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July 13, 1992

Lisa Anderl
Administrative Law Judge
Office of Administrative Hearings
Third Floor, Building E, FS-34
2420 Bristol Court S.W.
Olympia, Washington 98504

Re: Enoch Rowland d/b/a Kleenwell Biohazard
Docket No. TG920304

Dear Judge Anderl:

Enclosed please find the original and three (3) copies of the Opening Brief in this matter.

Very truly yours,

James T. Johnson

cc: Enoch Rowland
Steven W. Smith
Richard A. Finnigan
James Sells
Boyd Hartman
David Wiley
Cindy Horenstein

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of Determining the Proper Carrier Classification of:	Docket No. TG-920304
ENOCH ROWLAND d/b/a KLEENWELL BIOHAZARD & GENERAL ECOLOGY CONSULTANTS.	OPENING BRIEF

I

STATEMENT OF ISSUES

Whether a state may require a carrier operating solely in interstate commerce to obtain a certificate of convenience and necessity which would be issued only upon the state's determination that there is a need for the interstate service.

II

STATEMENT OF THE CASE

Kleenwell Biohazard & General Ecology Consultants, Inc., is engaged in the transportation of medical waste from various Washington customers and disposes of that medical waste at a disposal site in California.

Enoch Rowland, the owner of Kleenwell, is a microbiologist and a pharmacist as well and through other companies sells supplies and renders laboratory services for the physicians and dentists he serves in the disposition of medical waste. (T28, 29) He makes

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pickups at the offices of the physicians and dentists he served approximately once every ten days. (T30) The pickups are made either by Mr. Rowland or his daughter. (T30) She has had training on AIDS and hepatitis B and the blood-borne pathogens. The waste is shipped to Security Environmental Systems in Los Angeles, California. (T31) After the pickup is made, the material is brought to Kleenwell's refrigerated warehouse where it is kept at 0° Fahrenheit until shipment to California. (T31) Kleenwell has a permit from the Seattle-King County Health Department. (Exhibit 5) The storage facility utilized has also been approved by the Seattle-King County Health Department. (T33, Exhibit 6)

With this background of operations, the Commission levied penalty assessment number 2157 in the amount of $6,000 for violations of RCW 81.77.040 for failure to have a certificate of convenience and necessity. Kleenwell then sought mitigation of those penalties on the ground that the state's efforts to regulate these activities is a violation of rights protected by the Commerce Clause of the United States Constitution.

In seeking mitigation, Kleenwell relied on a decision in the U.S. District Court for the Southern District of West Virginia at Charleston in the case of Medigen of Kentucky, Inc., and Medigen of Pennsylvania, Inc., v. Public Service Commission of West Virginia, Civil Action No. 2:90-0761.

The next action taken was the issuance of a complaint, order, and notice of hearing in docket number TG-920304.

The Commission instituted a special proceeding on its own

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motion to determine whether Kleenwell was in the business of transporting solid waste for collection and disposal or compensation over the public highways of this state and territory for which it is required to hold a certificate for collection of solid waste as allegedly required by RCW 81.77.040 and WAC 480-70-070.

RCW 81.77.040 provides that no solid waste collection company shall hereafter operate for the hauling of solid waste for compensation without first having obtained from the Commission a certificate declaring that public convenience and necessity requires such operation.

WAC 480-70-070 provides:

> No solid waste collection company shall operate, establish or begin operation of a line or route or serve any territory, or any extension, for the purpose of transporting solid waste on the public highways of this state, without first having obtained from the Commission a certificate declaring that public convenience and necessity requires, or will require, the establishment and operation of such line or route in such territory.

The order served April 8, 1992, required Kleenwell to appear before it to give testimony and evidence as to its operation and placed on Kleenwell the burden of proving that the alleged operations are not subject to the provisions of RCW 81.77.040.

Kleenwell concedes that it is engaged in the transportation of biomedical waste and that the material it transports from various generators in the state of Washington is ultimately transported to an out-of-state disposal facility that meets all local, state, and federal environmental requirements.

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The testimony by witness Turnberg failed to identify any way in which the requirement of a certificate of convenience and necessity impacted safety issues. (T131-132, 134)

The operating witnesses presented by intervenors presented testimony to the effect that their operations are regulated by the Washington Utilities and Transportation Commission and that to allow interstate operators to operate without regulation would put them at a competitive disadvantage. The testimony of those witnesses fails to address the question of the legality of the state's efforts to regulate operations such as those of Kleenwell.

Witness Dempsey testified to his belief that in general free market entry has caused problems in terms of declining productivity, lower load factors, lower levels of profitability, inadequate profits for the motor carrier industry as a whole, a higher level of bankruptcies, etc. He offered no evidence other than generalization regarding safety factors. This witness had an obvious bias being employed by an organization that has long championed regulation. The witness has little familiarity with the hauling of medical waste. (T238) The witness made a pitch for the benefits of regulation of transportation generally but offered no evidence specifically directed at the transportation of medical waste.

III

ARGUMENT

Kleenwell urges that under the reasoning of the decision entered January 22, 1992, by the U.S. District Court Judge John T.

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Copenhaber, Jr., in the U.S. District Court for the Southern District of West Virginia at Charleston in the case of Medigen of Kentucky, Inc., and Medigen of Pennsylvania, Inc. v. Public Service Commission of West Virginia, et al., Civil Action No. 2:90-0761, any effort by the Washington Utilities and Transportation Commission to require transporters of infectious medical waste who are common carriers by motor vehicle engaged solely in interstate transportation of infectious medical waste to obtain a certificate of convenience and necessity prior to providing those services would be a violation of rights protected by the Commerce Clause of the United States Constitution.

We believe the evidence shows that the essential character of the shipments transported by Kleenwell is determined from the shipper's fixed and persisting transportation intent at the time of shipment. Baltimore & O.S.W.R. Co. v. Settle, 260 U.S. 166 (1922). The intent is ascertained from all the facts surrounding the transportation. Armstrong, Inc. - Transportation Within Texas, 2 ICC 2d 63, 69 (1986); Pacific Coast Building Products, Inc. - Petition for Declaratory Order Decided January 6, 1989 (not printed) at page 3. The transportation in question must be considered part of the subsequent movement in interstate commerce. We believe the evidence shows beyond any doubt that the services performed by Kleenwell fall within the parameters of the Medigen case.

In the Medigen case it was pointed out that Medigen of Kentucky transports medical waste to a disposal facility in

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Kentucky and that Medigen of Pennsylvania transports medical waste from West Virginia to a waste processing facility in Pennsylvania.

After briefing in the matter was completed, West Virginia enacted a Medical Waste Act, West Virginia Code Sections 20-5(j)(1) through 20-5(j)(10) (1991 Cum. Supp.). That act provides that effective July 1, 1991, transporters of infectious medical waste will be regulated by the PSC under the Common Carriers of Motor Vehicles Act, West Virginia Code Sections 24(a)-2-1 through 24(a)-2-5 (1986 replacement volume and 1991 Cum. Supp.). The West Virginia Common Carriers Act requires a prospective common carrier transporter to first obtain a certificate of convenience and necessity from the PSC before commencing operations in the state. Upon application for the certificate, a legal notice of the application is published in the proposed area of operation and existing transporters are given the opportunity to oppose the operation. If no protest is made, the certificate may be granted without hearing. If protest is received, the applicant must appear at a hearing to demonstrate that public convenience and necessity require the proposed service. Id. Existing transporters may present contradictory evidence.

Thus, it is evident that the West Virginia act is virtually identical to the regulatory scheme in the state of Washington.

On July 27, 1990, a member of the West Virginia PSC staff contacted Medigen of Kentucky and advised it to cease transporting medical waste from West Virginia customers until it had obtained the necessary certificate. In our case a penalty notice was given

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to Kleenwell.

In Medigen, the sole issue before the court was whether defendants can require plaintiffs to obtain a certificate of convenience and necessity prior to transporting medical waste from West Virginia to another state for disposal.

As is our position here, it was the contention of the plaintiffs in the West Virginia case that requiring a certificate of convenience and necessity is unconstitutional and violates the Commerce Clause of the United States Constitution because it is in direct regulation of interstate commerce and because its purpose is economic protection as it is designed to prevent free competition. The plaintiffs in the West Virginia case (and Kleenwell in this case) maintain that the requirement violates the Supremacy Clause of the United State Constitution because congress has preempted the field of market or economic regulation of motor carriers operating in interstate commerce.

Kleenwell acknowledges that at the present time the ICC has declined to exercise jurisdiction over the interstate transportation of waste, concluding that it is not "property" within the meaning of the Interstate Commerce Act. Nonetheless, Kleenwell maintains that Congress, through the Interstate Commerce Act, has so entirely occupied the field of economic regulation of interstate motor carriage in favor of the competitive forces of the marketplace, the state's ability to require a certificate of convenience and necessity is impliedly preempted.

As did the plaintiffs in the West Virginia case, plaintiff

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offers in support of its position the following portion of Castle v. Hayes Freightland, 318 U.S. 61, 63 (1954):

> Congress in the Motor Carrier Act [now recodified as part of the ICA] adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left to states to determine what carriers could or could not operate in interstate commerce.

Kleenwell contends that the state statutes at issue here are per se invalid because they are an attempt to effect direct regulation of interstate commerce and because their purpose and effect is economic protection. The principal cases relied upon by plaintiffs in the Medigen case and Kleenwell here are Buck v. Kuykendall, 267 U.S. 307 (1925), and George W. Bush & Sons v. Malloy, 267 U.S. 317 (1925), both decided on the same day.

Both before and after Buck and Bush, it has been consistently held that a state may not require a certificate of convenience and necessity from a carrier engaged exclusively in interstate commerce before it can operate within the state's borders. E.g., Sprout v. South Bend, 277 U.S. 163, 171 (1928) ("the privilege of engaging in interstate commerce is one which a state cannot deny"); Interstate Buses Corp. v. Holyoak St. Ry. Co., 273 U.S. 45, 51 (1927) ("no certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate"); Barnett v. New York, 232 U.S. 14, 31 (1914). Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its

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exercise in the absence of a local license.

The case of Port of Seattle v. Washington Utilities & Transportation Commission, 597 P.2d 383, 390 (Wash. 1979) ("state's certification requirements for carriers cannot be applied to a common carrier engaged in exclusively interstate commerce").

Brown-Foreman, 476 U.S. at 579, indicates that state statutes which directly regulate interstate commerce or discriminate against interstate commerce are generally invalid per se.

In the Medigen case the court concluded that the defendants' requirement of a certificate of convenience and necessity as a condition of allowing plaintiffs to operate in interstate commerce is a direct rather than an incidental burden on interstate commerce. The validity of the requirement can be upheld only if the state meets its burden of showing both the requirement of the certificate serves a legitimate purpose and that no other means can adequately serve that purpose.

In Medigen the court concluded that to the extent the state agency requires motor carriers to make a showing of convenience and necessity prior to engaging in the interstate transportation of infectious medical waste, the requirement violates plaintiff's rights under the Commerce Clause of the United States Constitution.

Many courts, including the United States Supreme Court, have specifically and directly addressed the essential issue raised by this appeal. The question of whether a state may require a carrier operating solely in interstate commerce to obtain a certificate of convenience and necessity based on need before engaging in

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interstate operations has always been answered the same way. A state may not.

The Commerce Clause granted to Congress the power to "regulate commerce. . .among the several states." U.S. Constitution, article I, section 8, clause 3. Although the clause speaks in terms of powers bestowed upon Congress, the United States Supreme Court long has recognized that it also limits the power of the states to erect barriers against interstate commerce. U.S. v. BT Investment Managers, Inc., 447 U.S. 27, 35 (1980).

In Buck v. Kuykendall, 267 U.S. 302 (1925), the court found that Washington's certificate requirement violated the Commerce Clause. Washington raised the argument of safety and economy to justify its position. The court's response was unequivocal.

> The argument is not sound. It may be assumed that section 4 of the state statute is consistent with the 14th Amendment; and also appropriate state regulations adopted primarily to promote safety on the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Michigan Utilities Commission v. Duke, 266 U.S. 571. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. . . . Thus, the provision of the Washington statute is a regulation, not of the use of its own highways but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. 267 U.S. at 315-316. Accord, George W. Bush & Sons v. Maloy, 267 U.S. 317 (1925).

This is not the first instance in which the Supreme Court made

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it clear that this kind of state regulation of interstate commerce is unconstitutional, regardless of the justification. In Barnett v. New York, 232 U.S. 14 (1914), the court stated:

> It is insisted that, under the authority of the state, ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly the exertion of the power essential to assure needed protection to the community may extent incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and it is not opposed to federal legislation. [Citations omitted.] It must, however, be confined to matters which are appropriately of local concern. It must proceed upon the recognition of the right secured by the federal constitution. Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license. [Citations omitted.] As was said by this court in Crutcher v. Kentucky, supra, "a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for opposing it." 232 U.S. at 31.

The state action in Buck was unconstitutional "because that statute as construed and applied invaded a field reserved by the Commerce Clause for federal regulation." Bush & Sons Co. v. Maloy, 267 U.S. 317 (1925).

The holding in Buck is so absolute that the Supreme Court has only reluctantly approved a "certificate" with no "need" requirement attached. In Frye Roofing Co. v. Wood, 344 U.S. 157 (1952), the Supreme Court addressed whether the state of Arkansas could issue a certificate of convenience and necessity to an interstate carrier when the certificate was used purely for registration. Arkansas' state commission expressly disclaimed any

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discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce and asserted "no power or purpose to require the drivers to do more than register with the appropriate agency." 344 U.S. at 161. The Supreme Court approved the use of such a conditional certificate because "Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways." 344 U.S. at 163. Interestingly, the concept of a state granting certificates of convenience and necessity to interstate carriers is so abhorrent to the Commerce Clause that four justices dissented, even though the certificates would be granted on application.

Courts have had no trouble following the Buck precedent. Many of these cases were cited by the District Court in its August 9, 1991, Memorandum Order (JA 210-212):

> Both before and after Buck and Bush, it has been consistently held that a state may not require a certificate of convenience and necessity from a carrier engaged exclusively in interstate commerce before it can operate within the state's borders. E.g., Sprout v. South Bend, 277 U.S. 163, 171 (1928) ("the privilege of engaging in [interstate] commerce is one which a state cannot deny"); Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U.S. 45, 51 (1927 ("no. . .certificate of public convenience and necessity is required in respect of transportation that is exclusively interstate"); Barnett v. New York, 232 U.S. 14, 31 (1914) ("local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license); Blease v. Safety Transit Co., 50 F.2d 852, 855 (4th Cir. 1931) (the question of a state's ability to require a certificate of convenience and necessity as a condition of operating in interstate commerce "has been so repeatedly answered in the negative as not to justify further discussion"); Gulf Coast Motor Freight Lines v. United States, 35 F. Supp. 136, 137 (S.D. Tex. 1940) ("it is beyond the constitutional power

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of the state commission to permit or prohibit carriage interstate on grounds of public convenience and necessity"); United States v. Union Pacific R.R. Co., 20 F. Supp. 665, 667 (D.C. Idaho 1937) ("the state board has no authority to grant certificates of public convenience and necessity to those engaged in interstate commerce operations"); Atlantic-Pacific Stages v. Stahl, 36 F.2d 260, 262 (W.D. Mo. 1929) ("where a carrier is engaged exclusively in interstate commerce a state may not require it to obtain a certificate of convenience and necessity"); Hi-Ball Transit Co. v. Railroad Comm'n of Texas, 27 F.2d 425 (N.D. Tex. 1928) (state requirement that commission consider quality of service, financial ability of applicant and adequacy of existing service before granting a certificate "is entirely unconstitutional, when sought to be applied to interstate commerce"); Magnuson v. Kelly, 35 F.2d 867, 969 (E.D. Ky. 1927) (the requirement of a certificate of convenience and necessity "is in violation of the provisions of the federal Constitution conferring on Congress power to regulate interstate commerce. The state has no power absolutely or conditionally to deny [an interstate motor] carrier the rights to use its public highways"); Interstate Busses Corp. v. Blodgett, 19 F.2d 256, 258 (D. Conn. 1927), aff'd, 276 U.S. 245 (1928) (the state "may not enact a statute which requires an interstate carrier of passengers by motor bus to secure a certificate. . .to establish the public convenience and necessity requiring the operation of busses"); Red Ball Transit Co. v. Marshall, 8 F.2d 635, 639 (S.D. Ohio 1925) ("a state law which permits denial of a certificate of public convenience and necessity to a common carrier of passengers and express, purely in interstate commerce, is unconstitutional"); Miller Transp. v. Alabama Pub. Serv. Comm'n, 454 So.2d 1373 (Ala. 1984) (upholding PSC decision that a certificate of public convenience and necessity was not required for interstate barge transportation of bulk commodity); Port of Seattle v. Washington Utilities & Transp. Comm'n, 597 P.2d 383, 390 (Wash. 1979) ("state's certification requirements for carriers cannot be applied to a common carrier in exclusively interstate commerce"); see, Floyd A. Fry Roofing Co. v. Wood, 344 U.S. 157 (1952) (state permitted to require certificate of convenience and necessity when only purpose was for registration of those using its highways and where state disclaimed any other authority over carriers operating solely in interstate commerce).

The District Court for the Northern District of Texas in Hi-Ball Transit Co. v. Railroad Commission of Texas, supra, reviewed

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a statutory scheme which required the Commission to consider the quality of service, financial ability of the applicant, and the adequacy of existing service. The Court's statement is directly relevant to this case.

> That such regulation by a state is entirely unconstitutional, when sought to be applied to interstate commerce, is not an open question. Discussion was foreclosed at an early date, because the fundamental law of the nation, which is the supreme law of the land, vests jurisdiction over such commerce in the national government.
>
> That the motor age has dawned does not change the law, and, beginning with Buck v. Kuykendall . . . --down through Bush v. Maloy, 267 U.S. 317, 45 S.Ct. 326, 327, 69 L. Ed. 627; Interstate Busses Corporation v. Holyoke Street Railway Co., et al., 273 U.S. 45, 47 S.Ct. 298, 71 L. Ed. 530; Interstate Busses Corp. v. Blodgett, Tax Commissioner of Conn., et al., (February 20, 1928) 48 S.Ct. 230, 72 L.Ed. _____; Clark v. Poor, 274 U.S. 554, 47 S.Ct. 702, 71 L. Ed. 1199, and Sprout v. City of South Bend, Indiana, (May 14, 1928) 48 S.Ct. 502, 72 L. Ed. _____, which treat of similar cases from the states of Washington, Ohio, Connecticut, Maryland, Massachusetts, and Indiana, there has been a consistent maintenance of the supremacy of the nation over such interstate traffic.
>
> Manifestly the purpose of sections 3 and 7 of the Texas act is to allow the Railroad Commission to determine, not the use of the state's highways, but the persons by whom such highways may be used, prohibiting use to some and permitting their use to others, and to determine what facilities are adequate, as well as to determine the financial ability, etc., of the persons so engaged. All such regulations by the state are unconstitutional.

27 F.2d at 426-27. Accord, Galveston Truckline Corp. v. Allen, 2 F. Supp. 488 (S.D. Tex. 1933), aff'd, 289 U.S. 708; State v. Sinclair Pipeline Co., 304 P.2d 930 (Kan. 1957); State v. Atlantic Greyhound Corp., 113 S.E.2d 57 (N.C. 1960); Nevin Bus Lines v. Public Service Comm'n, 182 A. 80, 83 (Pa. Super. Ct. 1935).

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This principle of constitutional law has not changed. Matson Navigation v. Hawaii Public Utilities Commission, 742 F. Supp. 1468 (D. Hawaii 1990), addressed the issue of whether shipments among the Hawaiian islands were intrastate or interstate commerce. The District Court stated:

> The court agrees that under Buck it would be wholly improper for the state to require a certificate of public use and convenience for shipments between Hawaii and the mainland United States which are purely interstate in nature. There is no dispute with respect to that issue. . .

742 F. Supp. at 1482.

In Dennis v. Higgins, 112 L.Ed.2d 969 (1991), the Supreme Court held violations of the Commerce Clause actionable under 42 U.S.C. §1983. The Court cited, with approval, several of the cases which established that a state cannot require certificates of convenience and necessity to engage in interstate commerce.

> The Court has often described the Commerce Clause as conferring a "right" to engage in interstate trade free from restrictive state regulations. In Crutcher v. Kentucky, 141 U.S. 47 (1891), in which the Court struck down a license requirement imposed on certain out-of-state companies, the Court stated: "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." Id., at 57. Similarly, Western Union Telegraph Co. v. Kansas ex rel. Coleman, 216 U.S. 1, 26 (1910), referred to "the substantial rights of those engaged in interstate commerce." And Garrity v. New Jersey, 385 U.S. 493, 500 (1967), declared that engaging in interstate commerce is a "righ[t] of constitutional statute."

112 L.Ed.2d at 978-979.

The Supreme Court went on to say that until Congress acts to alter or eliminate the right to engage in interstate commerce, the

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Commerce Clause operates as "a guarantee of freedom for private conduct that the State may not abridge." 112 L.Ed.2d at 980.

The case law is clear and specific. States cannot require interstate carriers to obtain certificates of convenience and necessity. States cannot require a showing of fitness, financial ability, or a need for the interstate service. This is a violation of the Commerce Clause. Put another way, "the right to engage in interstate commerce is not the gift of a state." H.P. Hood & Sons v. DuMond, 336 U.S. 525, 535 (1949). Even defendants' predecessor, the State Road Commission, recognized this. See, Mewha v. Public Service Comm'n, 112 W. Va. 305, 9 S.E.2d 868 (1940). Medigen was entitled to the injunctive relief it sought.

If the judge would ignore all of the court decisions which specifically address the issue presented, she would still have no trouble finding that the certificate requirement for the interstate transportation of medical waste is unconstitutional. "The rule that a state cannot exact conditions for permission to engage interstate commerce is one so well known that it does not need citation of authority to support it." Union Interchange, Inc. v. Parker, 357 P.2d 339, 344 (Mont. 1960). The constitutional violation is of such a kind that no balancing test need be applied before it is invalidated.

The United States Supreme Court stated, in Edgar v. MITE Corp., 457 U.S. 624, 641-642 (1982):

> The Commerce Clause, however, permits only incidental regulation of interstate commerce by the states; direct regulation is prohibited. . . [A] state

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> statute which by its necessary operation directly interferes with or burdens [interstate] commerce is prohibited regulation and invalid, regardless of the purpose with which it was enacted.

In Healy v. Beer Institute, 491 U.S. 324, 337, fn. 14 (1989), the Supreme Court again expressed this prohibition:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. . .

(Emphasis added.) Accord, Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 578-79 (1986).

Lower courts have had no trouble acknowledging that direct regulation of interstate commerce by the states is still prohibited by the Commerce Clause. Valley Bank of Nevada v. Plus Systems, Inc., 914 F.2d 1186, 1189 (9th Cir. 1990); State v. Ill. ex rel. Hartigan v. Panhandle Eastern Pipeline Co., 730 F. Supp. 826, 940 (C.D. Ill. 1990); TLX Acquisition Corp. v. Telex Corp., 679 F. Supp. 1022, 1029 (W.D. Okla. 1987); Terry v. Yamashita, 643 F. Supp. 161 (D. Hawaii 1986); Alleghany Corp. v. Pomeroy, 700 F. Supp. 460 (D.N.D. 1988); Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 389 (N.D. Ill. 1986); Icahn v. Blunt, 612 F. Supp. 1400, 1414 (D.C. Mo. 1985); Mon-Shore Management, Inc. v. Family Media, Inc., 584 F. Supp. 186, 190 (S.D.N.Y. 1984).

"Direct regulation" of interstate commerce occurs when a state law directly affect transactions that "take place across state lines" or entirely outside of the state's borders. Valley Bank of Nevada v. Plus System, Inc., 914 F.2d 1186 (9th Cir. 1990), citing

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Edgar v. MITE Corp., 457 U.S. 624, 641 (1982). The District Court, in its Memorandum Order of August 9, 1991, in Medigen, correctly found that the Public Service Commission's certificate requirement "is a direct rather than an incidental burden on interstate commerce." (JA 216) No other conclusion could be possible. The Commission wants Kleenwell to obtain its permission before Kleenwell can operate in interstate commerce. The Commission wants to decide whether there is a need for an interstate service. The Commission wants to decide which interstate carriers may operate and which may not, even though they all may operate in exactly the same manner. The Commission would regulate market access, service territory and even the rate to be charged. There can be no regulation more pervasive than that which the Commission wishes to impose on Kleenwell.

It is inescapable that the Commission, by attempting to regulate Kleenwell as it would an intrastate common carrier, is attempting the direct regulation of interstate commerce. The same was true in Medigen where the district court should have granted Medigen injunctive relief without further inquiry.

Instead, the district court relied on Maine v. Taylor, 477 U.S. 131 (1986), a quarantine case, to avoid holding the West Virginia Public Service Commission's actions invalid per se. This was an error. Maine v. Taylor is merely the most recent in a line of cases that stretches back at least 100 years. This line does not conflict with, or alter, in any way, the established constitutional principle that a state cannot require a purely

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interstate carrier to obtain a certificate of convenience and necessity based on need.

The Constitution of the United States provides:

> No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

Article I, section 10, clause 2. The right to make inspection laws is not granted to congress, but is reserved to the states. Patapsco Guano v. Board of Agriculture, 171 U.S. 345 (1898). Only when a state inspection regulation is in its effect an unreasonable discrimination against the products from other states it is invalidated under the Commerce Clause. See, Minnesota v. Barber, 136 U.S. 313 (1890).

> Traditionally considered, a concomitant to the power of inspection is the power of the states to impose quarantines upon animals, crops, goods, or even persons which might be injurious to the health and safety of the local community.

Antieau, Modern Constitutional Law, Volume II, §10:38 (1969).

> For the commerce clause is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community. That is true whether what is brought in consists of diseased cattle or fraudulent or unsound insurance.

Robertson v. California, 328 U.S. 440, 458-59 (1946).

The constitutionality of quarantine laws has long been established. See, Missouri, K. & T. R. Co. v. Haber, 169 U.S. 613, 628 (1898). The Supreme Court has always viewed the right of a state to pass quarantine laws as different from other questions arising under the Commerce Clause.

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> That from an early day the power of the States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question. That until Congress has exercised its power on the subject, such state quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution of the United States, although their operation affects interstate or foreign commerce, is not an open question. . .
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> * * *
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> While it is true that the power vested in Congress to regulate commerce among the States is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the States in the exercise of their reserve powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government.

Compaignie Francaise v. Louisiana Board of Health, 186 U.S. 380, 387-389 (1901).

In these quarantine cases, the Supreme Court concerned itself with whether the quarantine laws exceed what is necessary for a proper quarantine. See, Smith v. St. Louis and Southwestern Railway Company, 181 U.S. 248, 255 (1901); Clason v. Indiana, 306 U.S. 439 (1939); Robertson v. California, supra. It is the same concern that the Supreme Court shows in Maine v. Taylor.

This doctrine was developed concurrently with the Supreme Court's prohibition on states granting interstate carriers certificates of convenience and necessity, based on need. The Supreme Court has never seen a conflict in these positions, because there is none. As the court noted in Buck v. Kuykendall, 267 U.S.

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302 (1925), it is a difference between regulating the manner in which a state's highways may be used and who may use the highways. It is health and safety regulation versus limiting competition. It is banning a dangerous commodity versus selecting interstate carriers. The first is permitted. The second is not.

Maine banned the importation of live bait fish because parasites caused by some bait fish endangered wild fish in Maine and non-native species inadvertently included could disturb Maine's aquatic ecology. No known sampling or inspection procedures would prevent these dangers. A quarantine was thus proper, under a hundred years of decisions. See, Missouri, K. & T. R. Co. v. Haber, supra. a state has always been able to restrict interstate movement of an object when on account of the object's "existing condition [it] would bring in and spread disease, pestilence, and death." bowman v. Chicago & Northwestern R. Co., 125 U.S. 465 (1888).

The Commission is not attempting to restrict a commodity from coming into the state because it is dangerous. It is attempting to decide who can carry a commodity and who cannot, based primarily on the Commission's determination of need. The issue here is prohibition of competition, of attempting to permit the use of Washington highways to some and prohibit it to others. Maine v. Taylor had no application.

Since Maine v. Taylor, the Supreme Court has stated that it has not abandoned its blanket prohibition on direct state regulation of interstate commerce. Healy v. The Beer Institute,

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491 U.s. 324, 337 fn. 14 (1989). The District Court in Medigen erred in concluding that it had. The Commission's certificate requirement is invalid per se.

Even if applicable, the Commission failed to meet its burden of proof under Maine v. Taylor. As demonstrated above, the Commission is attempting to directly regulate interstate commerce with its certificate requirement. The District Court in Medigen required the West Virginia commission to demonstrate both a legitimate local purpose for the certificate requirement and that the purpose could not be served as well by available nondiscriminatory means. The Commission could do neither.

While the health and safety of a state's citizens is a legitimate local purpose, the uncontroverted evidence presented at trial in Medigen established that infectious medical waste poses no threat to the public. The Washington Commission provided no medical testimony or other evidence on the subject of public health and safety.

The Commission relies on witness Dempsey who was not qualified to provide opinion testimony on the health risks of medical waste. Since there is no proven risk to the public from infectious medical waste the Commission's certificate requirement cannot serve any "legitimate local purpose." When there is no danger, safety and public health are not improved by stricter regulation. What the Commission has attempted to do is to control market entry, service territory and rates without any proof that this benefits the citizens of Washington to any degree. The Commission failed

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completely in the first part of the Maine v. Taylor scrutiny.

Appellants made little attempt to meet their second burden under "strict scrutiny," that they were proposing the least restrictive alternative. The Commission contends that its certificate requirement is needed to guarantee universal service throughout Washington. The Commission, however, did not support this claim. There is no link between the Commission's actions and a "legitimate local purpose." Health and safety is not improved. There is obviously a less restrictive alternative than that proposed by the Commission, that is, the free market.

Finally, regardless of the evidence presented, the Commission's justification for a certificate requirement, universal, adequate service cannot support any burden on interstate commerce.

IV

CONCLUSION

For the reasons set forth above, Kleenwell respectfully requests the judge to rule that the interstate transportation of medical waste act in which Kleenwell is engaged is not subject to state economic regulation - the requirement of a certificate of public convenience and necessity.

RESPECTFULLY SUBMITTED this 13th day of July, 1992.

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CERTIFICATE OF SERVICE

I, James T. Johnson, counsel for Enoch Rowland and Kleenwell Biohazard, do hereby certify that I have served a copy of the foregoing Opening Brief on each party of record, mailing by first class mail properly addressed with postage prepaid on the 13th day of July, 1992.

DATED this 13th day of July, 1992.

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