

SERVICE DATE

FEB 22 1993

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Determining	)	
the Proper Carrier	)	DOCKET NO. TG-920304
Classification of:	)	
	)	COMMISSION DECISION AND ORDER
ENOCH ROWLAND d/b/a KLEENWELL	)	DENYING RECONSIDERATION;
BIOHAZARD AND GENERAL ECOLOGY	)	CORRECTING ORDER
CONSULTANTS	)	
	)	
.....	)	

**NATURE OF PROCEEDING:** This is a classification proceeding pursuant to RCW 81.04.110 and 81.04.510, brought to determine whether the respondent is operating as a solid waste collection company<sup>1</sup> without first having obtained a certificate of public convenience and necessity from the Commission authorizing such operations.

**PROCEDURAL STATUS:** The Commission entered a final order on January 25, 1993, which denied administrative review and affirmed an initial order concluding that Kleenwell is operating as a solid waste collection company within the state without required authority from the Commission. The final order directed Kleenwell to cease and desist from conducting its operations until it obtains a certificate of authority.

**PETITION:** Kleenwell petitions for reconsideration of the final order. It contends that the Commission erred in various findings and conclusions and repeats the principal arguments it made on review. Kleenwell requests that the Commission consider on reconsideration a recent U.S. Court of Appeals decision in a case arising out of West Virginia.

**COMMISSION:** The Commission denies the petition for reconsideration. The petition raises no issues which have not been discussed and decided already. The Fourth Circuit Court of Appeals decision in a West Virginia case does not change the Commission's evaluation of the evidence in this case, its conclusions, or its decision.

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<sup>1</sup> 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.

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 Enoch Rowland d/b/a Kleenwell Biohazard and General Ecology Consultants ("Kleenwell"), 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.

At hearing and on review, Kleenwell contended that it is engaging in interstate transportation because it is hauling the medical waste it collects out of the state, and contended 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 relied heavily on federal trial court decisions in a West Virginia case, 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").

Both the initial order and the Commission's final order rejected Kleenwell's arguments. In the final order, the Commission concluded that Kleenwell is operating as a solid waste collection company within the state and is required by RCW 81.77.040 to have a certificate of public convenience and necessity to conduct its operations; that Kleenwell's waste collection activity is intrastate in nature; and that the provisions of Chapter 81.77 RCW can be applied to Kleenwell's operations without violating the Commerce Clause of the U.S. Constitution. The Commission affirmed the initial order. It ordered Kleenwell to cease and desist its solid waste collection operations.

Kleenwell petitions for reconsideration of the final order. The petition contends that the Commission erred in various findings and conclusions relating to whether Kleenwell's waste collection activities are intrastate or interstate in nature, whether Chapter 81.77 RCW is designed to protect legitimate state health and safety interests, and whether Chapter 81.77 can be applied to Kleenwell's operations without violating the Commerce Clause of the U.S. Constitution. The petition

contends that the Commission should have adopted the reasoning and result of the West Virginia federal trial court decisions in Medigen, as it urged at hearing and on review. Kleenwell asks that the Commission consider, on reconsideration, a February 5, 1993 decision of the United States Court of Appeals for the Fourth Circuit, affirming the Medigen trial court's decisions.

A petition for reconsideration must demonstrate errors of law, or facts not reasonably available to petitioner at the time of entry of the order; it must present arguments which change the circumstances presented to, or the view of, the Commission. Order M. V. No. 140273, In re Thomas C. Kolean and James B. Stewart, d/b/a Olympic Transport, App. No. P-72389 (September 1989).

The petition states no basis for relief. The issues raised were thoroughly explored at the hearing, in post hearing pleadings, and on review. The petition cites no evidence that the Commission has not considered. The petition merely challenges the Commission's evaluation of the evidence and its interpretation of the law. It restates arguments which the Commission thoroughly considered in its final order. The Commission believes that it correctly evaluated the evidence, and correctly applied the law. The Fourth Circuit Court of Appeals decision in the Medigen appeal does not persuade the Commission that its evaluation of the evidence in this case, its conclusions, or its decision are incorrect. The petition for reconsideration should be denied. See, Order M. V. No. 140273, In re Thomas C. Kolean and James B. Stewart, d/b/a Olympic Transport, supra; Order M. V. No. 128067, In re Jon S. Pansie, d/b/a Tri-Pan Services, Inc., App. No. P-65704 (August 1983); Order M. V. No. 138434, In re Punctual Transportation, Inc., App. No. P-71023 (September 1988); Thurston County v. Burlington Northern Railroad, Cause No. TR-1930 (August 1988).

Medigen is distinguishable, for reasons set out in the Commission's final order. That legitimate state health and safety interests are served by the requirement of a certificate of public convenience and necessity is clearly established by the testimony in this case. Federal court decisions in another circuit do not govern matters in Washington State, and the Fourth Circuit's decision does not appear to be consistent with U. S. Supreme Court decisions discussed in the Commission's final order.

The petition points out that on page 16 of its Order the Commission twice referred to a "South Carolina Statute" although the statute was that of West Virginia. The Commission corrects the text by this reference.

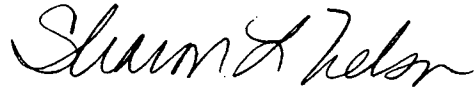
ORDER

THE COMMISSION ORDERS That the petition for reconsideration of Enoch Rowland d/b/a Kleenwell Biohazard and General Ecology Consultants is denied.

THE COMMISSION FURTHER ORDERS That the two references to a "South Carolina statute" which appear in the second full paragraph on page 16 of the Commission's final order are corrected to read "West Virginia statute."

DATED at Olympia, Washington, and effective this 19th day of February 1993.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



SHARON L. NELSON, Chairman



RICHARD D. CASAD, Commissioner



A. J. PARDINI, Commissioner