irrelevant to its jurisdiction. In Sure-Way the Commission stated:

> It is not necessary to request authority from the Commission to transport the waste across state lines and in fact the Commission has no power to grant authority of that nature. . . (Page 7)

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[4] Moreover, the legislature's grant of authority to the Commission to regulate transportation for disposal after the collection process is completed is limited by Chapter 36.58 RCW. RCW 36.58.050 provides, in pertinent part:

> When a comprehensive solid waste plan, as provided in RCW 70.95.080, incorporates the use of transfer stations, such stations shall be considered part of the disposal site and as such, along with the transportation of solid wastes between disposal sites, shall be exempt from regulation by the Washington utilities and transportation commission as provided in chapter 81.77 RCW.

Other Commission decisions consistent with the above are: Cause No. TG-1911, Evergreen Waste Systems, Inc. (May 1986); Cause No. TG-2195, Clark County Disposal, Inc., d/b/a Vancouver Sanitary Service and Twin City Sanitary Service, et. al. vs. Environmental Waste Systems, Inc., et. al. (October 1989).

The Commission has never taken the position that the foreign portions of isolated longhaul movement of biomedical waste from a Washington warehouse to an out-of-state disposal facility is a movement over which the Commission exercises jurisdiction.

In short, 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. Kleenwell's medical waste collection service is an intrastate activity which is subject to Commission regulation without regard to the location of the ultimate disposal site. Kleenwell cannot convert a local activity into interstate commerce by the simple expediency of hauling the unwanted waste across state lines.

C. Commerce Clause Hypothetical

Kleenwell contends that the application of Chapter 81.77 RCW to its activities is in violation of the provision of the U.S. Constitution, Article I § 8, conferring on Congress the power to regulate interstate commerce. It argues that Chapter 81.77 RCW and in particular the requirement of a certificate of public convenience and necessity is per se invalid because it is an attempt to effect direct regulation of interstate commerce and because its purpose and effect is economic protection.

The initial order, supposing for purposes of analysis that Kleenwell's collection and transportation to a warehouse is interstate commerce, rejects Kleenwell's Commerce Clause arguments. The Commission believes that the initial order's Commerce Clause analysis is correct. Supposing Kleenwell's operations to be interstate commerce, the application of Chapter 81.77 RCW to Kleenwell's activities would not violate the Commerce Clause.

[6] The Commission has previously considered the constitutionality of the application of Chapter 81.77 RCW to solid waste collection companies which dispose of waste outside the state. In Cause No. TG-1859, All County Disposal Services, Inc. (August 1985), the Commission ruled that a Washington corporation that collected waste in this state and disposed of it in Oregon was subject to the provisions of Chapter 81.77. The Commission found that the impact of Commission regulation on interstate commerce was negligible "if it exists at all." In

Cause No. TG-1911, Evergreen Waste Systems, Inc., the Commission reached the same conclusion on substantially similar facts except that Evergreen was an Oregon corporation. In both cases, the Commission rejected the same commerce clause arguments that Kleenwell makes in this proceeding. The Commission believes that its analysis in those decisions was and continues to be correct.

a. General Principles

Article I § 8 of the United States Constitution grants to Congress the power to regulate commerce among the several states. Although by its terms the Commerce Clause is an authorization for congressional action, the U.S. Supreme Court has long 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); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 64 L.Ed.2d 702, 100 S.Ct. 2009 (1980).

Congress may enact laws which leave no room for state regulation. Preemption occurs when Congress expresses an unambiguous intent to preempt state regulation; when it implicitly preempts state regulation by the comprehensiveness of its own regulation of an area; when there is a square conflict with federal law; or when the state law is incompatible with federal objectives.[5] On the other hand, Congress may authorize the states to engage in regulation that the Commerce Clause would otherwise forbid.[6]

In the absence of 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); Lewis v. BT Investment Managers, Inc., supra at 447 U.S. 36; Labor & Indus. v. Overnite Transp.,

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[5] See, e.g., Jones v. Rath Packing Co., 430 U.. 519, 530-531, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633, 36 L.Ed.2d 547, 93 S.Ct. 1854 (1973).

[6] See, e.g., Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 769, 89 L.Ed.2d 1915, 65 S.Ct. 1515 (1945); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 91, 81 L.Ed.2d 71, 104 S.Ct. 2237 (1984).

67 Wn.App. 24, 31 (1992). See, South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177, 185, 82 L.Ed. 734, 58 S.Ct. 510 (1938); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 440, 54 L.Ed.2d 664, 98 S.Ct. 787 (1978).

The Supreme Court has consistently held that a state's power to regulate commerce is never greater than in matters traditionally of local concern. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350, 53 L.Ed.2d 383, 97 S.Ct. 2434 (1977); Kassel v. Consolidated Freightways Corp., supra at 450 U.S. 670. Regulations that touch upon health, safety, and consumer protection are those that the Court has been most reluctant to invalidate. Raymond Motor Transportation, Inc. v. Rice, supra, at 434 U.S. 443; Kassel v. Consolidated Freightways, supra, at 450 U.S. 670; Sproles v. Binford, 286 U.S. 374, 390, 76 L.Ed. 1167, 52 S.Ct. 581 (1932); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963); Bradley v. Public Utilities Commission of Ohio, 289 U.S. 92, 77 L.Ed. 1053, 53 S.Ct. 577 (1932); Gardner v. Michigan, 199 U.S. 325 (1905). Indeed, "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." Raymond Motor Transportation, supra, at 434 U.S. 449 (Blackmun, J., concurring).

The Supreme Court has adopted a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce in favor of local economic interests, or when its effect is to favor in-state economic interests over out-of-state interests, the Court has generally applied a per se rule of invalidity, striking down the statute or regulation without further inquiry.[7]

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[7] See, e.g., Brown-Forman Distillers v. N.Y. Liquor Auth., 476 U.S. 573, 90 L. Ed.2d 552, 106 S.Ct. 2080 (1986)(New York statute directly regulated interstate commerce because it effectively regulated the price at which liquor was sold in other states); Toomer v. Witsell, 334 U.S. 385, 92 L.Ed. 1460, 68 S.Ct. 1156 (1947)(South Carolina statute required that shrimp boats licensed to fish in South Carolina's waters must unload and pack their catch in that state before transporting it to another state, the purpose being to divert employment and business to South Carolina); H. P. Hood & Sons, Inc. v. DuMond, supra (New York statute required a license to engage in an activity for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to protect and advance local economic interests).

When a state statute does not directly regulate 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. It has sought to reconcile the conflicting claims of state and national power by an appraisal and accommodation of the competing demands of the state and national interests involved. The principle the Court applies, as stated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L.Ed.2d 174, 90 S.Ct. 844 (1970) is:

> 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. Huron Cement Co. v. Detroit, 362 US 440, 443, 4 L Ed 2d 852, 856, 80 S Ct 813, 78 ALR2d 1249. If a legitimate local purpose is found, the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend upon the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate commerce. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, Southern Pacific Co. v. Arizona, 325 US 761, 89 L Ed 1915, 65 S Ct 1515, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens. See, e.g., Shafer v. Farmers Grain Co., [268 U.S. 189].

In applying the Pike v. Bruce Church balancing approach for determining whether a state has overstepped its legitimate role in regulating interstate commerce, the Supreme Court has distinguished between (1) state statutes that burden interstate transactions only incidentally, and (2) those that affirmatively discriminate against ("directly burden") interstate transactions. See discussions in Hughes v. Oklahoma, 441 U.S. 322, 336-337, 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979); and Maine v. Taylor, 477 U.S. 131, 138, 91 L.Ed.2d 110, 106 S.Ct. 2440 (1986). Statutes in the first group violate the commerce clause only if the burdens they impose on interstate commerce are clearly excessive in relation to the putative local benefits.[8]

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[8] E.g., Terminal R. Asso. v. Brotherhood of R. Trainmen, 318 U.S. 1, 87 L.Ed. 571, 63 S.Ct. 420 (1942), upholding a state safety requirement that freight trains traveling in the state be equipped with cabooses.

Statutes in the second group, those which seek to promote a legitimate state interest by affirmatively discriminating against interstate commerce, are subject to stricter scrutiny. Once the party challenging the validity of the state law shows that the law discriminates against interstate commerce, either on its face or in practical effect, the burden falls on the state to demonstrate both that the statute serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means. A state may not seek to achieve a legitimate goal such as protecting health and safety by the illegitimate means of isolating itself from the national economy.

b. No Federal Preemption

At hearing, Kleenwell argued that Congress, through the Interstate Commerce Act, has impliedly preempted the field of interstate transportation by motor carrier, prohibiting any state regulatory involvement in interstate solid waste transportation. The initial order rejected that argument, finding that Congress has not preempted the field. Kleenwell does not make a preemption argument on review. The Commission finds that the federal government has not preempted the state's regulation of interstate solid waste collection or disposal.

The Interstate Commerce Commission has interpreted its regulatory jurisdiction to exclude the transportation of garbage or refuse across state lines, ruling that garbage is not property within the meaning of 49 USC § 10521.[9] 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 United States Supreme Court, in Philadelphia v. New Jersey, 437 U.S. 617, 620, 57 L.Ed.2d 475, 98 S.Ct. 2531 (1978), at note 4, stated that it found no clear and manifest purpose of Congress to preempt the entire field of interstate waste management or transportation, either by express statutory command, or by implicit legislative design. The court found that "Congress expressly has provided that 'the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies. . . .' 42 USC §6901(a)(4)." Not only has the regulation of the collection and transportation of solid waste has always been within the residuum of power exercised by the states, Congress has expressed a

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[9] Although garbage is not property for purposes of the Interstate Commerce Act, it is commerce for purposes of the Commerce Clause. Philadelphia v. New Jersey, supra; Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. ___, 119 L.Ed.2d 139, 112 S.Ct. 2019 (1992).

"pervasive congressional concern that state and local authorities attempt to establish comprehensive systems for solid waste disposal and collection." Parola v. Weinberger, 848 F.2d 956, 961 (9th Cir. 1988).

c. Chapter 81.77 RCW Does Not Impermissibly Burden Interstate Commerce

Kleenwell argues that Chapter 81.77 RCW and in particular the requirement of a certificate of public convenience and necessity is per se invalid because it is an attempt to effect direct regulation of interstate commerce and because its purpose and effect is economic protection. The Commission rejects that argument.

First, the Commission points out that Kleenwell produced no evidence at all of a discriminatory purpose or effect of Chapter 81.77 RCW. Its entire case has consisted of the Medigen decisions, and a challenge to Commission Staff to distinguish Medigen. The Medigen court's conclusions that a South Carolina statute with a similar certificate requirement "directly" burdened interstate commerce, and that the State of South Carolina failed to demonstrate that the requirement served a legitimate health and safety interest, do not establish that Washington's statute impermissibly burdens interstate commerce. The burden of showing discrimination rests on the party challenging the validity of a statute. Hughes v. Oklahoma, supra, at 441 U.S. 336. If Chapter 81.77 is not on its face protectionist or otherwise discriminatory, Kleenwell has not carried its burden of producing evidence, and the state is not required to justify the statute.

However, the Commission will disregard the defects in Kleenwell's presentation for purposes of this discussion. An examination of the provisions of Chapter 81.77 RCW and a review of the evidence in this record clearly show that Chapter 81.77 RCW does not have the purpose or effect of economic protection, that in seeking to achieve health and safety goals the state has not discriminated against interstate commerce, and that the statute promotes a legitimate local interest in protecting the health and safety of the state's residents.

Chapter 81.77 RCW does not attempt to regulate interstate commerce, either directly or indirectly. It directly regulates solid waste collection in local territories within the state. It does not in any way regulate out-of-state transactions.[10]

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[10] Compare, Brown-Forman Distillers, supra.

Chapter 81.77 RCW's only stated purpose relates to health and safety. None of its provisions are facially protectionist; none favor in-state economic interests, and none arbitrarily discriminate against interstate trade for any purpose. Indeed, none of its provisions affirmatively discriminate against ("directly burden") interstate commerce at all. Moreover, Kleenwell did not demonstrate any protectionist or other discriminatory effects of Chapter 81.77 RCW. An analysis of the statute reveals none, none are shown in the record, and the Commission is aware of none.

Chapter 81.77 RCW does not permit residents to engage in solid waste collection while prohibiting nonresidents from doing so.[11] Anyone, without regard to citizenship, may apply for and be granted a certificate under chapter 81.77 RCW, on an equal basis. It does not impose restrictions on nonresidents or on out-of-state disposal which are not imposed on residents and in-state disposal. It does not require a nonresident, as a condition of engaging in business, to use certain state resources in pursuit of its business for the benefit of the local economy.[12] It does not place the burden of state regulation disproportionately on interests outside the state.[13] Nowhere in the chapter or in the implementing regulations is there any distinction made between in-state and out-of-state companies or in-state or out-of-state disposal.

Chapter 81.77 RCW does not ban the flow of solid waste across the state's borders.[14] Nor does requiring a certificate of public convenience and necessity have the effect of preventing the free flow of waste across the state's borders. An applicant is not required to designate a disposal site, and any certificated solid waste collection company is free to dispose of the waste it collects either within or without the state unless its application designated an in-state disposal site.

The Commission's granting of a certificate to an in-state company does not forever prevent other companies, in-state or out-of-state, from being granted overlapping authority in the same territory. The franchise granted under Chapter 81.77 RCW is subject to continued satisfactory performance and may be subject to overlapping grants for territories or specialized commodities

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[11] Compare, Lewis v. BT Investment Managers, Inc., supra.

[12] Compare, Toomer v. Witsell, supra note 7.

[13] Compare, Philadelphia v. New Jersey, supra.

[14] Compare, Philadelphia v. New Jersey, supra; Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, supra.

as to which the existing certificate holder fails to provide satisfactory service. The criteria for judging satisfactory service relate to the company's service within its collection territory and not its citizenship or whether it elects to use in-state disposal sites. The collection of specialized commodities may be subject to overlapping grants even if the existing certificate holders are providing satisfactory service, if the public interest will be served thereby.

Regulation under the act is evenhanded, as demonstrated by the fact that three out-of-state companies have certificates to operate as solid waste collection companies in designated service territories in the state. One of the intervenors in this case, American Waste Systems, is a California corporation to whom the Commission has granted statewide authority to collect infectious or medical waste; it disposes of the waste in California.

Chapter 81.77 RCW does not have the effect of making it more expensive for an out-of state firm to provide collection services in the state than it is for an in-state firm. It does not have the effect of forcing an out-of-state firm to alter its operating practices to the benefit of in-state firms.[15] It does not have the effect of requiring a nonresident business, in order to engage in business in the state, to construct unnecessary facilities.[16]

In support of its argument, Kleenwell relies on Buck v. Kuykendall, 267 U.S. 307, 69 L.Ed. 623, 45 S.Ct. 324 (1925) and George W. Bush & Sons v. Maloy, 267 U.S. 317, 69 L.Ed. 627, 45 S.Ct. 326 (1925), which held that a state may not require a certificate of convenience and necessity from a carrier (bus company) engaged exclusively in interstate commerce before it can operate within the state's borders. Those cases do not stand for the proposition that a carrier who crosses a state line is entitled to use state highways as a matter of right. Bradley v. Public Utilities Commission of Ohio, supra, 289 U.S. at 95. The problem with the state action in Buck and Bush was that it invaded a field, the adequacy of interstate transportation facilities, of peculiarly federal concern; a single state sought to control competition in an area of commerce that is inherently of concern to more than one state.[17] The primary purpose of

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[15] Compare, Hunt v. Washington State Apple Advertising Comm'n, supra.

[16] Compare, Pike v. Bruce Church, Inc., supra.

[17] The number of carriers who are permitted to transport goods or persons interstate is of concern to more than one state, and one state's regulation may impinge upon another's interests.

regulation in those cases was the prevention of competition deemed undesirable; the promotion of safety was merely incidental. Under chapter 81.77 we are concerned with the adequacy of solid waste collection service -- a test strictly related to local concerns. The state does not regulate the means of interstate commerce, but rather regulates the in-state aspects of collection service which are central to the health, safety, and welfare of the state's citizens.

If this state's requirement of a certificate of public convenience and necessity is not protectionist, and does not affirmatively discriminate against interstate commerce, any burden it places on interstate commerce can at most be an indirect or incidental burden. If there is a burden, the statute is not subject to strict scrutiny under the Pike v. Bruce Church balancing approach, and should be upheld unless the burdens it imposes on interstate commerce are clearly excessive in relation to the putative benefits.

However, the Commission does not believe that the requirement of a certificate of public convenience and necessity burdens interstate commerce at all. The only effect that this nondiscriminatory restriction on who may collect waste has on commerce is to prevent free entry and unrestricted competition; only a few companies are able to gain access to the waste collection markets. Limiting, in a non-discriminatory manner, the number of persons who can engage in local waste collection does not burden interstate commerce. It does not interfere with the national interest in keeping interstate commerce free from interferences that seriously impede it, and does not isolate the state from the national economy. The Commerce Clause does not create a right in a particular company to engage in whatever activity it chooses in a state, merely because its activity would somehow involve interstate movement. The Commerce Clause protects out-of-state firms from discrimination, and protects interstate markets; it does not protect particular interstate firms from even-handed restrictions on particular local activities. See, Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 73 L.Ed.2d 1254, 102 S.Ct. 3456 (1982); Bradley v. Public Utilities Commission of Ohio, supra, at 289 U.S. 95; Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 57 L.Ed.2d 91, 98 S.Ct. 2207 (1978); Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 474, 66 L.Ed.2d 659, 101 S.Ct. 715 (1981).

Thus, the possibility that Kleenwell would not be permitted to collect waste in a particular territory in Washington, either because it might not establish need for

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This is not true of local waste collection service.

another collection company or because of the previous determination of its unfitness, does not support its claim that application of Chapter 81.77 RCW to its activities impermissibly burdens interstate commerce.

d. Chapter 81.77 RCW Promotes Legitimate State Concerns.

The Commission rejects Kleenwell's contention that Chapter 81.77 RCW has nothing whatever to do with health or safety or any other legitimate local concern.

[5] The purpose of Chapter 81.77 RCW is "to protect public health and safety and to ensure solid waste collection services are provided to all areas of the state." RCW 81.77.100. Few matters are of greater local concern to a community than the reliable removal of solid waste, including medical waste, from all parts of the community. It is also a legitimate concern of the state that universal collection service be available to all communities as well as all rural areas throughout the state.

That the transportation of solid waste for collection or disposal is a legitimate local concern involving the protection of the public health, safety and welfare, and subject to the state's police power, is well settled. Smith v. Spokane, 55 Wash. 219, 220-21, 104 Pac. 249 (1909); City Sanitary Service v. Rausch, 10 Wn.2d 446, 448-49, 117 P.2d 225 (1958); Spokane v. Carlson, 73 Wn.2d 76, 436 P.2d 454 (1968). There are numerous reported cases upholding the authority of local governments to monopolize and regulate local garbage collection by eliminating or controlling competition among carriers. Annotation, Regulation and Licensing of Private Garbage or Rubbish Removal Services, 83 ALR 2d 799; Smith v. Spokane, supra, 55 Wash. at 221-22. The statutory scheme is not unique to chapter 81.77 RCW. What chapter 81.77 RCW does is provide for regulation of solid waste collection in unincorporated areas of the state, and in the cities and towns which have not undertaken to regulate that service themselves.

Kleenwell agreed at hearing that medical waste is a dangerous commodity and that risk of danger ought to be reduced. On review it takes the position that the waste it transports is not dangerous in the waste stream after it leaves the generating source because it is properly containerized. Wayne Turnberg of the Washington Department of Ecology, a medical waste expert and author of a 1989 statewide study of infectious waste management, testified that it is possible for disease transmission to occur from medical waste in the waste stream after it leaves the generating source. The uncontradicted testimony in this record establishes the potential risk of harm posed by medical waste in the solid waste stream. The risks to public health were also detailed in the hearings on Kleenwell's 1990 application for authority. Even if it may be possible to handle particular waste

without harm to the public, it may be subject to regulation when a uniform system of collecting and disposing of waste is necessary to protect the public from danger. Spokane v. Carlson, supra, 73 Wn.2d at 81-82.

A separate and very real danger is that medical waste will not be properly containerized and will not get into the waste stream at all if universal collection at reasonable, nondiscriminatory rates is not assured. In Evergreen Waste Systems, Inc., Cause No. TG-1911 (May 1986), witnesses described the problems a locality encounters when collection service is spotty or too expensive. Generators or shippers of waste who are unable to get service, or who are offered service only at prohibitive rates, take matters into their own hands, disposing of waste indiscriminately, with attendant health and environmental problems. The Commission's experience has been that when the price charged for any waste collection increases to a level that the public perceives to be unreasonable, improper disposal increases. The state clearly has a legitimate interest in discouraging improper disposal.

The Legislature has chosen the certificate of public convenience and necessity as the best mechanism to meet the health and safety concerns of solid waste collection in areas that are not regulated by incorporated cities. Requiring a certificate allows the state to accomplish universal waste collection without discrimination. RCW 81.28.010.[18] Rate regulation provides rates that are just, fair and reasonable and that do not discriminate among customers or provide unreasonable preferences. RCW 81.28.010, 81.28.180, and 81.28.190. Customers in rural areas are served at the same rates as customers in densely populated areas. Sudden discontinuance of service is avoided. Chapter 81.77 RCW also assures that market entrants are fit. Once a certificate is granted, safe and adequate operations are assured by the possibility of penalties, certificate revocation, or the grant of competing authority within the service territory. RCW 81.77.030; 81.77.040; 81.77.090.

In the absence of a rational system of regulation, the state's legitimate goals cannot be achieved. In an atmosphere of free and open competition, service will not be adequate, secure, reliable, or fair. The Commission's experience in prior cases supports this conclusion. The experiences in Evergreen Waste Systems and All County Disposal were that when an unregulated company comes into a territory served by a regulated collection company, the unregulated company engages in practices such as providing service in more densely populated areas and refusing

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[18] A certificate holder is a public service company, and as such is required to provide universal service without discrimination. RCW 81.77.070; 81.28.020; 81.28.180.

service to outlying areas; soliciting new customers at lower rates than the regulated company, which has to serve the entire territory, can offer; charging special rates to preferred customers; and abandoning customers in order to take on new customers. The cream-skimming in urban areas diminishes the ability of certificated companies to continue subsidizing service to rural areas. In order to survive, regulated companies must raise their rates, which makes them vulnerable to further cream skimming. Regulated carriers cannot long survive in such an environment.

Intervenors Sure-Way Medical Services, Inc. and American Environmental Management Corporation, both certificated waste collection companies, related similar experiences in the market that Kleenwell has targeted. Kleenwell selects customers based on the needs of its related medical supplies company. It presently subsidizes the collection service, enabling it to undercut the rates the certificated collection companies charge. It serves only the state's most populous area. Both certificated collection companies are losing accounts to Kleenwell, at an accelerating rate, in their most profitable market. The record establishes that Kleenwell's operations detrimentally impact universal service by existing biomedical waste collection companies. If a waste collector can escape state regulation by the simple expediency of disposing of the waste out of state, the regulatory scheme embodied in chapter 81.77 RCW cannot succeed.

The conclusion that the state's system of rational regulation is the best means to achieve the state's goals is further supported by the testimony of Professor Paul S. Dempsey, an internationally recognized expert in the area of transportation regulation. Professor Dempsey discussed in great detail the substantial danger to smaller communities and rural communities inherent in moving away from a regulatory scheme such as the one adopted in Washington. One particular portion of Professor Dempsey's testimony puts the value of the state's statutory scheme in perspective:

> Q. Professor Dempsey, can a regulatory scheme such as Washington has for the collection of solid waste, including infectious waste, succeed in providing universal service to both urban and rural areas at non-discriminatory rates if some of the entrants in that market are regulated a to rates, service, safety and others are not?
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> A. No, it certainly cannot succeed if there are two groups of carriers; one which are regulated and one which are not. The unregulated group will engage in cream-skimming. They will go for the most lucrative traffic depriving the established carriers, who are, by the way left with a common carrier responsibility to provide

their entire service territories with just and reasonable rates, with the freight that is easiest to pick up; the freight that is less costly to transport, the freight that has a higher profit margin. It will obliterate really the ability of the regulated group to continue to provide that service. What you will likely see over time is that the regulated group will themselves either go out of business, or try to become part of the unregulated group because they have -- you know, they have to make a profit in order to survive. They're owned by private investors, and they can't -- their ability to make a profit in a deregulated scheme is going to be significantly impeded.

Q. Does the Washington regulatory scheme, in your opinion, promote non-discriminatory pricing in the provision of waste collection service?

A. Yes, it does so explicitly. It requires that all rates charged shall be non-discriminatory; that they shall be just and reasonable. It imposes a common carrier obligation that carriers provide service throughout their service territories, and it regulates the safety of those companies providing this service.

When asked if it is possible to meet a statewide need for reasonably priced solid waste collection service, including biomedical waste, by allowing free market entry without any type of rate regulation, Professor Dempsey responded:

> No, it isn't. If you had no regulation at all, you would have a highly discriminatory pricing system. The service would be spotty. The economic condition of the industry would be weak, and the economic forces driving the disposal of waste in entirely the wrong direction for purposes of public health and safety would be stronger.

In sum, this state has chosen the certification requirement as the means of assuring universal solid waste collection service at rates that are reasonable. The Commission has found it to be an effective means of achieving the state's purposes. There are no obvious alternatives that would achieve the same result. A state is not required to develop new and unproven means of protection at an uncertain cost just to demonstrate that it is making a reasonable effort to avoid restraining the free flow of commerce. Maine v. Taylor, supra, 477 U.S. at 147. The Commerce Clause does not elevate free trade above all other values. Id., 477 U.S. at 151; Bradley v. Public Utilities Commission of Ohio, 289 U.S. 92, 95, 77 L.Ed. 1053, 53 S.Ct. 577 (1932).

e. The Commission Adheres to Its Decision in All County Disposal and Evergreen Waste Systems

The only new development in the law since All County Disposal and Evergreen Waste Systems is the Medigen case upon which Kleenwell relies. The Medigen decisions do not require the Commission to arrive at a result in this case that is different from its previous decisions.

Medigen dealt with a different statutory scheme, and a different Commission's interpretation of its authority. Medigen also is factually distinguishable. Medigen did not involve an intrastate movement prior to the shipment out of state; the parties stipulated that neither company engaged in the intrastate transportation of medical waste from one point in West Virginia to another point in West Virginia. Another distinction is that the State of West Virginia apparently failed to demonstrate persuasively that the requirement of a certificate served a legitimate public health and safety interest. A final distinction is that the plaintiffs in Medigen had not previously been found unfit to provide medical waste collection. The expert testimony in the present proceeding establishes the legitimate state interest, and the testimony and the Commission's experience in other solid waste proceedings establishes the connection between the interest and the certificate requirement.

This Commission also has the benefit of extensive previous experience with medical waste issues which a reviewing court may lack. See, Order M. V. G. No. 1452, In re American Environmental Management Corp., App. No. GA-874 (November 1990) and Order M. V. G. No. 1451, In re Sure-way Incineration, Inc., App. No. GA-868 (November 1990); and Exhibit 13 in this case (the initial decision denying Kleenwell's 1990 application for authority).

The Commission also believes that the Medigen court's analysis was not thorough and that the case was wrongly decided under the pertinent U.S. Supreme Court precedent, is contrary to the weight of authority, and is not binding on courts in Washington State. The Medigen court failed to recognize that solid waste collection is a particularly local concern, and that any interstate transportation of collected waste is merely incidental to the collection. The decision goes against long-standing and overwhelming precedent which recognizes that regulation of the collection and transportation of solid waste is especially within the states' residuum of power under the Commerce Clause. The decision improperly assumes that any requirement which prevents free access and open competition by a company which engages in interstate transportation is a "direct regulation" of interstate commerce. Its analysis equates "direct regulation" with "direct burden," applying the Pike v. Bruce Church stricter scrutiny alternative to "defendants' direct

regulation." It appears to assume an unconditional right of interstate firms to freely compete in any market, and loses sight of the proper focus of a Commerce Clause analysis -- that we have a single national economy, and that what is impermissible is state action which unjustifiably isolates the state from the national economy.

IV. CONCLUSION

Kleenwell's operations are subject to Commission regulation under Chapter 81.77 RCW. Its activities are defined by Washington statute as the common carrier activities of solid waste collection companies. Kleenwell is engaging in purely intrastate activity in collecting waste and in the transportation for collection; the collection of solid waste is a peculiarly local service.

Chapter 81.77 RCW does not favor in-state economic interests, or affirmatively discriminate against ("directly burden") interstate commerce. Rather, it prevents the uncontrolled collection of waste by restrictions which are applied evenhandedly and without regard to citizenship or whether the waste is removed from the state. If subjecting Kleenwell's operations to regulation under Chapter 81.77 RCW in any way affects interstate commerce, the effect is minimal and is wholly incidental to the operation of the statute in protecting legitimate state interests.

Kleenwell's petition for administrative review should be denied. The initial order directing Kleenwell to cease and desist its waste collection operations should be affirmed. Kleenwell should be declared to be engaging in operations without having obtained requisite authority; and the company should be declared to be subject to Commission jurisdiction.

Based upon the entire record and the file in this proceeding, the Commission makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On April 8, 1992, the Commission served a complaint, order, and notice of hearing initiating this classification proceeding pursuant to RCW 81.04.110 and 81.04.510. The issue to be determined is whether Kleenwell Biohazard Waste and General Ecology Consultants, Incorporated ("Kleenwell"), is in the business of transporting solid waste for collection and/or disposal for compensation over the public highways of the state without certificate authority required by RCW 81.77.040.

2. Kleenwell operates a medical waste collection business in the greater Seattle area in the state of Washington. The business is a Washington corporation and its sole shareholders and employees are Mr. Rowland and his daughter; both are Washington residents. Mr. Rowland operated his business as a sole proprietorship prior to incorporating in August 1990. The company provides a medical waste collection and disposal service for doctor and dentists. Mr. Rowland also operates a medical supply company, and most of Kleenwell's customers are customers of that company. The waste collection and disposal service does not make a profit, and is subsidized by the medical supply company.

3. Kleenwell collects medical waste from the generators on a weekly basis and supplies its customers with disposal containers and instructions on the proper handling of medical waste. Kleenwell transports the waste to a warehouse in Des Moines, near Seattle, where the waste is held in cold storage for up to 90 days until the Rowlands load it into a truck and transport it to California for disposal by incineration.

4. All of the waste that Kleenwell collects and stores is eventually disposed of in California. The decision to transport the waste to California is Mr. Rowland's alone. None of Kleenwell's customers has requested out-of-state disposal, and Mr. Rowland would refuse a request for in-state disposal.

5. Enoch Rowland and Wayne Turnberg testified about the risks to the public posed by medical wastes. Mr. Turnberg is an Environmental Planner in the Solid Waste Support Section of the Washington State Department of Ecology, and was project director and author of a 1989 statewide study of infectious waste management. Medical waste in the waste stream poses significant public health risk. Precautions must be taken in handling medical waste which are not required with solid waste generally. Once medical waste leaves the waste generator's premises, the only statewide regulations that apply to its transportation are those promulgated by the Commission.

6. Medical waste in the solid waste stream poses a risk of serious harm to the health and safety of the general public and must be carefully and properly handled. A uniform system of collecting and disposing of waste is necessary to protect the public from danger.

7. Professor Paul Dempsey, professor of law and director of the transportation law program at the University of Denver College of Law, testified about the impact of unregulated entry into the field of solid waste collection. Unregulated entry would cause unfair and discriminatory pricing and a lack of service in areas of the state, and would result in improper disposal of infectious waste.

8. Weldon Burton testified about the effects of unregulated competition on certificated solid waste collection companies in Clark County. An unregulated collector, Evergreen Waste Systems, engaged in cream-skimming, which enabled it to provide service at lower rates than the regulated companies. The regulated companies lost customers to Evergreen in the most densely populated areas of the county, especially along the major arterials; these were their most profitable accounts. Evergreen chose the customers it wanted to serve and dropped customers in favor of new customers when it was expedient to do so. The regulated companies suffered a loss in revenue which put them in the position of having to seek increases in rates in order to cover fixed costs.

9. Stan Robinson testified on behalf of intervenor Rabanco Companies' Sure-Way Medical Services operation. Jeff Daub testified on behalf of intervenor American Environmental Management Corporation. Both companies are regulated collectors of medical waste. Both companies collect medical waste in King County. American Environmental disposes of the waste it collects in California. American Environmental serves not only King County but rural and remote areas of the state. All of American Environmental's customers are served at same rate; its urban accounts subsidize the rural service. Both companies are losing accounts to Kleenwell in King County, and the rate of loss is accelerating. American Environmental has contingency plans to reduce its equipment and personnel committed to this state if unregulated operations such as Kleenwell's are allowed. Kleenwell's operations detrimentally impact universal service by existing biomedical waste collection companies.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this proceeding.

2. 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 RCW 81.77.040 to have a certificate of public convenience and necessity to conduct waste collection operations. The fact that the respondent ultimately transports the solid waste it collects out of the state for disposal does not affect this conclusion. The collection of solid waste is a local function of singularly local concern; the transportation of collected waste for disposal is incidental to the collection process.

3. The respondent's collection activities and its transportation of solid waste from waste generators' premises to an in-state warehouse is wholly intrastate activity.

4. The provisions of Chapter 81.77 RCW, including the requirement of a certificate of public convenience and necessity, can be applied to respondent's operations without violating the Commerce Clause of the United States Constitution.

5. The respondent should be ordered to cease and desist transporting solid waste for collection and/or disposal until it obtains a certificate from the Commission authorizing such operations.

O R D E R

THE COMMISSION ORDERS That the petition for administrative review of Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, is denied;

THE COMMISSION FURTHER ORDERS That Enoch Rowland and Kleenwell Biohazard Waste and General Ecology Consultants, Incorporated, are directed to cease and desist from operating motor vehicles for the collection and/or transportation of solid waste for compensation over the public highways of the State of Washington.

DATED at Olympia, Washington, and effective this 22d day of January 1993.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHARON L. NELSON, Chairman

RICHARD D. CASAD, Commissioner

A. J. PARDINI, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).