

LAW OFFICES OF
McCLUSKEY, SELLS, RYAN, HABERLY & UPTEGRAFT, INC., P.S.

510 WASHINGTON AVENUE, SUITE 300
BREMERTON, WASHINGTON 98310
(206) 479-4545
FAX: (206) 377-4581

TERRY K. McCLUSKEY
JAMES K. SELLS
JAMES E. RYAN
M. KARLYNN HABERLY
DARRELL D. UPTEGRAFT, JR.

HOLLY GODFREY BANKS
KATHLEEN SHEDD

GORDON L. WALGREN
OF COUNSEL

July 20, 1992

Mr. Paul Curl, Secretary
Washington Utilities and
Transportation Commission
Chandler Plaza Building
1300 S. Evergreen Park Dr. SW
Mail Stop FY-11
Olympia, WA 98504

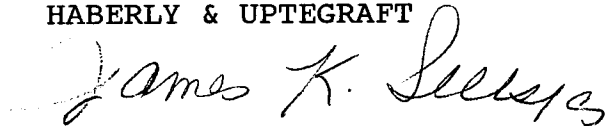
**Re: Rowland, d/b/a Kleenwell Biohazard
No. TG-920304**

Dear Mr. Curl:

Enclosed for filing in the above matter you will find an original and three copies of Post Hearing Brief of Intervenor Washington Waste Management Association.

Very truly yours,

McCLUSKEY, SELLS, RYAN,
HABERLY & UPTEGRAFT



JAMES K. SELLS

JKS:cs

Encls.

cc: Mr. J. P. Jones
Mr. Dave Wiley
Mr. Jack Davis
Ms. Cindy Horenstein
Mr. Steven Smith
Mr. Rick Finnigan
Mr. Boyd Hartman

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BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| In the Matter of Determining) | |
| the Proper Carrier Classifi-) | |
| cation of:) | DOCKET NO. TG-920304 |
| ENOCH ROWLAND d/b/a KLEENWELL) | |
| BIOHAZARD AND GENERAL ECOLOGY) | POST HEARING BRIEF OF |
| CONSULTANTS) | INTERVENOR WASHINGTON WASTE |
| | MANAGEMENT ASSOCIATION |

COMES NOW Intervenor Washington Waste Management Association, by and through its attorney, JAMES K. SELLS, and respectfully submits the following:

FACTS: This action was instituted by the Commission on its own motion April 6, 1992 when a "Complaint, Order and Notice of Hearing" was issued. The purpose of the hearing was to determine whether Respondent is operating a solid waste collection business without the appropriate authority required by RCW 81.77.040.

It is admitted by Respondent that it does, in fact, collect solid waste, medical waste in particular, within the State of Washington, and transports it over the public highways of the State. (TR. 18). However, Respondent argues that it is not subject to regulation by the Commission because it transports the waste to a disposal site in California. (TR. 98-99)

Respondent is not new to the medical waste business. In March of 1990 Respondent filed an application for medical waste authority in Western Washington. (Application GA-907). After hearing, the application was denied because "applicants have not

1 established the cost of service and their financial and regulatory
2 fitness to conduct the proposed operations". (Ex. 13, Order M.V.G.
3 No. 1480 at p. 2) The Administrative Law Judge further found that:

4 However, at two different times, the
5 applicants have knowingly continued operations
6 after being told to stop waste collection by
7 the Commission. The applicants have also
8 knowingly violated Health Department
9 regulations, in storing waste longer than
10 allowed. The applicant's assurances of
11 compliance don't match their actions and are
12 not believable. They are unwilling or unable
13 to comply with Commission laws and rules and
14 are therefore unfit to receive authority to
15 operate a solid waste collection company.
16 supra, at p. 15.

17 Respondent admits that virtually contemporaneously with
18 the denial of the referenced application, he "changed disposal
19 sites" from the in-state Recomp facility to a California facility.
20 (TR. 56) He acknowledges that the only reason for the use of a
21 California disposal facility is his attempt to avoid regulation by
22 this Commission. (TR. 98-99)

23 Presently Respondent indicates he travels 1,300 miles
24 from his storage facility in Des Moines, Washington to the disposal
25 site in Los Angeles. (TR. 88) He apparently makes the trip "every
26 90 days". (TR. 91) The "service territory" presently covered by
27 Respondent is apparently limited to King County. (TR. 64)

28 **ISSUE:** The sole issue here is whether or not the
29 Commission has the authority to regulate Respondent by reason of
30 its admitted collection and transportation of solid waste in
31 Washington; or if such regulation is in violation of the commerce
32 clause of the United States Constitution.

ARGUMENT: It is the strongly held position of the
Washington Waste Management Association that a state may regulate

1 solid waste collection and transportation within its borders, even
2 when the ultimate destination of the waste is another state. To
3 find otherwise would completely eliminate the power of a state to
4 regulate solid waste at all, as regulation could be avoided by the
5 simple expedient of disposing of the waste out of state.

6 The commerce clause of the United States Constitution
7 grants to Congress the power "to regulate commerce . . . among the
8 several states . . .". Art. 1, Sec. 8, Cl. 3. The purpose of the
9 clause is to prohibit discrimination by the states against
10 interstate commerce, and to prohibit economic protectionism by the
11 states. New Energy Co. v. Limbach, 486 US 269, 273 (1988).
12 However, it is equally clear that our Supreme Court recognizes the
13 right of states to adopt and enforce regulations to safeguard the
14 health and safety of its citizens, even if such regulations
15 "incidentally burden" interstate commerce. City of Philadelphia v.
16 New Jersey, 437 US 617, 624 (1978).

17 The Court has specifically stated that:

18 . . . the states retain authority under their
19 general police powers to regulate matters of
20 legitimate local concern, even though inter-
21 state commerce may be affected; so long as
22 they act in a manner consistent with the
23 ultimate . . . principle that one state in its
24 dealings with another may not place itself in
25 a position of economic isolation. Lewis v. BT
Investment Managers, Inc., 447 US 27, 35
(1980).

26 The Supreme Court, in Hughes v. Oklahoma, 441 US 322
27 (1979), sets three inquiries to be made concerning state regulation
28 of interstate commerce:

29 (1) whether [it] regulates evenhandedly with
30 only 'incidental' effects on interstate
31 commerce, or discriminates against interstate
32 commerce either on its face or in practical
effect;

(2) whether the [regulation] serves a
legitimate local purpose; and, if so,

1 (b) In-state and out-of-state carriers (if there were
2 any) must adhere to the same regulations -- there is no discrimina-
3 tion against either an out-of-state company nor against an in-state
4 company which hauls out of state;

5 (c) The regulations are neither protectionist nor
6 strictly revenue producing and there is no ban on the import or
7 export of anything by the state;

8 (d) There is no federal alternative available to protect
9 the health and safety of this state's citizens.

10 The "legitimate local purpose" exists; it is crucial to
11 any state, and there is no other means of meeting it.

12
13 **ARGUMENT RE MEDIGEN DECISION:** Respondent obviously
14 relies entirely on the recent Medigen of Kentucky, Inc., et al v.
15 Public Service Commission of West Virginia, et al, Civil Action No.
16 2:90-0761 (USDC S. Dist. of W. Va., Jan., 1992) In fact,
17 Respondent's brief is virtually a restatement of the District
18 Court's written decisions in that action.

19 Three observations must be made regarding that decision.
20 First, it simply may be wrong. It goes against long standing and
21 overwhelming precedent that a state may, in fact, incidentally (or
22 even directly) regulate interstate commerce in situations such as
23 this. see Lewis, supra; City of Philadelphia, supra.

24 Secondly, the Court apparently did not have sufficient
25 information and/or testimony before it upon which to make a finding
26 that West Virginia's regulation was necessary for the public
27 health. In the instant matter, the Administrative Law Judge has
28 the benefit of the testimony of two expert witnesses, one of whom
29 (Turnberg) is the person responsible for medical waste regulation
30 for the entire state; and one (Dempsey), who is an acknowledged
31 expert on interstate commerce. Both testified in favor of the
32 regulatory scheme. The Judge also has the benefit of extensive

1 previous experiences of the Commission with medical waste issues
2 (American Environmental Mgt. Corp., Order MVG 1452; and Sureway
3 Incineration, Order MVG 1451), in particular. In Sureway, the
4 Commission found, in relation to the need for specialized medical
5 waste service:

6 The evidence of public need is overwhelming.
7 All parties agree that there is a public need
8 for the proposed service. In addition the
9 Commission has recently adopted rules on the
10 transportation of medical waste. See WAC
11 480-70-500, et. seq. These rules require any
12 hauler handling biohazardous, infectious or
13 medical waste to follow certain procedures,
14 and to comply with training requirements,
15 packaging and handling requirements, record
16 keeping, insurance and other requirements.
17 Order MVG 1451, at 13.

18 The Commission has long ago made unchallenged findings
19 that the public health and safety is dramatically affected by the
20 handling and transportation of medical waste. The requirements of
21 the cited WAC provisions apply statewide to any and all haulers of
22 medical waste. Medical waste transportation is regulated by the
23 Commission, not by counties, as implied at page 8 of Intervenor
24 Ryder's brief.

25 Third, in Medigen, there was no issue of fitness on
26 behalf of the plaintiffs nor, apparently, was there any testimony
27 regarding the existence of carriers who were involved in medical
28 waste and clearly were endangering the public by their actions.
29 see Medigen, Memorandum Order, at p. 6. Here, the very existence
30 of Respondent, who presently collects and transports medical waste,
31 after previously specifically being found unfit to do so, injects
32 an entirely different issue into this proceeding. As indicated
previous, the fact that Respondent continues to operate literally
proves the inherent need for state regulation of his type of
transportation.

1 **ARGUMENT RE UNCONSTITUTIONALITY:** Respondent asks the
2 Commission to declare portions of RCW Chapter 81.77 to be violative
3 of the United States Constitution. Opening Brief, at 7. This is
4 a finding which is beyond the power of the Commission and can only
5 be made by the judiciary. Bare v. Gorton, 84 Wn.2d 380 (1974).

6 Even if the Commission had such authority, which it does
7 not, the burden of proving unconstitutionality as a legislative
8 enactment rests with the party who challenges the statute. Ford
9 Mtr. Co. v. Barrett, 115 Wn.2d 556 (1990). A statute duly enacted
10 by the legislature is presumed constitutional, and Respondent must
11 prove otherwise "beyond a reasonable doubt". Clarke v. Equinox
12 Holdings, Ltd., 56 Wn.App. 125 (1989).

13 In any case, if some subsequent Court hearing this matter
14 were to agree with Respondent's contention, the entire regulatory
15 scheme regarding solid waste in this state would be rendered null
16 and void. Any hauler of solid waste could completely avoid all
17 regulation regarding collection and transportation by the simple
18 means of disposing of the waste in another state. Since there is
19 no federal regulation of solid waste collection or transportation,
20 regulation in Washington would simply cease to exist. A regulatory
21 structure which has been in effect since 1961 would disappear and
22 the long-standing and heretofore unchallenged right of a state to
23 regulate solid waste within its borders would disappear with it.

24
25 **ARGUMENT RE PREEMPTION:** Respondent attempts, in its
26 brief, to take Medigen even one step further by arguing that
27 jurisdiction over interstate transportation of waste has been
28 preempted by Congress. Opening Brief, at 7. Not even Medigen went
29 that far. There the Court specifically stated:

30 The court accordingly finds that the statute
31 and regulations at issue here are not
32 preempted by federal law and cannot be
 invalidated on that ground. Memorandum Order,
 at 13.

1 The Medigen opinion correctly observed that, first, the
2 Interstate Commerce Commission has consistently declined to
3 regulate any interstate movement of solid waste; and, secondly,
4 that the preemption argument is contrary to City of Philadelphia v.
5 New Jersey, 437 U.S. 617 (1978). Memorandum Order, at 12.

6 In City of Philadelphia, the Court quoted from the only
7 possibly applicable federal legislation (the Solid Waste Disposal
8 Act) which provides in pertinent part that:

9 . . . the collection and disposal of solid
10 wastes should continue to be primarily the
11 function of State, regional and local agencies
12 42 U.S.C. 6901(4).

13 No new preemptory legislation has been enacted since Medigen which
14 would change the conclusion that preemption does not apply to solid
15 waste issues. In fact, as noted, Congress has been careful to make
16 it clear that even the existing legislation is not intended to
17 preempt this area.


18 **CONCLUSION:** Respondent asks this Commission to declare
19 a statute unconstitutional, and by doing so entirely disregard the
20 regulatory scheme which has governed solid waste collection and
21 transportation in this state since 1961. The Commission does not
22 have the power to do so, but even if it did such a finding would be
23 contrary to long-standing precedent that a state may regulate
24 matters of local concern, even if such regulation affects inter-
25 state commerce. There is no more "local" a matter than solid waste
26 collection and transportation. It is the state's right and duty to
27 protect the health and safety of its populace by regulation of this
28 commodity. It is even more imperative when dealing with medical
29 waste.

30 If Respondent's theory were adopted, regulation of solid
31 waste, including medical waste, would cease. Virtually anyone with
32 a vehicle could hold himself out as a collector and transporter of

1 medical waste in the vast majority of counties in the state, as
2 long as the disposal destination is in another state. Respondent
3 himself is a prime example of what can happen when a state does not
4 regulate this vital service.

5 The only finding the Commission need make in this matter
6 is that Respondent is indeed operating as a solid waste collection
7 company without appropriate authority as required by statute; and
8 the only order that need be issued is for him to cease and desist.

9 Respectfully submitted,

10
11  for
12 JAMES K SELLS
13 WSBA No. 6040
14 Attorney for Intervenor Washington
15 Waste Management Association
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CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the foregoing was mailed by first class mail, postage prepaid, to the following:

Mr. Dave Wiley
1700 Bellevue Place
10500 NE 8th St.
Bellevue, WA 98004

Mr. Jack Davis
Suite 1200
IBM Building
Seattle, WA 98101

Ms. Cindy Horenstein
900 Washington St., Suite 900
Vancouver, WA 98660


Mr. Steven Smith
Asst. Attorney General
1400 S. Evergreen Pk. Dr. SW
Olympia, WA 98504

Mr. Richard A. Finnigan
Vandeberg & Johnson
P. O. Box 1315
Tacoma, WA 98401-1315

Mr. Boyd Hartman
11000 Main St.
Bellevue, WA 98004



Subscribed and sworn to before me this 20th day of July, 1992.


Notary Public for the
State of Washington
Residing at Bremerton, WA
My commission expires 6-93