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July 23, 1992

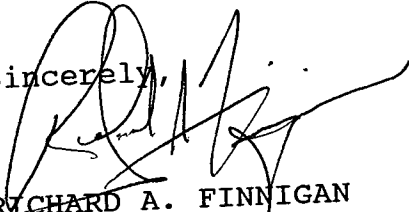
Mr. Paul Curl, Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

RE: Docket No. ^{TG-970304}~~WT-920085~~
Enoch Rowland, d/b/a Kleenwell Biohazard & General
Ecology Consultants

Dear Mr. Curl:

Enclosed are the original and three copies of our brief in the
above-referenced matter.

Sincerely,


RICHARD A. FINNIGAN

RAF:KMN

Enclosure

cc Steve Banchemo
Dick Ramsey
Stan Robinson

STATE UTILITIES
COMMISSION

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WASHINGTON UTILITIES & TRANSPORTATION COMMISSION

In the Matter of Determining)
the Proper Carrier)
Classification of:) NO. TG-920304
ENOCH ROWLAND, d/b/a KLEENWELL)
BIOHAZARD & GENERAL ECOLOGY)
CONSULTANTS.)
_____)

INTRODUCTION

This brief is submitted on behalf of Sureway Medical Services, Inc., which is a subsidiary of RABANCO, Ltd. Sureway is engaged in the business of collecting and transporting for disposal biohazardous and infectious waste under Certificate G-12.

FACTUAL BACKGROUND

Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants (hereinafter "Kleenwell") has been engaged in the transportation of medical or infectious waste in Washington since 1989 (TR 26). Kleenwell provides such service in the Seattle and King County areas, serving primarily doctors and dentists (TR 28). The medical or infectious waste is received from the generator and

1 taken to Kleenwell's warehouse where it is held for shipment under
2 refrigeration (TR 31). The time that it is held at the warehouse
3 will vary depending upon the waste that is to be collected (TR 32,
4 1. 3-8).

5 Kleenwell is a Washington corporation (TR 54, 1. 3-6; Ex. 3).
6 The only shareholders are Mr. Rowland and his daughter (TR 54, 1.
7 7-10). Mr. Rowland and his daughter are residents of the State of
8 Washington (TR 54, 1. 11-13).

9 Kleenwell's business address is also in Washington,
10 specifically Des Moines, Washington (TR 54, 1. 23-25). All
11 customers of Kleenwell are located in the State of Washington (TR
12 55, 1. 1-3).

13 Kleenwell does not hold any permits or operating authority
14 issued by the Interstate Commerce Commission (TR 55, 1. 10-15).

15 Kleenwell operated for a time under a temporary intrastate
16 authority, disposing of the infectious waste at the RECOMP
17 facility in Ferndale, Washington. Mr. Rowland's prior
18 application with the Commission was denied when he was found to be
19 unfit (Ex. 13). Kleenwell began to transport infectious waste out
20 of the State of Washington only after its intrastate application
21 was denied. (TR 55, 1. 16-TR 56, 1. 14). Mr. Rowland testified
22 that the only reason he transported the waste to California was to
23 avoid regulation (TR 98, 1. 11- TR 99, 1.3) The customers of
24 Kleenwell are indifferent as to whether the waste is disposed in

1 the state or not (TR 57, l. 17-21). The cost of disposing waste
2 at the out-of-state facility, Security Environmental Systems, is
3 two to three times as much as the cost of disposal at the
4 intrastate facility (TR 59, l. 3-10).

5 Mr. Rowland testified that there are health risks involved
6 with exposure to infectious waste and that inadvertent exposure to
7 infectious waste should be minimized or eliminated (TR 63, l. 11-
8 TR 64, l. 3). Mr. Rowland also agreed that his operation consists
9 of two pieces -- the collection of the waste is one piece and the
10 second piece is the transportation of the waste from Washington to
11 California (TR 74, l. 18-22). Mr. Rowland agrees that Kleenwell's
12 collection operations are subject to regulation by Seattle/King
13 County, including the selection of the disposal site (TR 74, l. 2-
14 TR 75, l. 22).

15 Mr. Rowland also testified that the determination to go to
16 California was exclusively his, and he merely advised the
17 generators of that fact (TR 84, l. 10-12). He further testified
18 that even if a customer asked that the infectious waste be taken
19 to the Ferndale site he would not do that (TR 84, l. 13-17).

20 PUBLIC POLICY

21 Mr. Turnberg testified that there is a health risk associated
22 with infectious waste and the handling of medical waste and
23 laboratory wastes, such as stocks and cultures, that should be
24 separately and appropriately regulated by the State to protect

1 against those contaminants (TR 126, l. 21-TR 129, l. 7). Mr.
2 Rowland agreed with this characterization of the problem of
3 medical/infectious waste. (TR 63 l. 11 - TR 64, l. 3).

4 Mr. Dempsey provided detailed testimony concerning the
5 adverse impacts that will result, especially to smaller
6 communities, if free entry is allowed in this area. Mr. Turnberg
7 also testified that he was familiar with the Commission's
8 regulations and believed them to be consistent with the promotion
9 of the safe management of the waste stream to control contact with
10 infectious or biohazardous waste (TR 131, l. 3-17).

11 ARGUMENT

12 1. Kleenwell's position.

13 As set forth in its brief, Kleenwell takes the position that
14 the Commission may not require Kleenwell to obtain a certificate
15 from the Commission because (1) the Commission is preempted by
16 federal regulation, and/or (2) the Commission's attempts to
17 regulate Kleenwell's activities are impermissible under the
18 Commerce Clause, Article I, Section 8, Clause 3, U.S.
19 Constitution. For the reasons set forth below, Kleenwell's
20 arguments fail.

21 2. The Commission's Authority to Regulate the Collection and 22 Disposal of Solid Waste Has Not Been Preempted.

23 Kleenwell argues at page 7 of its brief that Congress,
24 through the Interstate Commerce Act, has so entirely occupied the

1 field of the economic regulation of interstate motor carriage that
2 the states' ability to require a certificate of public convenience
3 and necessity is impliedly preempted. Nothing could be further
4 from the truth.

5 Preemption occurs only under limited circumstances.
6 Specifically, the question is whether or not Congress intended the
7 federal regulations supersede state law. Louisiana Pub. Serv.
8 Comm'n v. F.C.C., 476 U.S. 355, 368-69, 106 S. Ct. 1890, 90 L.Ed.
9 2d 369 (1986). The Interstate Commerce Commission has clearly
10 interpreted its jurisdiction to exclude the regulation of the
11 transportation of garbage or waste across state lines. Joray
12 Trucking Corporation Common Carrier Association, 99 MCC 109 (1965)
13 and Transportation of "Waste" Products for Refuse and Recycling,
14 114 MCC 92 (1971).¹ Finally, as stated by the United States
15 Supreme Court in City of Philadelphia v. New Jersey, 437 U.S. 617,
16 620, 98 S. Ct. 2531, 57 L.Ed. 2d 475 (1978), "there was no clear
17 and manifest purpose of Congress to preempt the entire field of
18 interstate waste management or transportation, either by express
19 statutory command or by implicit legislative design."

20
21 ¹Even the Medigen case, relied on so heavily by Kleenwell,
22 concluded that there was no preemption. Medigen of Kentucky, Inc.
23 v. Public Service Commission of West Virginia, 787 F. Supp. 590,
24 594-596, (S.D. W.VA. 1991). Commerce clause aspects of the
Medigen case are also reported at Medigen of Kentucky Inc. v.
Public Service Commission of West Virginia, 787 F. Supp. 602 (S.D.
W.Va. 1992).

1 There is no basis in fact or law to conclude that the
2 Washington Utilities and Transportation Commission's regulation of
3 solid waste collection and disposal has been preempted by federal
4 action.

5 3. The Commission's Actions to Regulate Solid Waste Collection
6 and Disposal are not Barred by the Commerce Clause.

7 There are four reasons why the Commission's action requiring
8 Kleenwell to obtain a certificate of public convenience and
9 necessity in this case are not barred by the Commerce clause.²
10 First, factually the Commission's action in this case does not
11 constitute a burden on interstate commerce, since Kleenwell is a
12 Washington corporation engaged in intrastate commerce. Second,
13 the Commission's regulation of solid waste and disposal is in the
14 public interest and is necessary to protect the public health and,
15 on balance, what burden it does place on commerce is outweighed by
16 the benefit of the public health. Third, Kleenwell itself has
17 admitted that the collection aspects of the medical waste business
18 that it engages in is duly subject to state (county) regulation
19 and thus under the Commission's regulatory scheme, a certificate
20 is necessary whether or not the disposal activity crosses state

21
22 ²It is Sureway's understanding that the Commission staff is
23 devoting significant effort to briefing the Commerce clause
24 issues. Thus, at this point, Sureway will only address these
issues in outline form.

1 lines. Fourth, Kleenwell has presented absolutely no evidence of
2 shipper intent that this product is in interstate commerce.

3 A. Given the Factual Basis for Kleenwell's Operation, There is
4 no Burden upon Interstate Commerce.

5 Kleenwell is a Washington corporation. (TR 54, 1.36). It is
6 located in Washington. (TR 54, 1.23-25). It has only Washington
7 customers. (TR 55, 1. 1-3) Its stockholders are Washington
8 residents. (TR 54, 1. 7-13). Its only reason for transporting any
9 waste outside the State of Washington is in an effort to evade
10 Commission jurisdiction. (TR 98, 1. 11 - TR 99, 1. 3).

11 The Washington regulatory scheme is facially neutral. It
12 does not prohibit foreign corporations from entry into this state.
13 Any applicant is entitled to consideration without regard to its
14 corporate citizenship. In re All County Disposal Services, Inc.,
15 Cause No. TG-1859 (1985). Virtually every Commerce clause case
16 cited by Kleenwell involved a situation in which the state sought
17 to protect local businesses or local interests from interstate
18 competition or sought to impose a tax or fee on interstate
19 commerce. That is clearly not what is before the Commission in
20 this case. Here, a Washington corporation, doing business in
21 Washington, seeks to avoid the Washington regulatory scheme by
22 carrying waste to a disposal site outside the state. There is
23 little comfort for Kleenwell in the cases cited by it.
24

1 B. The Public Health Benefits of the Commission's Regulation
2 Outweigh any Burden on Interstate Commerce.

3 The Commerce clause is not absolute. If it is determined
4 that Kleenwell's activities are not solely for the purpose of
5 evading state regulation, and the Commerce clause does apply to
6 its operations, that is not the end of the question. The next
7 step is that a balancing test is applied to determine whether the
8 burden of interstate commerce exceeds the local benefits. Pike v.
9 Bruce Church, Inc., 397 U.S. 137, 141, 90 S. Ct. 844, 25 L.Ed. 2d
10 174 (1970). See also, Brown-Forman Distillers v. New York Liquor
11 Auth., 476 U.S. 573, 106 S. Ct. 2080, 90 L.Ed. 2d 552 (1986).

12 As the record in this case establishes, there is a public
13 health danger associated with infectious waste. See the testimony
14 of Mr. Turnberg as confirmed by Mr. Rowland. There is also
15 substantial danger inherent in moving away from a regulatory
16 scheme, such as the one adopted in Washington, to smaller
17 communities and more rural communities as discussed in great
18 detail by Professor Dempsey in his testimony. It has been clearly
19 established in Washington that the transportation of solid waste
20 for collection and disposal is a matter involving the protection
21 of the public health, safety, and welfare. See, e.g., Smith v.
22 Spokane, 55 Wash. 219, 220-221, 104 P.2d 249 (1909) and City
23 Sanitary Service v. Rausch, 10 Wn.2d 446, 448-449, 117 P.2d 225
24 (1958).

1 The only burden on interstate commerce posed by Washington's
2 regulations is that a foreign corporation must prove it is fit
3 (which Kleenwell failed to do) and that its services are needed.
4 The benefits of protecting the health of those involved in the
5 health care industry and the general public through the proper and
6 careful collection and disposal of infectious waste certainly
7 should outweigh a burden on interstate commerce imposed by
8 Washington's statutory scheme.

9 C. Kleenwell has Admitted that Local Collection Activities are
10 Properly the Subject of Local Regulation.

11 Kleenwell admits that it engages in local collection
12 activities, brings the material to its warehouse, and stores it
13 there for up to 90 days before any thought is given to
14 transporting outside the state. (TR 28-31). Mr. Rowland admitted
15 that Kleenwell's collection activities in King County are properly
16 regulated by the Seattle/King County Health Department through
17 their issuance of a permit to operate in the county. If the
18 collection activities are the proper subject of regulation, then
19 the Commission need not reach the question of whether or not the
20 Commission can regulate the transportation of waste from a point
21 in Washington to a point in California. The first element of the
22 activities, the local collection, is already admitted to be
23 subject to regulation.
24

1 If local collection of waste is subject to regulation by the
2 Seattle/King County Health Department, then the legislature's
3 requirements that a certificate of public convenience and
4 necessity be obtained are also appropriately applied to Kleenwell.
5 The requirement to obtain a certificate to engage in local
6 collection activities has been affirmatively decided by the
7 Commission in prior cases. See, e.g., In re Evergreen Waste
8 System, Inc., TG-1911 (1986) and In re Sure-Way Incineration
9 Services, Inc., Order M.V.G. 1533, GA-868 (1992).

10 The rationale of distinguishing local, intrastate movement of
11 traffic from the interstate move was followed in a case related to
12 transportation of logs within the State of Washington. In
13 Burlington Northern v. Weyerhaeuser Co., 719 Fed. 2nd. 304 (9th
14 Cir. 1983), the Court reasoned as follows:

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

19 In Burlington Northern, the question was when the shipment of logs
20 in foreign commerce begins. Is it the point of original shipment,
21 or only from the sorting yard where the logs are gathered? The
22 court concluded the interstate move began only after the second
23 intrastate shipments were gathered together. This case is
24

1 analogous to the activities of Kleenwell; the infectious waste is
2 moved by several trips from individual points in the State of
3 Washington (the generators) to another (Kleenwell's warehouse).
4 There it sits until a sufficient volume has been gathered to make
5 the interstate move worthwhile.

6 Kleenwell would have the Commission adopt verbatim the
7 decision in Medigen, supra. However, despite the lengthy
8 quotations from the Medigen decisions, Kleenwell forgets that
9 there is one critical fact in Medigen: The parties in the Medigen
10 case stipulated that "neither company (the two Medigen companies)
11 engages in the intrastate transportation of medical waste from one
12 point in West Virginia to another point in West Virginia."
13 Medigen, 787 F. Sup. 590 at 592. Here, Kleenwell admits that it
14 does engage in the transportation of medical waste between points
15 in the State of Washington, engaging in extensive intrastate
16 transportation before loads are consolidated for transportation to
17 California. Even if Medigen is ultimately upheld on appeal, the
18 factual distinction is critical for our purposes. There is
19 definite and admitted intrastate collection and transportation
20 activities which are subject to the Commission's jurisdiction.

21 D. There is no Evidence of Intent to Engage in Interstate
22 Transportation.

23 As Kleenwell admits, one of the elements in determining
24 whether or not interstate transportation subject to the Commerce

1 clause protection has occurred is whether it is manifest that
2 there is a persisting intent to transport in interstate commerce
3 at the time shipment commenced. Baltimore and O.S.W.R. Co. v.
4 Settle, 260 U.S. 166 (1922). As stated by Mr. Rowland, there is
5 no intent on the part of the shippers that the goods move in
6 interstate commerce. Mr. Rowland is the one who makes the
7 determination that the waste will be shipped to California, even
8 to the point that he stated that he would refuse to move the
9 material to an intrastate facility. (TR 84, 1.13-17). It is
10 clear that there is a complete lack of evidence of intent that the
11 infectious waste be moved in interstate commerce. Lacking any
12 evidence of that intent, Kleenwell's case must fail.

13 CONCLUSION

14 Based on the evidence before the Commission, it is clear that
15 there is no shipper intent that the infectious waste move in
16 interstate commerce. Kleenwell has admitted that its collection
17 activities can and should be regulated (the distinction between
18 regulation by King County and regulation by the State is one that
19 Kleenwell cannot make). Kleenwell is a Washington corporation
20 doing business in Washington with Washington customers. The only
21 reason Kleenwell is moving in interstate commerce is to avoid
22 intrastate regulation. Finally, if all these reasons fail, the
23 public health concerns and the protection of the health workers
24

1 and the general public from the dangers of infectious waste
2 outweigh any burden on interstate commerce.

3 Sureway respectfully requests that the Commission issue an
4 order that Kleenwell cease and desist in its collection and
5 transportation activities involving infectious waste until such
6 time as it obtains a certificate issued by the Commission to
7 engage in such activity.

8 **RESPECTFULLY SUBMITTED** this 23rd day of July, 1992.

9 VANDEBERG & JOHNSON

10 By 

11 Richard A. Finnigan

12 WSBA # 6443

13 Of Attorneys for Sureway Medical
14 Services, Inc., a subsidiary of
15 RABANCO, Ltd.

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IN THE MATTER OF DETERMINING THE
PROPER CARRIER CLASSIFICATION - 13
RAF/7921.422/0423KMN.RAF

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CERTIFICATE OF SERVICE

DOCKET NO. UT-920085

I certify that on this date a true copy of Exhibit B to the Protective Order in the above-referenced docket was deposited in the United States mail, first-class, postage-prepaid, to those persons named below:

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Transportation Commission
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Karen M. Nevins

DATE: July 23, 1992

PLACE: Tacoma, Washington