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STATE OF WASH.
UTIL. & TRANSP
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VIA AIRBORNE EXPRESS

July 22, 1992

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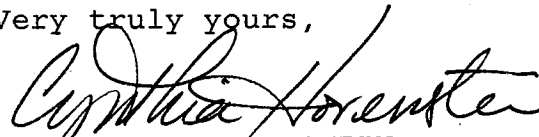
Mr. Paul Curl, Secretary
Washington Utilities and
Transportation Commission
Chandler Plaza Building
Mail Stop FY-11
1300 S. Evergreen Park Drive SW
Olympia, WA 98504

Re: Enoch Rowland, dba Kleenwell Biohazard and General Ecology
Consultants
Docket No. TG-920304

Dear Mr. Curl:

Enclosed please find for filing in the above matter an original and
three copies of the Response Brief of Intervenors Clark County
Disposal, Inc., and Buchmann Sanitary Service, Inc.

Very truly yours,


CYNTHIA A. HORENSTEIN

ss
Enclosure

cc w/enclosures:
Honorable Lisa A. Anderl
Steven W. Smith, Esq.
James T. Johnson, Esq. (via Airborne Express)
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1 convenience and necessity to transport biomedical waste in the State
2 of Washington. (Tr. 56.) Kleenwell uses this out-of-state facility
3 despite the fact that disposal costs are "twice to three times as
4 much" as disposal at the previously utilized Washington facility.
5 (Tr. 59.) The only reason Kleenwell is using the California disposal
6 facility is so that it can avoid Commission regulation. (Tr. 99.)

7 Kleenwell's service territory is the densely populated area of
8 King County, including the City of Seattle. (Tr. 64-65.)

9 Kleenwell does not make a profit on the rates it charges its
10 customers. (Tr. 67.) Kleenwell has the ability to underprice its
11 competitors and charge differential rates (e.g., assess preferred
12 customers a better rate). (Tr. 68-69.)

13 Several out-of-state companies hold certificates of public
14 convenience and necessity issued by the Commission authorizing these
15 companies to operate as solid waste collection companies (including
16 biomedical waste) within designated service areas in the State of
17 Washington, some of which are to the exclusion of Washington
18 companies. (Ex. 24, 25, 26, 28 and 29; Tr. 184-85.) Kleenwell holds
19 no such certificate. (Tr. 60.)

20 CCDI and Buchmann are certificated solid waste carriers whose
21 territory comprises substantially all of Clark County. (Tr. 291.)
22 CCDI and Buchmann intervened in this proceeding because of their
23 concern with the impact the outcome of this hearing may have on the
24 biomedical waste industry in particular but also the solid waste
25 collection arena generally and due to their previous experience with
26 unregulated competition in their service territories. For instance,
27 between 1983 and 1986, Intervenors experienced unregulated
28 competition from Evergreen Waste Systems, Inc. Id. During this
29 period of unregulated competition, Intervenors sustained a loss of
30 approximately \$30,000.00 a month in gross revenue resulting in a
31 total gross loss over the three year period of slightly in excess of
32 \$1,000,000.00. (Tr. 292.)

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II.
LEGAL ARGUMENT

A. Position of the Parties. Kleenwell is a "solid waste collection company" as defined by RCW 81.77.010(7) because it operates vehicles used in the business of transporting solid waste for collection and/or disposal for compensation over the highways of the State of Washington.

The Solid Waste Collection Act provides that no one "shall engage in the business of operating as a solid waste collection company in this state, except in accordance with the provisions of this chapter [chapter 81.77 RCW]." RCW 81.77.020. The provisions of the Solid Waste Collection Act, among other things, require solid waste collection companies to first procure a certificate of public convenience and necessity from the Commission prior to transporting solid waste for compensation. RCW 81.77.040. The Commission has authority to "regulate all solid waste collection companies conducting business in the state." RCW 81.77.100. Kleenwell is operating as a solid waste collection company in violation of chapter 81.77 RCW in that it does not hold a certificate of public convenience and necessity from the Commission.

Although Kleenwell concedes that it is engaged in the transportation of biomedical waste for compensation, it claims that because it disposes of the waste outside the State of Washington, it is exempt from regulation by the Commission. It is Kleenwell's contention that the Commission's requirement (that a certificate of public convenience and necessity must first be obtained prior to transporting solid waste for compensation over the highways of the State of Washington) is unconstitutional because it violates the Interstate Commerce Clause of the United States Constitution. The rationale behind this assertion is that the requirement constitutes (1) a direct regulation of interstate commerce, and (2) economic protectionism designed to prevent free competition.

1 Intervenors, however, contend that the Commission's regulation
2 of solid waste collection companies conducting business in the State
3 of Washington does not constitute economic protectionism and serves
4 a legitimate public interest without impermissibly burdening
5 interstate commerce. Therefore, the constitutionality of the Solid
6 Waste Collection Act, as applied to Kleenwell, should be upheld.

7
8 B. Introduction to Interstate Commerce Clause. Article I,
9 section 8 of the United States Constitution provides Congress with
10 the power to regulate commerce among the several states. The United
11 States Supreme Court has interpreted the Commerce Clause to give
12 Congress the exclusive power to regulate purely interstate commerce.
13 United States v. E.C. Knight Co., 156 U.S. 1 (1894). The Commerce
14 Clause was included in the United States Constitution to ensure that
15 the United States would exist as one economic union and to avoid the
16 protectionist economic policies between the states that were common
17 between nations and had threatened to destroy the union of the states
18 after the American Revolution. H.P. Hood & Sons v. DuMond, 336 U.S.
19 525 (1948).

20 The Commerce Clause, however, does not restrict all state
21 regulation of interstate commerce. In the absence of conflicting
22 federal legislation, states retain the power to regulate matters of
23 legitimate local concern under the police power reserved to the
24 states by the Tenth Amendment to the Constitution. Raymond Motor
25 Transportation v. Rice, 434 U.S. 429 (1978).

26
27 C. No federal pre-emption of interstate transportation of
28 solid waste.

29 Although Kleenwell, in its opening brief at page 7, claims that
30 Congress has "impliedly preempted . . . the state's ability to
31 require a certificate of public convenience and necessity," Kleenwell
32 acknowledges that the "ICC has declined to exercise jurisdiction over

1 the interstate transportation of waste." (Kleenwell Opening Brief at
2 page 7.) The Interstate Commerce Commission determined that the
3 interstate transportation of solid waste is not subject to its
4 jurisdiction in Joray Trucking Corp., Common Carrier Application, 99
5 MCC 109, 110-11 (1965). Because the Interstate Commerce Commission
6 has expressly enunciated its position that the interstate
7 transportation of solid waste is not subject to federal jurisdiction,
8 Kleenwell cannot be heard to argue that the states are "impliedly
9 preempted" from regulating the collection and transportation of solid
10 waste.

11 In that the regulation of solid waste has not been federally
12 preempted, we must turn to the analysis of whether the Commission's
13 regulation is unconstitutional because it is tantamount to economic
14 protectionism or an impermissible burden on interstate commerce, as
15 asserted by Kleenwell.

16
17 D. Commission regulation does not constitute economic
18 protectionism.

19 Kleenwell asserts that chapter 81.77 RCW is unconstitutional
20 because it constitutes economic protectionism "as it is designed to
21 prevent free competition." (Kleenwell Opening Brief at page 7.)
22 Kleenwell goes on to state, in its discussion regarding states'
23 interests as they pertain to quarantine laws, that "Only when a state
24 inspection regulation is in its effect an unreasonable discrimination
25 against the products from other states is it invalidated under the
26 Commerce Clause." Id. at 19 (emphasis added).

27 Kleenwell does not have standing to claim that the application
28 of chapter 81.77 RCW, as applied to Kleenwell, is unconstitutional
29 because it constitutes economic protectionism. Kleenwell is a
30 Washington corporation, servicing Washington clients and protesting
31 regulation by a Washington agency. There is no attempt in this
32 proceeding to discriminate against foreign haulers.

1 Even if Kleenwell had standing to assert economic protectionism,
2 this argument fails because the application of chapter 81.77 RCW does
3 not prevent an out-of-state corporation from doing business in the
4 State of Washington to the benefit of Washington businesses. Rather,
5 foreign as well as domestic businesses are treated similarly under
6 the Solid Waste Collection Act; chapter 81.77 RCW visits its effects
7 equally upon both domestic and foreign businesses. The Commission
8 noted, in In the Matter of All County Disposal Services, Inc., Cause
9 No. TG-1859, at page 5, "Chapter 81.77 RCW is not an instance of
10 patent economic protectionism. Any applicant is entitled to
11 consideration irrespective of its citizenship." Kleenwell has
12 offered no evidence to demonstrate how it is discriminated against in
13 comparison to similarly situated domestic businesses nor any evidence
14 to demonstrate that the Commission's regulation is "an unreasonable
15 discrimination against products from other states." In fact,
16 evidence that regulation under the Solid Waste Collection Act is
17 evenhanded is demonstrated by the fact that several foreign companies
18 have certificates to operate as garbage and refuse collection
19 companies in Washington to the exclusion of some Washington
20 businesses. (Ex. 24, 25, 26, 27, 28, 29; Tr. 184-85.)

21 As such, Kleenwell has failed to demonstrate that the purpose of
22 the Solid Waste Collection Act is economic protectionism of
23 Washington businesses to the exclusion of foreign businesses.

24
25 E. Chapter 81.77 RCW serves a legitimate public interest while
26 not impermissibly burdening interstate commerce.

27 Because the Commission's regulation is neither federally
28 preempted nor does it constitute economic protectionism, we turn to
29 the next factor in analyzing interstate commerce issues, whether the
30 Commission's regulation serves a legitimate public interest which
31 imposes only an incidental burden on interstate commerce.

1 The United States Supreme Court, in City of Philadelphia v. New
2 Jersey, 437 U.S. 617, 623-624 (1978), stated:

3 The opinions of the court throughout the years have
4 reflected an alertness to the evils of "economic isolation"
5 and protectionism, while at the same time recognizing that
6 incidental burden on interstate commerce may be unavoidable
7 when a state legislates to safeguard the health and safety
8 of its people. Thus, where simple economic protectionism
9 is effected by state legislation, a virtually per se rule
10 of invalidity has been erected. [Citations omitted] The
11 clearest example of such legislation is a law that overtly
12 blocks the flow of interstate commerce at a State's
13 borders. [Citations omitted] But where other legislative
14 objectives are credibly advanced and there is no patent
15 discrimination advanced against interstate trade, the court
16 has adopted a much more flexible approach, the general
17 contours of which were outlined in Pike v. Bruce Church,
18 Inc., 397 U.S. 137, 142 (1970):

19 Where the statute regulates even-handedly to
20 effectuate a legitimate local public interest,
21 and its effects on interstate commerce are only
22 incidental, it will be upheld unless the burden
23 imposed on such commerce is clearly excessive in
24 relation to the putative local benefits.
25 [Citations omitted] If a legitimate local
26 purpose is found, then the question becomes one
27 of degree. And the extent of the burden that
28 will be tolerated will of course depend on the
29 nature of the local interest involved, and on
30 whether it could be promoted as well with a
31 lesser impact on interstate activities.

32 Kleenwell contends that the Solid Waste Collection Act is
virtually identical to a West Virginia statute scrutinized in Medigen
of Kentucky, Inc. and Medigen of Pennsylvania, Inc. v. Public Service
Commission of West Virginia, et al, 787 F. Supp. 602 (Dist. of W. Va.
1992), and that "the uncontroverted evidence presented at trial in
Medigen established that infectious medical waste poses no threat to
the public. The Washington Commission provided no testimony or other
evidence on the subject of public health and safety." (Kleenwell
Opening Brief at page 22.)

1 It is well settled that the transportation of solid waste is a
2 legitimate local concern subject to the state's police power. Smith
3 v. Spokane, 55 Wash. 219, 220-21, 104 P.2d 249 (1909); City Sanitary
4 Service v. Rausch, 10 Wn.2d 446, 448-49, 117 P.2d 225 (1958); Spokane
5 v. Carlson, 73 Wn.2d 76, 436 P.2d 454 (1968); In the Matter of All
6 County Disposal Services, Inc., Order No. TG-1859, at pages 3 and 6.

7 A Commission staff witness, Professor Dempsey, testified to the
8 general effect of free market entry in the transportation industry
9 stating that,

10 It has tended to cause a problem in terms of declining
11 productivity . . . an anemic level of profitability,
12 inadequate profits for the industry as a whole; a higher
13 level of bankruptcies, a higher failure rate; a declining
14 ability to either provide resources for new equipment or to
15 maintain existing equipment adequately, and an inability to
16 pay labor the wages that have been traditionally paid in
17 the industry; all of that causing a deterioration in the
18 level of service, particularly for small communities, and
19 a higher transportation price for service for small
20 communities . . .

21 (Tr. 203.)

22 Professor Dempsey continued his discussion of the negative
23 consequences of deregulation as applied specifically to rates in the
24 transportation industry,

25 [T]he traditional requirements of both non-discriminatory
26 rates and just and reasonable rates were imposed to make
27 sure that rates are precisely that; that there's not
28 discrimination between larger and smaller users of the
29 system, between urban and rural users of the system.
30 Elimination of those controls puts the rate making
31 apparatus at the whims of the individual carriers who may
32 have market power in certain markets, . . . This puts
pressure on small communities . . . , that they pay a
higher portion of the fixed costs of operation.

Also, the rate making structure works in two
directions: by assuring a just and reasonable rate for
consumers. There's also a mandate in the regulatory
charter that in exchange for providing common carrier
service ubiquitously throughout their service territories,

1 the regulatory authority will assure that a reasonable
2 return on investment is earned so that we don't have the
3 problem of a high turnover in the identity of carriers, or
4 the inability of carriers approaching bankruptcy to
maintain their operations in a safe and effective manner.

5 (Tr. at 204-205.)
6

7 Professor Dempsey further elaborated upon the consequences of
8 deregulating the transportation industry, in that,

9 [W]hat has occurred [since deregulation] is that the market
10 has been flooded with new carriers. There are about twice
11 the number of certificated carriers today than there were
12 in 1980, and the amount of freight has not appreciably
13 increased. What that has resulted in is a decline in
energy efficiency and a decline in equipment utilization.

14

15 Now what that means is that the trucks that are on the
16 highway are traveling on the highway emptier than they were
17 before. There's a greater input of labor and fuel into
18 moving goods across the United States. Now that, coupled
19 with the fact that carriers are competing very vigorously
20 to take that empty space and fill it up . . . there's an
21 imperative to try to put something in the space in order to
cover the marginal cost of operation, the fuel and the
labor inputs.

22 What has happened is carriers have been chasing the
23 freight and pricing themselves in an unrealistic level
24 trying to steal freight from each other. As a consequence,
25 the profitability of the industry . . . has not been the
26 strong point of deregulation. . . . Now if you have this
27 kind of anemic profitability over any period of time,
28 you're going to end up with a high number of bankruptcies
29 . . . [and] the survivors are not particularly healthy. .
30 . . So, clearly, this has been an industry which has
suffered significantly in terms of profitability, in terms
of the large number of bankruptcies. . . . The industry
driven by a wholly unsatisfactory level of profitability
has not been able to re-equip with new trucks.

31 (Tr. 211-12, 215-17, 219.)
32

1 One of the net effects of deregulation is an inability to monitor
2 rates so that an adequate rate of return is received by haulers in
3 order to provide haulers with the means to maintain and upgrade their
4 fleet. Professor Dempsey went on to state,

5 The other thing that occurs is that there are
6 lucrative and unprofitable traffic lanes. Urban areas
7 generally are lower cost areas in many instances, . . .
8 therefore, there's been no cream-skimming that goes on in
9 the urban corridors leaving the smaller communities with
10 less service.

11 Generally speaking, a number of studies have shown
12 that service has declined in smaller areas, and rates have
13 increased in smaller areas, and they've increased because
14 of the absence of regulatory control.

15

16 If you take a look at what has happened in
17 transportation generally under deregulation, small
18 communities have paid a very high price. . . . so that
19 prices appear in rural communities to be higher. Service
20 appears to have deteriorated, and the equity goals, which
21 can only be advanced by government, have been abandoned
22 under this process.

23 (Tr. 222-24.)

24 Thus, not only does governmental regulation ensure an adequate
25 return to the haulers to allow for the maintenance and acquisition of
26 safe vehicles, but it also provides universal service to all areas of
27 a community at a reasonable price.

28 When asked to apply these general, regulatory principles to
29 solid waste collection, Professor Dempsey responded,

30 I would anticipate the same consequences, only they would
31 be somewhat worse. The ability of carriers to enjoy the
32 economies of density to provide service in urban and rural
areas, urban as well as rural areas, would be diminished by
cream-skimming. They would be denied lucrative market
opportunities with which to cover their fixed cost of
operation. There would be no regulatory oversight to
assure that carriers fulfilled any notion of a common

1 carrier responsibility to provide service to less
2 profitable, or perhaps nonprofitable venues, and I think
3 particularly of rural areas. To the extent that service
4 was provided to rural areas, it would undoubtedly be at a
higher price.

5 Now here's the twist. When we're talking about
6 garbage or refuse, or medical waste . . . [t]he difference
7 . . . is that it's not like [the transportation of] tennis
8 shoes. Tennis shoes have an economic value. There will be
9 an economic motive to have it transported to its market.
10 But when you're talking about waste, in most instances, if
11 you're not talking about recyclables, it has no economic
12 value. In fact, it has a negative economic value, because
13 when you get it to [its] destination, you have to pay to
14 have it disposed of at a landfill, or a waste disposal
15 facility of some kind. It means that you don't realize any
16 economic gain by having it transported. You incur an
17 economic loss; thus, the motive, absent the compelling
18 force of government, is to dispose of it quickly and
19 cheaply.

20

21 [T]here are a great many people who are driven by the
22 economics of the business, and the economics of the
23 business drive disposal entirely the wrong direction. If
24 the cost of transportation becomes higher for smaller
25 communities; if the level of service becomes worse for
26 smaller communities, then there will be an enhanced
27 incentive to dispose of the waste improperly, to bury it on
28 private land or public land, or do something with it.

29 (Tr. 225-27.)

30 Professor Dempsey's testimony underscores Washington State's strong
31 interest in regulating the transportation of solid waste. If the
32 collection of solid waste is not regulated, the state has no ability
to monitor rates charged by the solid waste collection companies.
This has two health and safety impacts. Initially, unregulated
carriers have the ability to undercut their regulated competition
with no corresponding assurance that the unregulated haulers will
receive an adequate return on their investment. This may impede them

1 from acquiring necessary equipment, or at least maintaining existing
2 equipment in a safe manner so as not to jeopardize the safety of
3 others on the roads in the State of Washington. Secondly, without
4 some form of state oversight, there is no assurance that rural
5 customers will receive solid waste collection service at a reasonable
6 price. Although this is true with the transportation of commodities
7 in general, Professor Dempsey points out that this is particularly
8 true with solid waste which has a negative economic value.

9 The state's interest in regulating medical waste is even more
10 compelling than its interest in regulating other forms of solid
11 waste. Wayne Turnberg, Environmental Planner in the Solid Waste
12 Support Section of the Washington State Department of Ecology
13 ("Ecology"), testified that he served as a project manager for a risk
14 evaluation of infectious waste in King County, Washington, when he
15 was employed by the Seattle/King County Health Department (1) to
16 determine whether the risk to human populations were present from
17 medical waste, and (2) to develop recommendations on how to regulate
18 that waste stream, if necessary. Subsequently, the Washington State
19 legislature directed Ecology to conduct an examination of infectious
20 waste on a state-wide basis. Mr. Turnberg participated in this study
21 and served as project manager and senior author of the report
22 resulting from the study which was submitted to the Washington State
23 Legislature. (Tr. 122-124.) Mr. Turnberg testified to the findings
24 resulting from the state-wide study, "[Ecology] recommended that the
25 state develop a medical waste regulation. . . . We felt that the
26 waste stream should be defined and regulated in a specific way."
27 (Tr. 124.) This recommendation was in response to the potential
28 dangers waste industry personnel may experience from exposure to
29 biomedical waste, "we certainly have identified an exposure problem,
30 particularly with regard to hypodermic needles." (Tr. 126.) In
31 addition to determining that hypodermic needles pose a greater risk,
32 Mr. Turnberg noted, "Laboratory wastes, stocks and cultures of

1 grown, pure infectious agents present concentrations that are just
2 not normally found in the waste stream, and if contact with that
3 component of the waste stream occurs, again, the risk would be
4 increased for potential transmission [of disease]." (Tr. 127.) This
5 study clearly sets forth the need for state intervention through
6 health and safety regulations.

7 When questioned whether Mr. Turnberg thought that regulation of
8 infectious waste is an area with which the state should be concerned,
9 Mr. Turnberg responded affirmatively, "I believe that the components
10 of the waste stream that have been identified as biomedical waste by
11 the State Legislature, it would be prudent for that waste stream to
12 be properly managed. I believe that it ought to be regulated."
13 (Tr. 130.)

14 In discussing the regulations addressing the collection of
15 infectious waste, recently enacted by the Commission, Mr. Turnberg
16 noted that, "[t]here is a rationale for [categorizing] these wastes
17 separately from the rest of the waste stream." (Tr. 131.) In Mr.
18 Turnberg's opinion, these rules promote the safe management of the
19 biomedical waste stream. Id.

20 In distinguishing the case at bar from the Medigen case, the
21 Public Service Commission for the State of West Virginia did not
22 provide the court with sufficient evidence to find that the State of
23 West Virginia had a legitimate public health and safety interest in
24 regulating the transportation of biomedical waste. On the other
25 hand, as noted above, the Commission staff in this proceeding
26 presented the testimony of both Professor Dempsey and Mr. Turnberg to
27 demonstrate the state's interest in regulating not only solid waste
28 but also biomedical waste.

29 The only method for the State of Washington to serve this
30 legitimate public interest is through the regulation of solid waste
31 transporters. When questioned whether a regulatory scheme for the
32 collection of solid waste, including biomedical waste, such as is in

1 place in Washington, would succeed in providing universal service to
2 both urban and rural areas at nondiscriminatory rates if some of the
3 entrants in that market are regulated as to rates, service, safety
4 and others are not, Professor Dempsey responded,

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

24 (Tr. 228-29.)

25 Professor Dempsey continues,

26 [rural areas would not receive solid waste collection
27 service] at non-discriminatory rates, and some of them will
28 not receive service at all. Again, some small communities
29 have lost transportation service in rural areas of other
30 kinds. You know, a farmer can always get in his pickup
31 truck and drive 50 or 100 miles and buy a pickup load of
32 fertilizer and take it back to his farm, so there are other
alternatives. But when you're talking about the disposal
of waste, infectious waste, medical waste, there's going to
be every economic incentive in the world to do something
with it that shouldn't be done.

(Tr. 230-31.) Professor Dempsey goes on to note that "[t]he statute
explicitly says that it is its purpose to protect public health and
safety, and to ensure solid waste collection services are provided to
all areas of the state." (Tr. 230.)

1 The state's legitimate interest in regulating biomedical waste
2 is accomplished through the regulatory scheme set forth in the Solid
3 Waste Collection Act. This objective cannot be accomplished with
4 less restrictive means. When asked if it is possible to meet a
5 statewide need for reasonably priced solid waste collection services,
6 including biomedical waste, by allowing fee market entry without any
7 type of rate regulation, Professor Dempsey responded adamantly,

8 No, it isn't. If you had no regulation at all, you
9 would have a highly discriminatory pricing system. The
10 service would be spotty. The economic condition of the
11 industry would be weak, and the economic forces driving the
12 disposal of waste in entirely the wrong direction for
13 purposes of public health and safety would be stronger.

14 (Tr. 231.)

15 Mr. Burton testified as to the practical ramifications of
16 unregulated competition in the solid waste collection arena. In
17 addition to the effects raised by Professor Dempsey (e.g., potential
18 for insufficient capital to maintain equipment in a safe manner and
19 no assurance of universal service at reasonable rates, particularly
20 in regard to rural areas) and Mr. Turnberg (e.g., health issues
21 associated with handling biomedical waste), Mr. Burton noted an
22 additional consequence of unregulated solid waste collection as
23 increased rates which must be borne by solid waste customers. He
24 explained the rationale behind intervenors having to increase rates
25 to cover fixed costs from revenue generated from fewer and fewer
26 customers due to the cream-skimming by the unregulated hauler,
27 Evergreen Waste Systems, in the mid 1980's,

28 The basic concept of the regulated service territory
29 is to service all customers in an efficient, cost effective
30 manner. And the truck driving down the street, if it picks
31 up ten households, and that's the ten households on that
32 street in that block, it's operating at a hundred percent
efficiency and its cost to the customer is at the lowest
point.

1 If they only pick up six households, they're operating
2 at obviously 60 percent efficiency, and if another
3 competitor comes down the same street with the same truck,
4 or a different truck, they have approximately the same
5 fixed costs so that the consumers on that street are paying
6 for two trucks instead of one; and consequently, the
7 customer must pay a higher rate in the long run to keep the
8 two companies operating in a competitive manner. . . . the
9 only way that the losses [in revenue] could be made up were
10 through rate filings with the WUTC. . . ."

11 (Tr. 294, 299-300.)

12 CCDI and Buchmann did not immediately file for rate increases
13 when they experienced the unregulated competition because,

14 The unregulated carrier could follow along the regulated
15 carrier and adopt a rate structure, generally similar to
16 the regulated carrier, undercutting prices by maybe 15 to
17 25 cents per service unit, and that way, the unregulated
18 carrier could charge approximately the same rates. And
19 when the regulated carrier went in for a rate increase, the
20 unregulated carrier would raise his rates and hitch-hike
21 along with the regulated carrier by getting the same rate
22 structure without any state regulation or oversight. And
23 every time the regulated carrier had to raise his rates, he
24 would lose customers to the unregulated carrier, and the
25 customers that went to the unregulated carrier would end up
26 paying approximately the same amount as the regulated
27 carrier would provide, but there was no regulation over the
28 unregulated carrier.

29 (Tr. 294-295.) Essentially, CCDI and Buchmann delayed seeking rate
30 increases (1) so as not to immediately provide the unregulated
31 hauler, Evergreen Waste Systems, with a rate increase, and (2) to
32 postpone the loss in customers.

In summary, the Commission and Intervenors provided more than
adequate evidence that Washington State has a legitimate interest in
regulating solid waste collection, and in particular, biomedical
waste. The effect of no regulation in this area would certainly pose
a threat to public health and safety.

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III.

CONCLUSION

As applied to Kleenwell, chapter 81.77 RCW does not fall within the realm of regulation which has been preempted by federal law nor does it constitute economic protectionism. Rather, it promotes a legitimate state interest without impermissibly burdening interstate commerce. Accordingly, Kleenwell should be deemed a solid waste collection company which must first obtain a certificate of public convenience and necessity as required by the Solid Waste Collection Act prior to transporting solid waste, including biomedical waste, over the highways of the State of Washington for compensation. The Commission regulation should be upheld.

DATED this 22 day of July, 1992.

Respectfully submitted,


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Of Attorneys for Clark County
Disposal, Inc. and Buchmann Sanitary
Service, Inc.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the attached Response Brief of Clark County Disposal, Inc. and Buchmann Sanitary Service, Inc. on July 22, 1992, by mailing a copy contained in a sealed envelope, with postage prepaid, addressed to the following at their regular office addresses, to wit:

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