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A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

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July 22, 1992

The Office of the Secretary
Washington Utilities & Transportation
Commission
P. O. Box 9022
1300 S. Evergreen Park Dr. S.W.
Olympia, Washington 98504-9022

Re: Protestant American Environmental Management Corporation Post Hearing Brief In Re TG-920304, Enoch Rowland d/b/a Kleenwell Biohazard

Dear Mr. Curl:

Enclosed please find an original and three (3) copies of Protestant American Environmental Management Corporation's Post-Hearing Brief for filing in the above-captioned matter.

Please contact the undersigned if you have any questions.

Yours truly,

WINDUS, THOMAS, CALMES & WILEY

David W. Wiley

DWW/khs
Enclosures

cc: Roger Van Valkenburgh
James T. Johnson
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Lisa Anderl, Administrative Law Judge

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re the Matter of Determining the Proper Classification of ENOCH ROWLAND d/b/a KLEENWELL BIOHAZARD	)	TG-920304 POST-HEARING BRIEF OF INTERVENOR AMERICAN ENVIRONMENTAL MANAGEMENT CORPORATION

I. DESCRIPTION OF PROCEEDING

This is a complaint action brought by the Commission pursuant to RCW 81.04.110 and RCW 81.04.510 to determine whether Enoch Rowland d/b/a Kleenwell Biohazard (hereinafter "Kleenwell" or "Respondent"), is engaging in the business of transporting solid waste for collection and disposal over the public highways of this state for which it holds no requisite authority under RCW 81.77.040 and WAC 480-70-070. The matter was duly noticed and set for hearing May 13, 1992 at Kent, Washington with a resumed hearing date of June 11, 1992 at the same location. In addition to the staff and the Respondent, appearances in intervention were granted on behalf of Ryder Distribution Resources, Inc., Rabanco Companies and Sureway Medical Systems, Clark County Disposal Group, The Washington Waste Management Association, and American Environmental Management Corporation ("AEMC"). Following testimony in this record, briefs were requested on the important legal issues raised in this proceeding, which argument and analysis by AEMC follows.

II. SUMMARY OF FACTUAL EVIDENCE

The essential facts in this matter appear not to be in

dispute. Kleenwell Biohazard is a Washington corporation owned by Enoch Rowland and his daughter who are both Washington residents (Tr. 54). All of Kleenwell's customers are located in the State of Washington (Tr. 55). Initially, while briefly operating under a temporary WUTC permit, Kleenwell used the Recomp Incinerator in Ferndale, Washington, but concurrent with the denial of its permanent application under GA-907, Exhibit 13, Kleenwell began to transport its waste to Security Environmental Systems, Inc. ("SES") in Los Angeles, (Garden Grove) California (Tr. 56). The cost of disposing at SES versus the Recomp Incinerator is about twice to three times as much (Tr. 59). Kleenwell currently operates only in King County, a densely populated area in the State of Washington (Tr. 65). Kleenwell Biohazard does not make a profit (Tr. 67) and its sister corporation has always subsidized its infectious waste collection operations (Tr. 68). Respondent can underprice its regulated competitors at will (Tr. 68), can use promotional rates and other preferential pricing (Tr. 69), and has a "competitive advantage" over its regulated competitors (Tr. 70). While believing it is not subject to Commission regulation, Kleenwell does believe its waste collection operations come under the jurisdiction of the Seattle/King County Health Department to legally collect (pick-up) waste (Tr. 74), as well as county control regarding disposal situs, even where same is out-of-state (Tr. 75). Kleenwell divides its operation into two pieces: collection of the infectious waste, and transportation of that waste to California (Tr. 74).

The only reason Kleenwell transports the collected material to

California is to avoid the regulatory control of the WUTC (Tr. 99). Kleenwell collects material wholly within King County, Washington and then returns it to its warehouse where it is held in its refrigerator in storage up to 90 days (Tr.91), for ultimate shipment to California (Tr. 32). Kleenwell's customers are indifferent as to whether their medical waste is disposed of within or without the State of Washington (Tr. 57). The choice to dispose of the material in California is thus unilaterally made by respondent.

III. ISSUES PRESENTED

1. Are the on-going operations of Kleenwell in violation of state law, to-wit: RCW 81.77.040 and WAC 480-70-070, so that an initial order should issue classifying and requiring the respondent to cease and desist from such operations pending grant of requisite authority under state law and rule?

2. Is RCW 81.77.100, as applied to the operations of Kleenwell Biohazard as adduced on this record, constitutional?

IV. ANALYSIS OF LAW

In addressing the legal issues in this proceeding, it must first be acknowledged that neither this proceeding nor this Commission can determine the constitutionality of RCW 81.77.100 which appears to be the solitary goal of respondent Kleenwell in this action. "An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power." Bare v. Gorton, 84 Wn.2d 380, 383, 526 P.2d 379 (1974).

Thus, the analysis and discussion of the constitutionality of RCW 81.77.100 in issue 2, (above), are largely academic. Neither the administrative law judge nor this Commission can validate or

invalidate the statute, but can only apply the challenged provisions to the activities of respondent adduced on this record to determine whether its operations violate RCW 81.77.100, or are validly interstate in nature so as to escape Commission regulation.

A. The operations of Kleenwell Biohazard are those of a common carrier solid waste collection company under the provisions of RCW 81.77.

Under Washington law a "common carrier" of solid waste is one who:

> undertakes to transport solid waste for the collection and/or disposal thereof, by motor vehicle for compensation, whether over regular or irregular routes or regular or irregular schedules. RCW 81.77.010(3)
>
> A "solid waste collection company" is every person or his lessees, receivers, or trustees, owning, controlling, operating or managing vehicles used in the business of transporting solid waste for collection and/or disposal for compensation, except septic tank pumpers over any public highway in the state whether as a "common carrier" thereof or as a "contract carrier" thereof. RCW 81.77.010(7).

Reviewing the undisputed facts in this record as summarized in Section II, above, leads to the inescapable conclusion that Kleenwell Biohazard is a "common carrier" of solid waste engaged in on-going operations as a "solid waste collection company." As Mr. Rowland testified, his company operates no differently now than during the brief interval in which it held temporary authority from the Commission, except now it merely is not bound by tariff strictures (Tr. 30, 31) and is eventually shipping waste to California (Tr. 31, 33).

Kleenwell collects and transports wastes generated in physicians' and dentists' offices once a week to every ten days on average (Tr. 29-31) and transports the collected materials over the

public highways to its warehouse where it remains "up to 90 days" (Tr. 32), for eventual shipment to California. Kleenwell is compensated for this collection, transportation and disposal service at the rate of $12.00 per individual small box and $20.00 per individual large box (Tr. 84, 94, 95). Regulated solid waste carriers are Kleenwell's "competitors" (Tr. 68, 69). Kleenwell thus unquestionably meets the statutory definitions of a common carrier solid waste collection company.

B. As a common carrier of solid waste, Kleenwell is fully subject to regulation by the State of Washington, except where that regulation would be precluded by Article I, Section 8 of the United States Constitution's Commerce Clause.

As to operations between points in the State of Washington in intrastate commerce, there would appear to be no dispute here that regulation by the State of solid waste transportation activities is a presumptively valid exercise of the State's police power. See City Sanitary Service Co. v. Rausch, 10 Wn.2d 446, 448, 449 (1941) and Smith v. Spokane, 55 Wash. 219, 104 P. 249 (1909).

Of course, the State would be presumed to be acting with a heightened degree of authority when regulating the effects of occupational exposure to medical waste which the Respondent testified is fraught with health risks to the general public (Tr. 63). In directly challenging RCW 81.77.100 and asserting its unconstitutionality, the Respondent must also acknowledge the focus of such an inquiry when confronted with a dormant commerce clause challenge.

> The crucial inquiry . . . must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can be fairly viewed as a law directed to legitimate local concerns, with

effects upon commerce that are only incidental. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

Kleenwell's assertion that RCW 81.77.040 and RCW 81.77.100 "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," (Kleenwell Opening Brief at 8), is never established by Kleenwell either in this record or on argument. The act which triggers jurisdiction by this Commission under RCW 81.77, of course, is the act of collecting and transporting medical waste for compensation upon the public highways of this state. As is discussed, *infra*, the activities of Kleenwell in this regard are clearly divisible and there is no showing on this record that the State's legitimate policy power jurisdiction over solid waste collection activities within the state is in any way a "direct regulation of interstate commerce," merely because Respondent itself chooses to move the collected material for disposal to another state. Even assuming a recognizable impact on interstate commerce, the State's interest should prevail under the balancing test announced by the United States Supreme Court in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

The Commission has previously addressed the "burden"/equal protection argument (in a case with more nexus to the burden claim raised here by Kleenwell) as well as the claim that the statutory scheme in question is economically protectionist.[1]

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[1] AEMC, as a California corporation and holder of Certificate G-231, is uniquely able to dispute any implicit argument by Kleenwell that RCW 81.77 evinces an intent to favor state economic

> When we balance the need for adequate, secure, and reliable garbage and refuse collection and transportation services against a demand for free and open competition, we do not see how this system of regulation constitutes an impermissible burden on interstate commerce. Indeed, as we have discussed above, we do not discriminate between in-state and out-of-state carriers, and therefore, we believe the statute as applied to EWS does not violate the commerce clause of the United States Constitution. Cause No. TG-1911, In re the Matter of Evergreen Waste Systems, Inc., (Aug. 1986) at 8-9.

C. Kleenwell's halting attempt to characterize its overall activities in the act of collecting and transporting medical waste as interstate in nature is wholly inaccurate.

One of the most glaring deficiencies in Kleenwell's attempt to meet its burden of proof in this proceeding is the gaping hole in its proof that Kleenwell's **entire** operation is in interstate commerce. AEMC concurs with the Respondent that it is the shipper's "fixed and persisting" intent at the time of the shipment that determines the essential character of commerce. Baltimore & Ohio Southwestern R.R. Co. v. Settle, 260 U.S. 166, 168-69 (1922). (See also the concurring testimony of Professor Dempsey at Tr. 251, 252). As the United States Supreme Court previously summarized:

> It is undoubtedly true that 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 (citations omitted). But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement, or prevent the reshipment to a point within the same

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interests. It would assert, however, that the fitness standards required to be established by an applicant in RCW 81.77.040 and WAC 480-70-070 are important threshold standards that Kleenwell cannot meet (See, i.e. Exhibit 13 again and testimony by Respondent on previous revocation proceedings on the county license of Kleenwell at Tr. 104) and are statutory requirements which Kleenwell would seek to avoid at all cost.

> state from having an independent and intrastate character. (Citations omitted).

Chicago, Milwaukee & St. Paul Ry Co. v. Iowa, 233 U.S. 334, 343 (1914).

Nowhere in this record does Respondent describe how its customers have a "fixed and persisting intent that collected material be considered part of the subsequent movement in interstate commerce." (Kleenwell Opening Brief at 5).

Kleenwell obviously glosses over this point because the testimony as noted above shows just the contrary. Kleenwell's customers were totally "indifferent" as to where their waste was disposed of (Line 21, Tr. 57), and none of its customers had any objections to Kleenwell's previous use of the Ferndale facility (Tr. 57). The only reason Kleenwell's customers' waste cross state lines is the unilateral decision by Kleenwell to circumvent state regulation by commencing a longhaul movement to California with separate motor carrier equipment (Tr. 88) rented on a per use basis (Tr. 105). There has been absolutely no showing by Respondent in this record that the act of collecting, picking-up and transporting medical waste to its warehouse is in anyway held out as anything other than a purely local activity over which the state can unquestionably exercise its police power jurisdiction.

Kleenwell cannot avoid the imposition of jurisdiction by this Commission by simply uttering an incantation of "interstate commerce" and ignoring any effort to link the act of local collection of infectious waste to the independent sporadic movement, removed in time, equipment configuration and intent from

the ultimate movement in interstate commerce. It therefore cannot avoid the mantle of characterizing the purely local move as intrastate commerce by "considerations" of subsequent interstate movements. As the Ninth Circuit found in a related storage and inventory case on character of commerce questions . . .

> The record establishes that the only intent manifested by the shipper in this case at the time of shipment . . . was to ship the goods to the warehouse for eventual transshipment to an as yet unknown destination - interstate, intrastate or foreign - and to assure their eligibility for transit credits which were available regardless of whether the ultimate transshipment was interstate, intrastate or foreign.

Southern Pacific Transp. Co. v. ICC, 565 F.2d 615, 617-18 (9th Cir., 1977).[2]

Here, by Kleenwell's own admission, the generator (shippers) were "totally indifferent" as to the situs of disposal. Hence, the entirely separate movement for disposal was clearly not one in which the generators formed an intent that the shipment of their waste be a part of interstate commerce. The "constitutional burden" claim of Kleenwell is thus built on a premise that its

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[2] On a related break-in-transit ruling from the Ninth Circuit, see Sumitomo Forestry Co. Ltd. of Japan v. Thurston County, 504 F.2d 604, 608 (9th Cir. 1974), cert. den. 423 U.S. 831 (1976), where the Court validated the imposition of an ad valorem county property tax on logs being stored for export in spite of a contractual commitment for same.

> Certainty of export evidenced by financial and contractual relationships does not by itself render goods 'exports' before the commencement of their journey abroad. (Citation omitted) (Emphasis added). Thus, even if we 'accept as fact the [appellee's] assurances that the prospect of eventual exportation here was virtually certain,' the immunities of the Import-Export Clause are unavailable absent an actual entrance of the appellee's logs into the export stream.

customers formed an intent that is not simply supported in this record. As the Commission found in All County Disposal Service, Inc., Cause No. TG-1859 (Aug. 1985):

> Here, the purpose of the transportation is merely to remove the unwanted commodities from within the regulated territory and it is totally irrelevant to the contract of collection and transportation where the ultimate disposition occurs. Here, the interstate shipment is at the election of the carrier. It is irrelevant to the purposes of the customers. Washington is not erecting artificial barriers to interstate commerce; it is insuring the safe and sanitary operation of garbage and refuse collectors and transporters within the state.

Cause No. TG-1859 at 7.

D. Public policy favors non-discriminate economic regulation of solid waste carriers' operations in this State in a manner which does not offend the Commerce Clause.

Respondent's rationale and argument for its position in this proceeding is borrowed liberally from the plaintiff's position and the United States District Court's ruling announced in January 1992, in Medigen of Kentucky, Inc. v. Public Service Commission of West Virginia, 787 F. Supp. 602 (S.D. W. Va. 1992), which is currently on appeal to the United States Fourth Circuit Court of Appeals. We are not made privy by Respondent to the specific facts in that proceeding other than the apparent parallels in state economic regulatory systems for solid waste transportation in West Virginia and Washington, (Respondent Opening Brief at 6), and the fact that the Medigen plaintiff appears to dispose of its West Virginia-collected waste out of state.[3]

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[3] The initial memorandum order from the U.S. District Court in August, 1991 alludes to a major factual distinction in this case. There it states all waste in West Virginia is transported either to a processing facility in Pennsylvania, or a disposal site in Kentucky. "Neither company engages in the intrastate

Despite Kleenwell's liberal argument by analogy, the sole issue before the Medigen court of "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," (Kleenwell Opening Brief at 7), is NOT the issue raised by the record in this proceeding. As discussed above, Kleenwell, through its presentation, has not posited this case as turning on whether the State of Washington may impose its licensing requirements under RCW 81.77.040 on the separate movement of biomedical waste from Respondent's Des Moines warehouse facility to California. Neither AEMC nor the staff of this Commission has ever taken the position that the isolated longhaul movement of biomedical waste from a Washington warehouse facility to the SES incinerator in Garden Grove, California is a movement over which the state exercises economic jurisdiction.[4]

It is this compelling distinction which clearly seems to have

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transportation of medical waste from one point in West Virginia to another point in West Virginia." Medigen of Kentucky, Inc. v Public Service Commission of West Virginia, 787 F. Supp. 590, 592 (S.D. W. Va. 1991). This major apparent factual distinction in Medigen and this proceeding is never addressed by Respondent. See also, footnote 16 in Medigen, 787 F. Supp. 602, 608 where the court seems to address the lack of interstate regulatory intent of the Washington statutory scheme.

[4] Indeed by analogous legislation, the state has expressly exempted movements of solid waste from "transfer stations" to disposal sites from regulation by this Commission when such sites are included in county solid waste management plans. See RCW 36.58.050. While a medical waste storage facility may not be consistently labelled a "transfer station," it is clear the legislature has generally intended the subsequent movement of previously-collected solid waste to a final disposal site to be exempt from the economic regulation of this Commission, whether or not the secondary movement crosses state lines.

escaped Kleenwell's analysis in this proceeding. As alluded to above, this record is devoid of evidence or law that the Respondent's activities from point of original pickup in King County to incineration in Garden Grove, California constitutes a **continuing** movement in interstate commerce. Without such corroboration of course, Kleenwell's case fails. For if the administrative law judge and/or this Commission were to find to the contrary, almost any article of commerce (or waste product) moving for hire between points in this state would be presumptively interstate commerce, as almost all goods or portions thereof consumed or manufactured in Washington at some point in time likely were created or are eventually destined to or from an out-of-state point. Moreover, surely such an unsubstantiated characterization by Respondent must fail under the Tenth Amendment to the United States Constitution which reserves powers to the state which are not expressly delegated to the federal government.

Nowhere does Kleenwell point to federal preemption of local solid waste collection activity jurisdiction and in truth, there is none.[5] Nowhere has Kleenwell demonstrated how its purely local pickup of medical waste from a King County doctor's office months prior to a subsequent shipment, which it alone controls and selects for disposal in California, is an "intertwined link" in an interstate commerce chain.

Clearly, deterring state oversight of the local action of

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[5] See contra, the Federal Airline Deregulation Act of 1978 and Professor Dempsey's point regarding the Federal Express Corp. v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991), case at Tr. 243, 249.

picking up and transporting infectious waste over state highways would be questionable public policy. Ample indications of the regulatory prudence of RCW 81.77 is available in the testimony of Professor Paul Dempsey in this record. Two particular questions to and answers by Professor Dempsey, put the value of this statutory scheme in perspective and contrast it, (as now), with the environment of unlicensed haulers competing with regulated operations and the inevitable impact on small generators in outlying areas.

Q. Professor Dempsey, can a regulatory scheme such as Washington has for the collection of solid waste, including infectious waste, succeed in providing universal service to both urban and rural areas at non-discriminatory rates if some of the entrants in that market are regulated as to rates, service, safety and others are not?

A. No, it certainly cannot succeed if there are two groups of carriers; one which are regulated and one which are not. The unregulated group will engage in cream-skimming. They will go for the most lucrative traffic depriving the established carriers, who are, by the way left with a common carrier responsibility to provide their entire service territories with just and reasonable rates with the freight that is easiest to pick up; the freight that is less costly to transport, the freight that has a higher profit margin. It will obliterate really the ability of the regulated group to continue to provide that service. What you will likely see over time is that the regulated group will themselves either go out of business, or try to become part of the unregulated group because they have -- you know, they have to make a profit in order to survive. They're owned by private investors, and they can't -- their ability to make a profit in a deregulated scheme is going to be significantly impeded.

Q. Does the Washington regulatory scheme, in your opinion, promote non-discriminatory pricing in the provision of waste collection service?

A. Yes, it does so explicitly. It requires that all rates charged shall be non-discriminatory; that they shall be just and reasonable. It imposes a common carrier obligation that carriers provide service throughout their service territories, and it regulates the safety of these companies providing this

service.

The impacts of unregulated haulers competing with regulated haulers on promotion of universal service is hardly theoretical, as they are amply attested to in this record by the testimony of Weldon Burton for the Clark County Disposal Group beginning at page 288 of the transcript. Reviewing the experience of unregulated hauler intrusion in the regulated territories within Clark County demonstrates unquestionably the accuracy of the conclusion of Professor Dempsey at Tr. 228, 229, (above).

V. CONCLUSION

The public policy goals behind RCW 81.77, when coupled with the considerable public health and safety concerns surrounding the handling of biomedical waste products and their inherent danger to cause disease and/or death if carelessly handled, transported or disposed of presents compelling cause to uphold state action under the specific facts of this proceeding. Through its statutory scheme, Washington has erected neither a state or local "border ban" which hinders the flow of solid waste across state lines. (Cf. BFI Medical Waste Systems, Inc. v. Whatcom County, 756 F. Supp. 480 (W.D. Wash. 1991).

As applied to the undisputed operations of Kleenwell Biohazard, RCW 81.77.040 and RCW 81.77.100 would require a certificate to be obtained to conduct local collection and transportation operations in hauling biomedical waste over the state's highways for compensation. The eventual and incidental movement from cold storage to disposal out of the state of Washington whether performed by Kleenwell in Budget Rent a Car

equipment, or by another carrier by rail or truck, is not at issue in this proceeding, no matter how much Kleenwell would like it to control the commerce characterization herein.

Kleenwell's present operations contravene state law and rule, undermining the entire concept of universal solid waste service at fair, just and reasonable rates, and directly threaten the viability of existing service providers, particularly if its operations establish precedent for unlicensed haulers to intrude throughout the state. The statutory scheme which Kleenwell's on-going operations offend is not unconstitutional, discriminatory nor burdensome on interstate commerce when those operations are closely analyzed under the facts adduced and under applicable state and federal law. AEMC therefore urges that an order issue classifying the Respondent's operations as being fully subject to RCW 81.77.040 and WAC 480-70-070, and requiring Kleenwell to cease and desist from such operations pending award of applicable authority from this Commission.

DATED this 22 day of July, 1992.

Respectfully Submitted,

WINDUS, THOMAS, CALMES & WILEY

By: _____
DAVID W. WILEY, WSBA #8614
Of Attorney for Intervenor
American Environmental Management
Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing properly addressed with postage prepaid pursuant to WAC 480-09-120(2)(a) and WAC 480-09-770, including as follows:

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Ms. Lisa Anderl
Administrative Law Judge
Office of Administrative Hearings
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DATED at Bellevue, Washington this 22 day of July, 1992.

David W. Wiley
DAVID W. WILEY
Attorney at Law

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