BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

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

BRIEF OF COMMISSION STAFF

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I.

STATEMENT OF THE CASE

The Washington Utilities and Transportation Commission instituted this special proceeding under RCW 81.04.110 and 81.04.510 to determine whether Kleenwell Biohazards and General Ecology Consultants, Inc. is operating as a solid waste collection company in this state without a certificate to do so as required by RCW 81.77.040.

II.

STATEMENT OF THE FACTS

Kleenwell Biohazard Waste and General Ecology Consultants, Inc. (Kleenwell) is a Washington corporation with all of its facilities located in this state. Ex. 3, Tr. 23, 54, 55. Enoch Rowland and his daughter, both Washington residents, are the only shareholders of Kleenwell. Tr. 54. Kleenwell has operated as a collector of medical waste since 1989. Its customers are doctors and dentists in the Seattle-King County area which is the most densely populated area in the state. Tr. 25, 65.

Medical waste is typically collected by Mr. Rowland or his daughter from customers every seven to ten days in a "strip down

model" van. Tr. 30, 39. The waste is then transported to Kleenwell's rented warehouse where it remains under refrigeration for up to 90 days until a load is aggregated for hauling to California. Tr. 31-32, 33. Kleenwell has one charge for small generators and one for large generators, but has no tariffs filed with any regulatory body. Tr. 36, 55.

Mr. Rowland and his daughter are also the only shareholders of another Washington corporation--Kleenwell Medical Services. Tr. 54. This corporation provides a consulting and laboratory service and sells medical supplies. Tr. 29. The two corporations work in conjunction. If a customer of the medical services corporation requests removal of medical waste, Kleenwell provides that collection service. Tr. 28-29.

Under this arrangement, Kleenwell does not make a profit from the rates it charges for medical waste collection and it is able to remain in business only because its operations are subsidized by the earnings of the medical service corporation. Tr. 67-68. Kleenwell chooses the customers it will serve primarily based on the business considerations of the medical supply corporation. Ninety percent of Kleenwell's customers are customers of the medical supply company. Tr. 64, 108.

At one time, Kleenwell held a temporary certificate from the Washington Utilities and Transportation Commission (the Commission) to operate as a medical waste collection company. While operating under that temporary authority, Kleenwell used the Recomp facility in Ferndale, Washington as a disposal site. Tr. 55. Since the cancellation of that certificate by the Commission, Kleenwell has

continued to provide the same service in the same manner except that its rates are no longer tariffed and it now transports the medical waste it collects to Security Environmental Systems (SES) in Los Angeles, California instead of to Ferndale. Tr. 30-31, 33.

Kleenwell began hauling waste to SES immediately after the Commission denied its application for permanent authority to collect medical waste. Tr. 47-48. At that time Recomp was still accepting medical waste from Kleenwell, and the only reason Kleenwell changed to the out-of-state disposal site was an attempt to avoid state regulation since its permanent application had been denied. Tr. 56. That application was denied on the grounds of lack of fitness due to unwillingness and inability to comply with the Commission's laws and rules and lack of finances to carry out the proposed service. Ex. 13, Tr. 60-63.

It is twice to three times as expensive to dispose medical waste at SES in Los Angeles than at Recomp in Ferndale. The major portion of that expense is transportation costs since it is 1,300 miles to Los Angeles. Transportation costs aside, however, SES charges about ten cents more a pound for disposal than does Recomp. Tr. 59. There is nothing different in the handling and disposal of medical waste at SES that would justify, on business grounds, the change in disposal sites. Tr. 74.

The decision to dispose out-of-state was Kleenwell's alone. No customers ever requested that their medical waste be disposed in California and none objected to the disposal at Ferndale. Kleenwell's customers were totally indifferent as to whether their medical waste was disposed in-state or out-of-state. Tr. 57, 84.

No Washington disposal sites have sought Kleenwell's business and Mr. Rowland was not aware of any in-state disposal site that is interested in Kleenwell's business. Tr. 58. Recomp, however, was always available to Kleenwell as a disposal site. Tr. 56, 87.

III.

APPLICABLE STATE LAW

Kleenwell is a "solid waste collection company" as defined by RCW 81.77.010(7). The company owns and operates vehicles which use state highways to transport medical waste[1] for collection for compensation and, thus, meets every element of that subsection.

RCW 81.77.020 provides that no one may operate as a solid waste collection company in this state without complying with the provisions of chapter 81.77 RCW (the act). One of those provisions, RCW 81.77.040, requires the holding of a certificate of public convenience and necessity from the Commission prior to operating. In light of that factual and statutory background, and without more, it would readily follow that Kleenwell is operating as a solid waste collection company without complying with chapter 81.77 RCW since it holds no certificate from the Commission to so operate. Kleenwell, however, contends that it is exempt from Commission regulation by virtue of the Commerce Clause of the United States Constitution.

As we will explain in detail below, Kleenwell's claim of exemption on Commerce Clause grounds is without merit.

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[1] Medical waste falls within the broader statutory definition of solid waste. See RCW 81.77.010(9) and 70.95.030.

IV.

BURDEN OF PROOF

Kleenwell is challenging the constitutionality of the certification requirement as applied to it.[2] A party challenging a statute's constitutionality has the burden of establishing its invalidity beyond a reasonable doubt. High Tide Seafoods v. State, 106 Wn.2d 695, 698, 725 P.2d 411 (1986). In addition, there is a strong deference accorded to a state's regulation on matters of local concern. As we point out later, solid waste collection is a legitimate area of local concern because of its relation to public health and safety. Kassel v. Consolidated Freightways, 450 U.S. 662, 670, 67 L. Ed. 2d 580, 101 S. Ct. 1309 (1981). State regulations enacted to promote public health and safety are accorded particular deference and carry a strong presumption of validity when challenged under the commerce clause. Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources, No. 91-636, 60 L.W. 4438 at 4441, June 1, 1992, Burlington Northern v. Nebraska, 802 F.2d 994, 999 (8th Cir. 1986).

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[2] The Commission has no authority to determine the constitutionality of the law itself. Bare v. Gorton, 84 Wn.2d 380, 383, 526 P.2d 279 (1974). The Commission does, however, have the authority to determine the constitutional application of the statutes it administers. 3 K. Davis, Administrative Law Treatise § 20.04 at 74 (1958); RCW 81.77.100.

V.

COMMERCE CLAUSE

A. General Principles.

Article 1 § 8 of the United States Constitution grants to Congress the power to regulate commerce among the several states. Although by its terms the Commerce Clause is a grant of authority to Congress, it has long been recognized that the Commerce Clause contains an implied limitation on the power of the states to interfere with or impose burdens on interstate commerce. See, e.g., Cooley v. Board of Wardens, 12 How. 229, 13 L. Ed. 966 (1852); H. P. Hood & Sons v. DuMond, 336 U.S. 525 (1949). This limitation upon state authority, however, is not absolute. In the absence of conflicting Federal legislation, the states retain power to regulate matters of legitimate local concern under the police power reserved to the states by the Tenth Amendment to the Constitution. See, e.g., South Carolina v. Barnwell, 303 U.S. 177, 185, 82 L. Ed. 734, 58 S. Ct. 510 (1938); Raymond Motor Transportation v. Rice, 434 U.S. 429, 440, 54 L. Ed. 2d 664, 98 S. Ct. 787 (1978). Thus, although most exercises of the police power affect interstate commerce to some degree, not every such exercise is invalid under the Commerce Clause.

B. The Federal Government Has Not Preempted the Regulation of the Interstate Transportation of Solid Waste for Compensation.

This case does not involve Federal preemption. The Interstate Commerce Commission, in interpreting its regulatory jurisdiction, has determined that waste is not property within the meaning of 49 U.S.C. § 10521 and therefore that agency does not regulate the

transportation of garbage across state lines. Joray Trucking Corp. Common Carrier Application, 99 MCC 109, 110-11 (1965); Transportation of "Waste" Products for Reuse and Recycling, 114 MCC 92, 104 (1971).[3]

At page 7 of its Opening Brief, Kleenwell acknowledges that the ICC has declined to exercise jurisdiction over the interstate transportation of waste, but nevertheless argues that Congress, through the Interstate Commerce Act, has impliedly preempted the field of interstate transportation by motor carrier. This argument was expressly rejected in the primary case relied on by Kleenwell: Medigen of Kentucky, Inc. and Medigen Pennsylvania, Inc. v. Public Service Corporation of West Virginia, 787 F. Supp. 602 (S.D. W. Va. 1992). In Medigen the Court distinguished Castle v. Hayes Freight Lines, 348 U.S. 61, 99 L. Ed. 68, 75 S. Ct. 191 (1954), relied on by Kleenwell, on the ground that Castle involved state action in direct conflict with the ICC's exercise of express statutory authority, while the ICC has decided not to regulate the transportation of waste.

The Medigen court also noted that this preemption argument was contrary to the findings of the Supreme Court in City of Philadelphia v. New Jersey, where the Court stated:

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[3] Although garbage is not property for purposes of the Interstate Commerce Act, it is commerce for purposes of the Commerce Clause. City of Philadelphia v. New Jersey, 437 U.S. 617, 621, 57 L. Ed. 2d 475, 98 S. Ct. 2581 (1978); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, (No. 91-636, 60 L.W. 4438, June 1, 1992); Chemical Waste Management, Inc. v. Hunt, (No. 91-471, 60 L.W. 4433, June 1, 1992).

> From our review of this federal legislation [the Solid Waste Disposal Act], we find no "clear and manifest purpose of Congress" . . . to pre-empt the entire field of interstate waste management or transportation, either by express statutory command, . . . or by implicit legislative design. . . . To the contrary, Congress expressly has provided that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies. . . . "42 U.S.C. § 6901(a)(4). Similarly, [New Jersey's law] is not pre-empted because of a square conflict with particular provisions of federal law or because of general incompatibility with basic federal objectives. . . . In short, we agree with the New Jersey Supreme Court that [the statute] can be enforced consistently with the program goals and the respective federal-state roles intended by Congress when it enacted the federal legislation.

City of Philadelphia, 437 U.S. at 620-21 n. 4 (only citations omitted).

Since there is no Federal preemption of the subject matter of this proceeding, any bar to the application of chapter 81.77 RCW to Kleenwell must come, if at all, from the implied limitations or "negative implications" of the Commerce Clause. In the absence of Federal preemption, state statutes affecting interstate commerce have been found unconstitutional under the implied limitations of the Commerce Clause only where the state regulation amounts to economic protectionism or an impermissible burden on interstate commerce. Neither of those conditions exists in the application of chapter 81.77 RCW to Kleenwell.

C. The Service Provided by Kleenwell Does Not Involve Interstate Commerce.

Although the waste collected by Kleenwell eventually goes to California, one may question whether we are dealing with interstate commerce at all. Kleenwell's medical waste collection service is

strictly local in nature, and the only reason for crossing a state line is to avoid state regulation of that service. The admitted motive for going to California establishes that the alleged interstate commerce is neither real nor bona fide. But, motive aside, there is another basis for concluding that interstate commerce is not involved in Kleenwell's operations.

Kleenwell does not transport waste directly to California. Waste is first accumulated in Kleenwell's rented warehouse in this state prior to shipment to California. Waste can be stored in-state for up to ninety days. Tr. 31-32, 33. Kleenwell argues that the transportation to the warehouse in Washington must be considered part of the subsequent movement to California. Opening Brief of Kleenwell at p. 6.

The current test, at least of the Interstate Commerce Commission, to determine whether intrastate transportation constitutes interstate commerce comes from its 1986 decision in Armstrong World Industries, Inc., 2 I.C.C. 2d 63, at 69 (1986), aff'd sub nom., Texas v. United States, 866 F.2d 1546 (5th Cir. 1989):

> It is well settled that characterization of transportation between two points in a State as interstate or intrastate in nature depends on the 'essential character' of the shipment. Crucial to a determination of the essential character of a shipment is the shipper's fixed and persisting *intent at the time of shipment*.

Texas v. United States at 1556. Kleenwell accepts this formulation of the test. Opening Brief at p. 5.

The problem Kleenwell has under this test is that the shippers (the waste generators) have no "fixed and persisting intent at the

time of shipment" to send their waste to California. They have no intent at all other than that the waste be removed from their premises. Not one customer ever requested disposal in California. Not one customer objected to disposal at Ferndale. Kleenwell's customers were absolutely indifferent as to whether their waste was disposed in-state or out-of-state.

Against that factual background, Kleenwell makes the astonishing assertion that the transportation to the warehouse must be considered part of the subsequent movement in interstate commerce because the evidence shows that to be the "shipper's fixed and persisting transportation intent at the time of shipment." Id.

Nothing in the record supports this claim. Whether the shipment is viewed as one step or two steps, the shippers have no intent to ship out-of-state. The only intent to move out-of-state is the carrier's, who wishes to avoid regulation by the Commission.

D. The Application of Chapter 81.77 RCW to Kleenwell Does Not Constitute Economic Protectionism Forbidden by the Commerce Clause.

Even if Kleenwell's operations are deemed to involve interstate commerce, it is commerce that the state can constitutionally regulate. The Supreme Court has adopted a two-tiered approach to analyzing state regulations under the commerce clause. When a statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, a "virtual per se" rule of invalidity has applied on the ground that such regulation amounts to "simple economic protectionism." City of Philadelphia, 437 U.S. at 623-624.

But where other legislative objectives exist and there is no patent discrimination, the Court has applied the balancing test first articulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . .

Pike at 142. Under either the "per se" or the balancing test, "the critical consideration is the overall effect of the statute on both local and interstate activity." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986).

Kleenwell contends that the certification requirement of chapter 81.77 RCW is per se invalid because it is a direct regulation of interstate commerce and because its purpose and effect is economic protectionism. Opening Brief of Kleenwell at page 8.

The act does not directly regulate interstate commerce. The act directly regulates solid waste collection in the state of Washington. RCW 81.77.100. Moreover, the statute does not discriminate against interstate commerce either on its face or as applied to Kleenwell.[4] The full burden of accomplishing a

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[4] See e.g., Northwest Central Pipeline Corporation, 489 U.S. 509, 103 L. Ed. 2d 509, 109 S. Ct. 1262 (1989) in which the Supreme Court upheld a regulation of the Kansas Corporation Commission which provided for the permanent cancellation of gas producers' rights to extract gas from a certain field if production was delayed beyond a certain time. An interstate pipeline company challenged the regulation on the ground, among others, that it

legitimate police power goal is not placed on only out-of-state companies as was the case in City of Philadelphia, 437 U.S. at 628. Anyone, without regard to citizenship or state of incorporation, may apply for and be granted a certificate under chapter 81.77 RCW. Regulation under the act is evenhanded as demonstrated by the fact that three out-of-state companies have certificates to operate as solid waste collection companies in designated service territories in this state. Exs. 25, 26 and 27.

In those three instances, Washington companies, among others, are generally precluded from operating as solid waste collection companies in those service territories because of the preference for exclusive territories contained in RCW 80.77.040. The purpose of the act cannot possibly be to discriminate against out-of-state interests since certificates have been granted to these out-of-state companies at the expense of Washington companies who may wish to serve those same territories. In the case of infectious or medical waste specifically, statewide authority to collect that class of waste has been granted to intervenor American Waste Systems (AEM) which is a California Corporation. Tr. 160.

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affected interstate pipelines' purchasing decisions and required abandonment of gas dedicated to interstate commerce. In affirming the constitutionality of the regulation, the Court found that the regulation did not directly regulate or discriminate against interstate commerce since on its face the regulation was neutral and provided for cancellation of producers' extraction rights without regard to whether they supply the intrastate or interstate markets. Id. at 523.

Likewise, chapter 81.77 RCW is neutral on its face and prohibits solid waste collection by uncertificated companies irrespective of whether they dispose in Washington or dispose out-of-state.

In any event, Kleenwell is a Washington corporation. The fact that the act applies to it does not give rise to a claim of discrimination against interstate commerce, at least not on that basis. See, e.g., American Airlines v. Mass. Port Authority, 560 F.2d 1036, 1039 (1977). (In-state users of airport cannot argue that application of a tax to them violates the commerce clause.) A statute that imposes the same restrictions on its own citizens does not discriminate against interstate commerce. Sporhase v. Nebraska, 458 U.S. 941, 956, 73 L. Ed. 2d 1254, 102 S. Ct. 3456 (1982). Even when the practical effect of the statute is to impose a greater burden on out-of-state companies than on in-state companies, there is no discrimination against interstate commerce as long as the statute applies alike to in-state and out-of-state interests. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 96 L. Ed. 2d 67, 107 S. Ct. 1637 (1987).[5] The act imposes no burden on out-of-state companies that it does not place on Washington companies.

1. The Act Does Not Prevent the Free Flow of Waste Across State Lines.

Given this inability to claim that it is discriminated against based on being an out-of-state company, Kleenwell bases its

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[5] In CTS Corp., the Court considered a discrimination-based challenge to an Indiana takeover act that applied only to corporations chartered in Indiana. Dynamics Corporation claimed the statute discriminated against interstate entities because most hostile takeovers are launched by offerors outside of Indiana. The Court ruled that the state law was not discriminatory even though it applied most often to out-of-state interests. The act did not discriminate against interstate commerce because it did not impose a greater burden on out-of-state offerors than it did on Indiana offerors. Id. at 88.

discrimination or direct regulation claim solely on the fact that, while it collects medical waste entirely within the state of Washington, it disposes medical waste out-of-state.

That there is nothing in chapter 81.77 RCW that prevents the free flow of waste, medical or otherwise, across state boarders. The certificated medical waste collector, American Environmental Management, disposes Washington medical waste in the State of California with no interference whatsoever from the State of Washington. Tr. 155.

If the act is applied to Kleenwell, it is true that it will not be able to collect waste in Washington and dispose that waste out-of-state. But that does not support Kleenwell's claim of discrimination under the Commerce Clause. The fact that the burden of a state regulation falls on some interstate companies does not establish a claim of discrimination against interstate commerce. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978). The Commerce Clause protects only interstate markets, not particular interstate firms from prohibitive or burdensome regulation. Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 474, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981). Thus, Kleenwell has no Commerce Clause exemption from state regulation due to the fact that the application of the act would prevent it from disposing Washington medical waste in California.

2. The Act Does Not Favor In-State Economic Interests Over Out-of-State Interests.

Since the act is neutral on its face and does not directly regulate or discriminate against interstate commerce, if the act is unconstitutional per se it must be because the effect of the statute is to favor in-state economic interests over out-of-state interests. Northwest Central Pipeline Corporation, 489 U.S. at 523. This requires an analysis of the in-state and out-of-state economic interests involved in Kleenwell's operation.

Kleenwell is a Washington corporation and both its shareholders are Washington citizens. Tr. 54. The application of the act to an in-state company does not advance the state's own commercial interests at the expense of out-of-state interests. Indeed, out-of-state carriers have been granted certificates to the exclusion of Washington companies. Exs. 25, 26 and 27. And, as noted above, a state corporation is in no position to claim that the application of a state statute to it violates the Commerce Clause.

Furthermore, the effect of the act is not to favor in-state disposal sites over out-of-state disposal sites. First, there is no competition between in-state and out-of-state disposal sites for the waste Kleenwell collects in the state. No Washington disposal sites have sought Kleenwell's business and none are interested in it. Recomp in Ferndale apparently made no effort to retain Kleenwell as a customer after the latter began disposing in California. Tr. 56, 87. In any event, application of the act to Kleenwell would not mean that Washington's medical waste could not

go to SES who would be free to compete in the marketplace with Washington disposal sites for that business.

Whether the collection companies or the disposal sites are considered, there are no in-state economic interests that are favored at the expense of out-of-state interests if the act is applied to Kleenwell.

3. Buck v. Kuykendall and Bush & Sons v. Maloy Prohibit State Control of Exclusively Interstate Business Activities and Do Not Govern the Local Activities Regulated by the Act.

In support of its argument that the act is per se invalid because its purpose and effect is economic protectionism, Kleenwell relies on the cases of Buck v. Kuykendall, 267 U.S. 307, 69 L. Ed. 623, 45 S. Ct. 323 (1925) and Bush & Sons v. Maloy, 267 U.S. 317, 69 L. Ed. 627, 45 S. Ct. 326 (1925). As Kleenwell notes in its opening brief, at page 11, the problem with the state action in Buck was summarized in the companion case of Bush:

> The state action in the Buck case was held to be unconstitutional . . . because the statute, as construed and applied, invaded a field reserved by the commerce clause for federal regulation.

Bush, 267 U.S. at 324-25. And that is what distinguishes the present case from Buck and Bush. The field of solid waste collection is not a field reserved for federal regulation. The opposite is the case. The field of solid waste collection has been primarily reserved by Congress for local regulation:

> The Congress finds with respect to solid waste--
> . . .
> (4) that . . . the collection and disposal of solid wastes should continue to be primarily the function of State, Regional and local agencies . . .

42 U.S.C. § 6901(a)(4) (The Solid Waste Disposal Act).

The infirmity in the statute in Buck was that its purpose was to prevent competition deemed undesirable and the test employed was the adequacy of existing transportation facilities for conducting interstate commerce "a test peculiarly within the province of federal action." Bradley v. Public Utilities Commission of Ohio, 289 U.S. 92, 95, 77 L. Ed. 1053, 53 S. Ct. 577 (1932). Under chapter 81.77 RCW we are not concerned with the adequacy of transportation facilities for conducting interstate commerce. We are concerned with the adequacy of solid waste collection service--a test strictly related to local concerns. The effect on interstate commerce is merely incidental in those cases where an unsuccessful applicant for authority had intended to transport waste out-of-state. Bradley, 289 U.S. at 95.

The conclusion that Buck does not control this case is shown by the vice exposed by the Court in the statute in Buck. That vice was control of interstate commerce. This was demonstrated by the fact that Oregon had already issued a certificate of necessity for the route between Seattle and Portland on the finding that Oregon citizens would benefit from the additional competition. Consequently, Washington's denial of a certificate affected not only its own citizens, but also those of Oregon, as well as citizens of other states who may have been traveling between the two cities. Here, the citizens of other states have no interest in the area of solid waste collection governed by chapter 81.77 RCW.

Buck and Bush hold only that a single state may not control competition in an area of commerce that is inherently of concern to more than one state. Those cases do not stand for the proposition

5. The Burden of the Act on Interstate Commerce is Minimal.

Against the significant local benefits provided by the regulation of solid waste collection and transportation, the incidental impact on some out-of-state disposers cannot realistically be characterized as "clearly excessive." In fact, the burden on interstate commerce is minimal. As an incident of the local regulation of solid waste collection, out-of-state disposers (as well as Washington companies who dispose in-state) may not operate in this state without a certificate to do so. But in some situations, out-of-state companies or out-of-state disposers could, and have, received certificates to operate in service territories to the exclusion of state companies or in-state disposers.

In either case, the actual flow of solid waste, including infectious waste, is not blocked at the state border. The certificated carriers can still dispose waste out-of-state. Out-of-state disposal sites can still compete for that disposal business if they are interested in acquiring it.

It is true that Kleenwell cannot operate in this state if the act is applied to it, but the commerce clause protects interstate markets not interstate firms. Exxon Corp., 437 U.S. at 127. If interstate markets as a whole are analyzed, the burden is insignificant and is outweighed by the important local purpose of assuring universal collection at reasonable rates.

F. The Commerce Clause Does Not Give Kleenwell the Right to a Competitive Advantage Over Certificated Carriers.

There are two anomalies in Kleenwell's claim that the act discriminates against interstate commerce. The first is that there is no showing whatsoever that Washington carriers who utilize out-of-state disposal sites (or for that matter out-of-state carriers), are treated differently from Washington carriers who would dispose in-state. The act is neutral on its face and in practical effect insofar as the state of the carrier or the location of the disposal site is concerned.

The second anomaly is that under the rubric of "discrimination" the relief Kleenwell seeks is direct discrimination in its favor based on an artificial factor. Kleenwell enjoys a competitive advantage if, but only if, it is allowed to operate outside the statute by "cream-skimming" the high profit--low cost customers in the most densely populated urban area of the state, serving them at a lower price than certificated carriers are allowed to charge. In fact, serving them at rates that are not compensatory but rather are subsidized by another corporation owned by Kleenwell's shareholder. Tr. 67-68. Meanwhile, certificated carriers are left with the common carrier obligation to serve the remote and rural areas at less than profitable rates. Tr. 68-70.

Kleenwell does not seek evenhanded treatment, it seeks a preference to which it is not entitled under the Commerce Clause. As the Court noted in Sporhase v. Nebraska, 458 U.S. at 956, which involved Nebraska's restrictions on transfers of ground water: "An

exemption for interstate transfers would be inconsistent with the idea of evenhandedness in regulation."

In this regard, there is a further troubling aspect with respect to Kleenwell's operations. Kleenwell acquires customers who would otherwise be served by certificated carriers, not because it is more efficient or provides a better service, but because it can continue to operate at a loss since it is subsidized by another corporation. In other words, the statutory scheme for waste collection is subverted simply to advance the interests of another corporation whose business considerations dictate whom Kleenwell serves. Tr. 67-68. And all of this will be accomplished through a carrier who, after hearing, was determined to be unfit to provide service to the citizens of this state. Ex. 13. The Commerce Clause does not give an out-of-state disposer (in this case a Washington corporation) the right to control or subvert the solid waste collection system in this state by providing service "without regard to whether and on what terms" in-state disposers can provide that service. Commonwealth Edison v. State of Montana, 453 U.S. 609, 619, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981).

G. The Commission Should Adhere to Its Decisions In Evergreen Waste Systems and All County Disposal Service.

This is not the first time the Commission has considered the application of chapter 81.77 RCW to out-of-state disposers. In All County Disposal Services, Inc., Cause No. TG-1859, the Commission ruled that a Washington corporation that collected waste in this state and disposed it in Oregon was subject to the provisions of chapter 81.77 RCW. In Evergreen Waste Systems, Inc., Cause No. TG-

1911, the Commission reached the same conclusion on substantially similar facts except that EWS was an Oregon corporation. In both cases, the Commission rejected the same commerce clause arguments that Kleenwell makes in this proceeding.

The only new development since those decisions is the Medigen case out of the West Virginia Federal District Court. The Medigen case does not require the Commission to arrive at a different result in this case. First, a federal district court decision in West Virginia is not binding on this Commission. Second, for the reasons stated in this brief, we believe that case was wrongly decided as does the West Virginia Public Service Commission which has appealed the decision to the Fourth Circuit Court of Appeals. Finally, the companies in Medigen did not engage in the intrastate transportation of medical waste between points within one state, while Kleenwell does. Thus, factually the Medigen case is distinguishable from Kleenwell's operation.[11] For those reasons, the Medigen case does not require the Commission to overturn the position it adopted in the All County Disposal and Evergreen Waste Systems.

VI.

CONCLUSION

For the foregoing reasons, the Commission can constitutionally apply all the provisions of chapter 81.77 RCW to Kleenwell.

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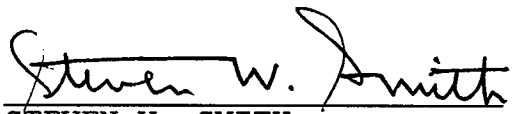
[11] As argued earlier, the staff's position is that the Commission has jurisdiction over Kleenwell's collection activity even if Kleenwell did not carry the waste to the in-state warehouse prior to hauling out-of-state.

Accordingly, staff requests the Administrative Law Judge to enter a proposed order declaring that Kleenwell's operations in this state are subject to the act and directing Kleenwell to cease and desist such operations until it acquires a certificate authorizing it to do so.

DATED this 24th day of July, 1992.

KENNETH O. EIKENBERRY
Attorney General



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CERTIFICATE

I certify that on this day I mailed a true and correct copy of the foregoing document to the parties of record listed below via U.S. mail, postage prepaid:

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I further certify that on this day I personally served a copy of the foregoing document on the party of record listed below:

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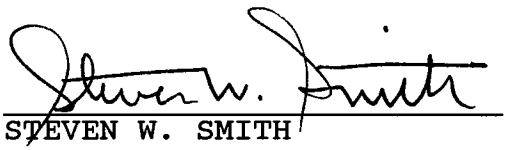

STEVEN W. SMITH

Dated: July 24, 1992.