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February 2, 1993

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STATE OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

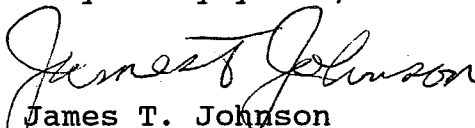
Paul Curl, Secretary  
Washington Utilities and Transportation Commission  
1300 South Evergreen Park Drive S.W.  
Olympia, Washington 98504-9022

Re: T. G. 920~~0~~04  
Enoch Rowland, d/b/a Kleenwell Biohazard and  
General Ecology Consultants

Dear Secretary Curl:

Enclosed please find an original and 3 copies of a Petition for Reconsideration and for Stay of Effectiveness of a Final Order. These petitions are filed pursuant to RCW 34.05.467 and 34.05.470.

Very truly yours,

  
James T. Johnson

Enclosure

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RECORDS MANAGEMENT

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STATE OF WASH.  
UTIL. AND TRANSP.

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

) PETITION FOR RECONSIDERATION  
) AND STAY OF EFFECTIVENESS OF  
) ORDER

COMES NOW the applicant Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants and Kleenwell Biohazard Waste and General Ecology Consultants, Inc. to petition for reconsideration of the Order served January 25, 1993 and pursuant to RCW 34.05.467, petitions for Stay of Effectiveness of Order pending the Reconsideration of the Petition proceeding.

HISTORY OF PROCEEDING

This is a classification proceeding, initiated by the Commission on its own motion, to determine whether the respondent is operating as a solid waste collection company without having obtained the required operating authority. The order of which Kleenwell seeks reconsideration is, like the initial order, structured so as to justify the conclusions reached rather than to reach a proper and just decision and one consistent with prior federal court decisions. The Commission clearly erred in finding that Kleenwell is engaging in purely intrastate activity in collecting waste and in the transportation for collection and in finding that Chapter 81.77 RCW is designed to protect legitimate

1 state health and safety interests.

2 ARGUMENT

3 The respondent concedes that it is engaged in the  
4 transportation of biohazardous or biomedical waste and that the  
5 material it transports from various generators in the State of  
6 Washington is always intended to be and is ultimately transported  
7 to an out-of-state disposal facility that meets all applicable  
8 environmental regulations. Kleenwell urges that under the  
9 reasoning of a decision entered January 22, 1992, by the United  
10 States District Judge John T. Copenhaver, Jr. in the United States  
11 District Court for the Southern District of West Virginia in  
12 Charleston in the case of Medigen of Kentucky, Inc. and Medigen of  
13 Pennsylvania, Inc. v. Public Service Commission of West Virginia et  
14 al, Civil Action No. 2:90-2761, 787 Fed. Supp. 602 (S.D. W.VA.  
15 1992), that any effort by the Washington Utilities and  
16 Transportation Commission to require transporters of the medical  
17 wastes who are common carriers by motor vehicles engaged solely in  
18 interstate transportation of medical wastes to obtain a certificate  
19 of convenience and necessary prior to providing those services  
20 would be a violation of rights protected by the Commerce Clause of  
21 the U.S. Constitution.

22 The only requirement of the Chapter 81.77.040 is that solid  
23 waste collection companies are required to obtain a certificate of  
24 public convenience and necessity. This is clearly economic  
25 regulation solely and has no bearing on public health or safety.

26 Contrary to the findings in the Order, the West Virginia

1 Medical Waste Act, West Virginia Code Sections 20-5J-1 through 20-  
2 SJ-10 (1991 Cum. Supp.) provides that transporters of infectious  
3 medical waste shall be regulated by the BSC under the Common  
4 Carriers of Motor Vehicles Act. West Virginia Code Sections 24A-2-  
5 1 through 24A-2-5 (1986 Repl. Vol. and 1991 Cum. Supp.). The West  
6 Virginia Act requires a prospective common carrier transporter to  
7 first obtain a certificate of convenience and necessity from the  
8 PSC before commencing operations in the state. Upon application  
9 for the certificate, a legal notice of the application is published  
10 in the proposed area of operation and existing transporters are  
11 given an opportunity to oppose the application. If no protest is  
12 made, the certificate may be granted without hearing. If protest  
13 is received, the applicant must appear at a hearing and demonstrate  
14 that the public convenience and necessity require the proposed  
15 service. Id. Existing transporters may present contradictory  
16 evidence. It is evident that the West Virginia Act is virtually  
17 identical to the regulatory scheme in the State of Washington.

18 In Medigen, supra, the sole issue before the court was whether  
19 defendants can require plaintiffs to obtain a certificate of public  
20 convenience and necessity prior to transporting medical wastes from  
21 West Virginia to another state for disposal. As is our position  
22 here, it was the contention of the plaintiffs in the West Virginia  
23 case that requiring a certificate of public convenience and  
24 necessity is unconstitutional and violates the Commerce Clause of  
25 the U.S. Constitution because it is direct regulation of interstate  
26 commerce and because its purpose is economic protectionism and

1 because it is designed to prevent free competition.

2 The Commission's decision clearly stands at odds with the  
3 Medigen case. The Medigen case is a federal court case which is  
4 now before the Fourth Circuit Court of Appeals having been argued  
5 in early December, 1992. Clearly the decision of the Court of  
6 Appeals in the Medigen case will be important to consider in  
7 resolution of the issues presented in the instant case involving  
8 Kleenwell.

9 It is our position that the Medigen decision is applicable to  
10 the facts at hand and that the Commission should await the decision  
11 on appeal before deciding Kleenwell's status or classification.

12 On page 4 of its decision, the Washington Commission endeavors  
13 to distinguish this case from the Medigen case on its facts.  
14 However, that effort must fail. While it is true that RCW 1.77.100  
15 states that the purpose of Commission regulation of solid waste  
16 collection companies is "to protect the public health and safety  
17 and to ensure solid waste collection services are provided in all  
18 areas of the state," but there is no connection between those  
19 purposes and the requirement of certificate of public convenience  
20 and necessity.

21 On page 16 of its Order, the Commission stated that Kleenwell  
22 produced no evidence at all of a discriminatory purpose or effect  
23 of Chapter 81.77 RCW implying that this was Kleenwell's burden when  
24 the Medigen case clearly establishes that the requirement of the  
25 public convenience and necessity showing is in fact, under  
26 Medigen, a requirement which stands in violation of the Commerce

1 Clause. If the Medigen decision is upheld by the Fourth Circuit  
2 Court of Appeals, the decision hereunder attacked would clearly be  
3 in error.

4 On page 16 of its Order, the Commission twice referred to a  
5 "South Carolina statute" when the statute involved was that of West  
6 Virginia.

7 On page 24, the Commission stated that Medigen did not involve  
8 an intrastate movement prior to the statement out of state, stating  
9 that the parties stipulated that neither company engaged in the  
10 intrastate transportation of medical waste from one point in West  
11 Virginia to another point in West Virginia. In fact, the Medigen  
12 movements are similar to those here under review.

13 In its brief, Medigen stated in Pennsylvania, medical waste is  
14 processed and then transported to disposal facilities owned by  
15 affiliated corporations in Kentucky and New York. The  
16 transportation to the processing facilities is no different from  
17 Kleenwell's transportation from the generators to the storage  
18 facility in Washington where it is stored pending the accumulation  
19 of a sufficient volume of waste to constitute a proper load to the  
20 out of state disposal facility. The transportation from the  
21 generator to the storage facility is the initial leg of interstate  
22 trip.

23 The Commission endeavors to claim that the transportation from  
24 the generators' location to the storage facility is not the initial  
25 leg of the interstate trip because Enoch Rowland testified that the  
26 generator does not care whether the waste is disposed of in the

1 State of Washington or in another state. Mr. Rowland made clear in  
2 his testimony that he explained to the generators the service he  
3 provided in taking the waste collected in the storage facilities  
4 from which it would be transported to an out of state disposal  
5 site. This is what was intended in connection with all of the  
6 waste transported by Kleenwell and clearly the transportation from  
7 the generation to the storage facility was the first leg of an  
8 interstate trip, contrary to the Commission's findings. Due to the  
9 erroneous findings and conclusions referred to herein, the  
10 respondent seeks reconsideration of the order here at issue and  
11 requests an indefinite stay of the effectiveness of the order. The  
12 failure to grant stay would involve irreparable harm to Kleenwell  
13 as it would require respondent to either (1) discontinue its  
14 operations or (2) enter federal court requesting a temporary  
15 injunction, permanent injunction, declaratory relief and attorney's  
16 fees.

17 If the Commission endeavors to enforce its decision in an  
18 absence of an overruling of the Medigen decision, respondent will  
19 very seriously consider seeking relief in federal court. We  
20 believe that the Commission's decision cannot stand in light of the  
21 Medigen decision on virtually identical facts.

22 DATED this 4<sup>th</sup> day of February, 1993.

23 

24 James T. Johnson  
25 WSBA No. 1490  
26 Attorney for Respondent

JJ petition.202

6 - PETITION FOR RECONSIDERATION

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4 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION  
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10 BIOHAZARD AND GENERAL ECOLOGY )  
CONSULTANTS. )

DOCKET NO. TG-920304  
CERTIFICATE OF SERVICE

11 I hereby certify that I have this day served a true copy of  
12 the Petition for Stay and Reconsideration upon the following by  
13 depositing a copy thereof in the United States first class mail,  
14 postage prepaid.  
15

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DATED this 4<sup>th</sup> day of February, 1993.

*James T. Johnson*  
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