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July 13, 1992

Mr. Paul Curl
Acting Secretary
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION
P.O. Box 9022
Olympia, WA 98504-9022

Re: ENOCH ROWLAND d/b/a KLEENWELL BIOHAZARD
Docket No. TG-920304

Dear Mr. Curl:

Enclosed is the original and three copies of the Post Hearing Brief filed on behalf of Ryder Distribution Resources, Inc., in the above entitled cause.

Sincerely yours,

BOYD HARTMAN

BH:br

Enclosures 4

cc: Mr. James T. Johnson
Mr. Richard A. Finnigan
Mr. James Sells
Mr. David W. Wiley
Ms. Cindy Horenstein
Mr. Steven W. Smith
Mr. Warren Goff

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 AND GENERAL ECOLOGY CONSULTANTS	RYDER DISTRIBUTION RESOURCES'S POST HEARING BRIEF

PRELIMINARY STATEMENT

The facts of this case are not in dispute. Kleenwell has for the past several years engaged in the business of assisting in collecting and transporting for disposal, medically infectious waste from generators in the state of Washington. Kleenwell had originally attempted to gain from the WUTC the necessary authority under the provisions of RCW 81.77.040 to engage in that service. Kleenwell had also sought a determination that it's activities were not subject to regulation. Having failed to obtain a favorable decision in these efforts, Kleenwell commenced transporting the waste it solicited to disposal facilities without the state of Washington. It's admitted purpose for altering its disposal site to an out of state site was to a void the requirement of first obtaining appropriate state authority (Tr. 87).

The complaint filed by the Commission asserts that Kleenwell is engaging in a regulated activity and that it cannot continue its

service without obtaining a certificate from the Commission. The certificate in question cannot be obtained without notice and hearing and without affording existing certificate holders the right to protest and oppose the application. Upon the conclusion of any hearing, the Commission is permitted to grant the authority if requested in a territory not then served, only if it finds that the public convenience and necessity requires the service. In the case of Kleenwell, the territory it seeks to service is already being serviced by existing carriers and no new service is permitted unless the Commission can find that the existing certificate holder cannot provide service to the satisfaction of the Commission. (RCW 81.77.040)

As previously held by the Commission, the standard "service to the satisfaction of the Commission" places a strong impediment upon the entry of new carriers and protects existing carriers from competition. See *SUPERIOR REFUSE REMOVAL CORP.*, Order M.V.G. No. 1526, Hearing GA-849 (Nov. 1991). Any overlapping of authorities is considered not to be in the public interest. It is clear, that Kleenwell's possibility of entering into this field of service under a certificate issued from this Commission is nil. Its past history of non-compliance with the Commission's regulations and its previous denial of its authority application would be insurmountable obstacles in themselves.

The evidence would disclose on the record that there is presently one certificated carrier that service the entire state and several who operate in the area served presently by Kleenwell.

Each of these carriers claim to be responding to the public need for service in their territories and further claim that additional competition would impair their ability to serve the public and would particularly impact their ability to serve small accounts at more remote locations.

The Commission staff called as its witness Professor Paul Dempsey, who, testifying as an expert, discussed the perils of unregulated entry into the transportation industry. Referring to the regulatory reforms instituted by Congress in the 1980's he testified that unrestricted entry into transportation services has caused a general decline in the quality of serve, an increase in the cost of service to most consumers and has adversely affected public safety. He presented evidence that virtually every deregulated industry has suffered severe revenue losses and significant numbers of bankruptcies.

Mr. Dempsey testified that the state of Washington had a legitimate interest in the regulation of infectious waste and that such regulation was necessary to assure reasonably adequate service at fair and impartial rate levels. In his opinion the Washington statutory scheme was necessary for the public health and safety and was not in impermissible burden on interstate commerce.

THE WASHINGTON STATUTORY SCHEME

Historically, the standards under which garbage and refuse authorities were issued was identical for those companies and other transportation companies. It does appear, however, that the

Commission had at least by 1949 decided that duplications of authority common in the transportation industry were not a desirable incentive to service in the garbage and refuse field. *IN RE REVISION OF COMMON CARRIER PERMITS OF GARBAGE AND REFUSE HAULERS IN KING COUNTY,* Hearing No 4020 (Nov., 1949) In 1961, the Legislature carved out of RCW Chapter 81.80 the regulation of garbage and refuse haulers and enacted the present standards for entry which, at least in the Commission's view, favors single certificated territories. The provisions of RCW 81.80.020, setting forth the public policy as a guide stone of Commission regulation was not incorporate under the garbage and refuse section of the code. There were in 1961 no specific stated guidelines underlying RCW Chapter 81.77. If in this cause there are to be found specific directives in respect to the regulation of interstate commerce for the public health and benefit, one must look outside of the legislative scheme itself to find such a mandate.

Under the provisions of RCW 81.77.100, as amended in 1985, the following language was adopted:

> However, in order to protect public health and safety and to ensure solid waste collection services are provided to all areas of the state, the commission, in accordance with this chapter, shall regulate all solid waste collection companies conducting business in this state.

This is of course an empty admonishment if the activity required of the Commission exceeds the permissible limits of state authority. As a focal point of jurisdiction, the directive does little to assist the Commission or indeed the courts, in

determining why regulation in conformance with the chapter is necessary to protect the public health and safety. In reviewing a far more comprehensive and specific regulatory scheme enacted in the state of West Virginia, the court in the *MEDIGEN* case, *MEDIGEN OF KENTUCKY, INC. MEDIGEN OF PENNSYLVANIA, INC. v. PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,* Civil Action No 2:90-0761, U.S. Dist Ct. So. Dist of W.Va. (Jan. 1992), observed:

> * * * No particularized evidence was offered to support the generalized legislative findings set out in the statute that the health and safety of the general public are endangered by exposure to infectious medical waste. Nor was any evidence offered that the health of residents in counties presently having no infectious medical waste carrier with PSC authority is more adversely affected then that of residents in counties having such service.

The court's view of the testimony presented by the existing certified carriers should also be of some concern to the Commission here. First, observing that they were the only ones holding certificates the court observed:

> Consequently, their interest in precluding competition by preserving the existing certification system is apparent. No other evidence was presented tending to show that a free-market economy will not satisfy the state-wide need for reasonably priced infectious medical waste transportation services.

The Commission, if it is to assert jurisdiction here must avoid the pitfalls of assuming the existence of a clear legislative policy sufficient to convince a federal court of the necessity to cede federal control to the state. Washington's statement of policy is clearly less pervasive then that existing in the West Virginia situation already found deficient by the Federal Courts. It should be further stressed, that little support is afforded the

commission by the opinions expressed by Professor Dempsey. As persuasive as his arguments are, they are not a substitute for the required pronouncement of a state policy. Nor do those comments justify a conclusion that there is a necessary relationship between public health and safety and controlled entry. We must further recognize, that Professor Dempsey's comments have been found to be unpersuasive on the Federal level and would probably be of little aid to the Commission should it assert jurisdiction here. The basic problem the Commission would have in relying upon Professor Dempsey's testimony as a foundation for asserting control over an interstate activity, is that the court in *MEDIGEN* has already found Washington's tight regulatory scheme to be unrepresentative of state regulation in general. No evidence was presented on that record or here that there is any benefit resulting from state regulation through certification of transportation as would affect the public health and safety.

It is permissible for the legislature to direct that an intrastate industry be regulated for the public health and safety. Its legislative findings of need are sufficient. The Federal Courts, however, are not bound by any recitation of perceived state concern where the activity regulated transgresses upon the federal rights granted to citizens in general. There is no showing, for example, that Kleenwell during its unregulated tenure, has been responsible for any activity exposing the public to any hazard. Even the rules recently enacted by the Commission, WAC 480-70-500 *et sequa*, would not prove persuasive to a *Medigen* court that has

found transportation of biomedical waste to be non-hazardous and medical waste in general, once containerized, to constitute no public health risk.

The preservation of state jurisdiction must rest not upon any broad assertion of a public benefit, which assertion failed to convince the court in *MEDIGEN*, but must rest upon a clear recognition of what is truly local commerce and what is a federally protected activity.

SOLID WASTE COLLECTION SERVICE IS A LOCAL ACTIVITY NOT AFFECTING INTERSTATE COMMERCE

This Commission's jurisdiction of solid waste collection service is derived in part from the definition of the service contained in RCW 81.77.050 (7). The Commission's decision in *ALL COUNTY DISPOSAL SERVICES, INC.* Cause No. TG-1859 (Aug 1985) as reaffirmed in *SURE-WAY INCINERATION SERVICES, INC.*, Order M.V.G. 1533, GA-868 (Feb. 1992), clearly indicate that the Commission interprets its jurisdiction as extending only to the local activity involved in the collection for disposal of solid waste. In order for a carrier to come within the Commission's jurisdiction it must be "primarily in the specialized business of transporting solid waste for collection and/or disposal . . " As pointed out in *ALL COUNTY*, supra, the disposal of garbage is not the primary ingredient of the service. The customer has little concern for the point of disposal and does not specify that its solid waste be disposed of at a particular site. In fact, by the very nature of the service, the commingling

of the waste, precludes a customer by customer selection of differing disposal sites. At the time the basic service is provided, the generator has no specific transportation intent sufficient to delineate the character of the commerce. As noted in *ALL COUNTY, supra*, "it is totally irrelevant to the contract of collection and transportation where the ultimate disposition occurs." (Order, p.7)

It is also to be noted, that in respect to solid waste transportation, the state, through County Comprehensive Solid Waste Management Plans, has preempted any individual determination regarding disposal sites. These comprehensive plans, however, pose some problems with the Commission's jurisdiction here. First, the Legislature has placed in the hands of the Counties the primary concern over health and safety matters concerning solid waste. RCW 70.95.160 provides in part:

> "Each county, or any city, or jurisdictional board of health shall adopt regulations or ordinances governing solid waste handling implementing the comprehensive solid waste management plan covering storage, collection, transportation, treatment, utilization, processing and final disposal including the issuance of permits. . ."

The larger role given the WUTC under the provisions of the 1989 amendments (Substitute House Bill No. 1671) places the Commission in a more participatory role in the overall waste management program, but its role is more advisory and is focused on implementation and costing and not on public health and safety.

Another difficulty faced by the Commission in attempting to assert jurisdiction over interstate commerce on the basis of public

health and safety, is the fact that under the state constitution, the cities have the prerogative of providing or of contracting to provide for the collection and transportation of solid waste. It would be difficult to convince a Federal Court that the certificating process under which the WUTC operates is necessary to preserve the public health and safety, when it is not a program generally applicable within the state itself, and when the Legislature has placed the basic health and safety concerns regarding the transportation and collection of solid waste in other branches of government.

The entire issue concerning the interstate characteristics of solid waste transportation has gained importance as local disposal options have been reduced by land fill closures and the inability to locate new sites, and by the environmental problems and incident cost of operating incinerators. As a result of these conditions, more and more of the state's solid waste is moving out of state for disposal. Even the biohazardous waste element of the waste stream had moved in significant quantities out of state for disposal. The challenge to the state's jurisdiction in this proceeding has obvious and far reaching connotations. It is for this reason that the Commission must be most cautious in defining the perimeters of its jurisdiction. It must assert its specific local interest as defined in the *ALL COUNTIES* decision. On the record, and in light of the Federal Court's decision in *MEDIGEN*, it is very likely that any blanket assertion of jurisdiction impacting interstate commerce on the basis of the public health and safety, which assertion would

attempt to justify the certification process, would be struck down.

THE SPECIFIC NATURE OF THE COMMERCE AT ISSUE MUST BE RECOGNIZED

In proceedings before the commission, the solid waste industry has generally taken the position that anything falling within the definition of regulated waste affects their interest. The industry has been perhaps overzealous in its effort to protect their perceived interest. In the commission's decisions, on the other hand, it has been generally acknowledged that there are services offered within the broad range of service authorized under the description of solid waste that are unique, specialized and not available from the traditional service provider. As noted in *AMERICAN ENVIRONMENTAL MANAGEMENT CORP.* Order MVG 1452, Hearing GA-874 (Nov. 1990):

> "Based on the evidence of record as set forth in the findings below, it must be concluded that the existing holders of permanent, G-authority will not provide such service to the satisfaction of the Commission. Even assuming that satisfactory service is being provided by such solid waste collection companies in their collection activities of traditional solid waste, it is not shown that those companies were specially equipped and trained to meet the demonstrated need for specialized, infectious waste collection service, nor were they in fact meeting the real public need for that service. This specialized service involves distinct and different operational requirements. The certificate holders were not serving to the full extent of their authorities, which left this public need unserved. . ."

In the past, the commission has recognized the transportation of hazardous waste as requiring specialized service, not provided by the general solid waste carrier. *AMALGAMATED SERVICES, INC.* Order MVG No. 1183, Hearing No. GA-767 (Oct. 1984). In that case, the

Commission noted:

> "Here, there is substantial evidence that the service sought to be provided by the applicant is largely a specialized service, and includes specialized equipment and specialized training of its personnel. There is evidence that the nature and the level of service provided by the applicant were not generally available from existing carriers at the time applicant's service was begun. The service as operated and as herein sought specializes further, in serving the needs of relatively small shippers, for quantities which might in other circumstances be uneconomical."

In the case of *WILLIAM R. BELL, d/b/a MONTLEON TRUCKING*, Order MVG No. 1176, Hearing No. GA-769 (Jul. 1984), the Commission recognized the public benefit in authorizing a carrier to provide service for construction debris. The need expressed was for a carrier with broader and more flexible service then available through traditional certificate holders who's territorial limitations was found not responsive to the public demand. The present service provided by Kleenwell, is a specialized service and the Commission treatment of Kleenwell on this record should recognize that uniqueness.

One of the essential differences in that service, is that the disposal of the product in certain counties, is not permitted. Those counties, as a part of their comprehensive waste plan require that infectious waste be incinerated or treated in such manner as to decontaminate it before it can be disposed as a part of the county's regular waste stream. Although, the county regulations are not consistent, those that regulate the waste, normally place the burden of compliance on the generator. It is significant that most counties within the state have no special regulations

out of state would not seem unreasonable to a Federal Court.

The weakness in Kleenwell's case, is that the interstate transportation is a choice made by it and not the generator. As testified by Mr Roland, the generator had no interest in the point of disposal and did not designate that the product be transported to California. Only after the material was collected by Mr. Rowland did it become designated as an interstate shipment, and then only after a period of storage and only after consolidated in sufficient quantities to justify an interstate shipment.

A distinction can be made again, that in the collection of the waste, Kleenwell is engaging in a strictly local activity and that those activities fall with in the definition of "solid waste collection" as defined in the act. Even though there may be no public health relationship to the certification process, the Commission can still regulate a local activity.

As noted in *TEXAS & NEW ORLEANS RAILROAD CO. v. SABOME TRAM COMPANY*, 227 U.S.111 (1912), the protection of the commerce clause extends to commerce when it can be manifested that there was a persisting transportation intent at the time the shipment commenced. In *CHICAGO M. & ST. P. RY Co. v. IOWA*, 233 U.S. 334, the court stated:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity or prevent the shipment to a point within the same state from having an independent or intrastate character even though it be in the same cars."

In *BURLINGTON NORTHERN v. WEYERHAEUSER CO.*, 719 F.2d 304 (1983), the court had before it a situation where Weyerhaeuser had shipped logs to its sorting yard in Tacoma with the general intent that it would sell those logs, which were of export quality, in foreign commerce. Most of the logs were exported. The question was whether the logs moving within the state to the sorting yard were also interstate in character. Quoting with approval from the case of *COE v. ERROL*, 116 U.S. 517, (1886), the court stated:

> "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between States has commenced. But this movement does not begin until the articles have been shipped or started for transportation from one State to another. The carrying of them in carts or vehicles, or even floating them, to the depot where the journey is to commence is no part of the journey."

In this case, the collection and storage of the medical waste leaves the waste in the control of Kleenwell which party may, except for authority impediments, ship to any point including an intrastate point. There is no commitment to the commerce out of state until the waste has been collected in sufficient quantities. There is justification for holding that the collection and storage activities are within state control and remain so until there has been a commitment to ship the product out of state, at which time and interstate shipment is created. Under the *All County* doctrine, the WUTC claims no control over that second movement.

Giving consideration to the intent of the shipper is also required in the situation where the Commission is dealing with special services existing in the solid waste field. Many hazardous

shipment are specifically and by law manifested at the time of tender and are intended for out of state disposal. This specific intent would preclude state jurisdiction. Even in the transportation of Medical waste, if a specific generator directed that its waste be transported without the state and was willing to submit to a separate contract for that shipment, an interstate shipment beyond state control is formed. The Commission in such situations would be dealing with a separate shipment and not a collection service. In making these observations, it is stressed again, that sufficient facts do not exist on this record to hold that the state's concern for the public health and welfare justify imposing the Commission's regulatory burden on interstate commerce and careful distinctions must underly the state's assertion of authority.

DATED this 13th day of July, 1992.

BOYD HARTMAN, Attorney for Ryder Distribution Resources, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of the foregoing Post Hearing Brief upon applicant's attorney, James T. Johnson, Two Union Square, Suite 3000, 601 Union St., Seattle, WA 98101-2324; Richard A. Finnigan, 1201 Pacific Ave. Suite 1900, Tacoma, WA 98402; James Sells, 510 Washington Ave., Bremerton, WA 98310; David W. Wiley, 1700 Bellevue Place, 10500

N.E. 8th St., Bellevue, WA 98004; Cindy Horenstein, 900 Washington St., Suite 900, Vancouver, WA 98660 and Steven W. Smith, Assistant Attorney General, 1400 S. Evergreen Pk. Dr. S.W., Olympia, WA 98504, by mailing a copy thereof, by United Sates Mail, postage pre-paid, properly addressed to said parties.

DATED this 13th of July, 1992.

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