SERVICE DATE
AUG 3 1 1992

NOTE! An important notice to parties about administrative review appears at the end of this order.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Determining the Proper Carrier Classification of:	)	DOCKET NO. TG-920304
ENOCH ROWLAND d/b/a KLEENWELL BIOHAZARD AND GENERAL ECOLOGY CONSULTANTS	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND INITIAL ORDER

Hearings were held in this matter in Kent on May 13 and June 11, 1992, before Administrative Law Judge Lisa A. Anderl of the Office of Administrative Hearings. The parties requested an opportunity to brief the issues. Respondent submitted an opening brief by July 15, intervenors and Commission staff answered by July 24, and respondent submitted a reply brief on August 7, 1992.

The parties appeared and were represented as follows:

COMPLAINANT: WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
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RESPONDENT: ENOCH ROWLAND d/b/a KLEENWELL BIOHAZARD & GENERAL ECOLOGY CONSULTANTS
By James T. Johnson, attorney
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INTERVENORS: RYDER DISTRIBUTION RESOURCES, INC.
By Boyd Hartman, attorney
11000 Main Street
Bellevue, Washington 98004

WASHINGTON WASTE MANAGEMENT ASSOCIATION
By James Sells, attorney
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INTERVENORS (CONT'D):

AMERICAN ENVIRONMENTAL MANAGEMENT CORPORATION
By David W. Wiley, attorney
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Bellevue, Washington 98004

RABANCO COMPANIES
By Richard A. Finnigan, attorney
1201 Pacific Avenue
Suite 1900
Tacoma, Washington 98402

CLARK COUNTY DISPOSAL, INC.
BUCHMANN SANITARY SERVICE, INC.
By Cynthia A. Horenstein, attorney
900 Washington Street
Suite 900
Vancouver, Washington 98660

MEMORANDUM

This is a classification proceeding, initiated by the Commission on its own motion pursuant to RCW 81.04.110 and 81.04.510. The issue to be determined is whether Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, is in the business of transporting solid waste for collection and disposal for compensation over the public highways of the state without certificate authority as required by RCW 81.77.040.

In 1991, the respondent applied for certificate authority pursuant to RCW 81.77.040 under Application GA-907.[1] That application was denied on the basis of the applicant's failure to demonstrate his fitness to receive common carrier authority. No appeal was taken from that decision and the respondent has no application for authority pending.

Mr. Rowland appeared at the hearings in this matter and conceded that his company's operations are no different now from when he originally sought authority, with the exception that the waste is ultimately transported out of state for disposal. Mr. Rowland claims that his operations are exempt from Commission regulation as interstate commerce. He further argues that the Commission cannot require him to obtain a certificate of convenience and necessity and cannot order him to cease and desist.

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[1] During the pendency of the application Kleenwell operated under temporary authority granted by the Commission.

FACTUAL SETTING

The respondent, Kleenwell Biohazard and General Ecology Consultants, (Kleenwell) operates a medical waste transportation business in the greater King County area. The business is a Washington corporation and its sole shareholders and employees are Mr. Rowland and his daughter, both of whom are residents of the state. The company provides a medical waste collection and disposal service for doctors and dentists. In general, these customers are also customers of Mr. Rowland's medical supplies company.

Kleenwell collects medical waste from the generators on a weekly basis. It provides its customers with disposal containers and instructions on the proper handling of medical waste. The service is priced according to container size, with a large container (18 gallons) priced at $20 per pick up and a small container (10 gallons) at $12. The collection service does not make a profit. The cost of the collection service is subsidized by the revenues from the medical supplies business.

Kleenwell transports the waste to a warehouse in Seattle where it is held in cold storage for up to 90 days until it is loaded into a truck and transported to California for disposal by incineration.[2] The doctors and dentists who generate the waste have no interest in where the ultimate disposal site is located and do not care whether the waste is shipped out of state for disposal or not. Tr. 57 & 84. If a generator requested disposal in-state, Kleenwell would refuse to do so.

POSITIONS OF THE PARTIES

Respondent argues that it is exempt from state regulation because it is engaged in interstate commerce and that state regulation is an impermissible burden on its activities under the Commerce Clause of the United States Constitution. Respondent relies primarily on the recent decision by the U. S. District Court in the case of Medigan of Kentucky and Medigan of Pennsylvania, Inc., v. Public Service Commission of West Virginia, 787 F. Supp. 602 (S.D. W. Va. 1992).

Commission staff argues that the respondent's activities are intrastate in nature, not interstate, and therefore subject to regulation without the Commerce Clause even becoming an issue. The staff further contends that the State may

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[2] Prior to the denial of Kleenwell's application, waste was transported to Ferndale in the state of Washington for incineration.

exert its regulatory authority over the respondent even if the transportation is interstate because of the legitimate state interest in controlling the collection and transportation of medical waste.

Intervenors all take the position that the state may exert jurisdiction over Kleenwell's operations and require it to obtain a certificate of convenience and necessity before operating in the state. Intervenors advance several bases for this conclusion. Ryder asserts only that the transportation from generator to warehouse is wholly intrastate and therefore subject to Commission regulation. In general, the other intervenors all argue that the traffic is intrastate and contend that even if it is not, the state has a legitimate local interest in regulating solid waste collection and transportation so that a constitutional analysis results in the conclusion that there is no conflict with the commerce clause.

ISSUES

I. Is respondent operating as a solid waste collection company subject to RCW 81.77.040 and RCW 81.77.100?

II. Is the transportation in question intrastate or interstate traffic?

III. With regard to the Commerce Clause, Article 1, Section 8 of the U. S. Constitution:

A. Has the federal government preempted the field to prohibit any state regulatory involvement in solid waste transportation?

B. Is the regulatory scheme evenhanded (i.e. neutral) or does it discriminate against interstate commerce?

C. Does the regulatory scheme serve a legitimate state purpose?

D. Could that purpose be accomplished as well without discriminating against interstate commerce?

DISCUSSION

I. Is respondent operating as a solid waste collection company subject to RCW 81.77.040?

A solid waste collection company is defined in RCW 81.77.010(7) as one which operates vehicles used in the business of transporting solid waste for collection and/or disposal for compensation over any public highway in the state. Medical waste

is a type of solid waste. WAC 480-70-050(8). Guided by these definitions, it is clear the Kleenwell is a solid waste collection company in all respects. Under RCW 81.77.100, the operations of this company as it conducts its business within the state may be regulated by the State, subject to Constitutional limitations discussed below.

Under the provisions of RCW 81.77.040, no solid waste collection company may operate without first having obtained from the Commission a certificate of public convenience and necessity. Kleenwell does not have a certificate and may not lawfully operate. Pursuant to its authority in RCW 81.04.510, the Commission should order the respondent to cease and desist operations as a solid waste collection company.

II. Is the transportation in question intrastate or interstate traffic?

Kleenwell claims that it is exempt from Commission regulation because it is operating in interstate commerce when it transports waste from Washington to California for disposal. It asserts that the initial movement from the generator to the storage facility is also interstate commerce because of the intent of the shippers to move the waste out of state. Staff and the intervenors take issue with that characterization and argue that the transportation from generator to warehouse is intrastate in nature.

To determine the essential character of transportation between two points in the same state (i.e. whether it is simply intrastate traffic or whether it is interstate traffic because of a prior or subsequent movement across state lines) the shipper's fixed and persisting intent at the time of shipment is determinative. Baltimore & Southwestern R.R. Co. v. Settle, 260 U.S. 166 (1922).

In this case, the shippers have no intent regarding the waste other than that it be removed from their premises. Presumably, they are concerned with proper disposal, but Mr. Rowland's testimony establishes that they do not care whether it goes out of state or remains in state. Therefore, the transportation from the doctors' or dentists' offices to the warehouse in Des Moines is intrastate commerce and wholly subject to state regulation.

It should be noted that this is just one of the ways in which this case is factually different from the Medigan case on which respondent relies. In Medigan, the court noted that neither of the solid waste collection companies involved in the case was engaged in any intrastate commerce. Memorandum order entered August 9, 1991.

Because the regulated transportation in this case is intrastate, the Commerce Clause arguments advanced by respondent must fail. However, Commission staff argues that even without a stop in Des Moines, the traffic could be regulated by the Commission. In addition, the parties briefed the constitutional issue extensively. Therefore, and because this order's characterization of the commerce as intrastate in nature may not be accepted on review, the issues raised by the Commerce Clause should be discussed.

III. With regard to the Commerce Clause, Article 1, Section 8 of the U. S. Constitution:

A. Has the federal government preempted the field, prohibiting any state regulatory involvement in solid waste transportation?

Although the respondent argues that the field has been preempted by federal regulation, that is not the case. As pointed out by several of the parties, Congress has explicitly stated that collection and disposal of solid waste should be the function of state, local and regional agencies. 42 U.S.C. 6901. See also, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) where the Supreme Court found no clear and manifest purpose of Congress to preempt the entire field of interstate waste management or transportation. Thus, the door is open for state regulation which may have an impact on interstate commerce.

B. Is the regulatory scheme evenhanded (i.e. neutral) or does it discriminate against interstate commerce?

State regulation which has an impact on interstate commerce is allowed as long as it does not constitute economic protectionism or an impermissible burden on interstate commerce. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the regulation amounts to simple economic protectionism and is invalid. City of Philadelphia v. New Jersey, 437 U.S. 617, 623-624.

The respondent claims that the state statutes at issue in this case are per se invalid as an attempt to effect direct regulation of interstate commerce. The other parties (except Ryder) argue that the statutes are at worst neutral, with an equal effect on in-state and out-of-state businesses and economic interests. Commission staff points to several existing certificates issued to out-of-state companies. Staff also notes that the respondent is a Washington corporation, employing Washington residents and that no discrimination can be claimed on that basis.

In Medigan, the court found that the State of West Virginia's requirement of a certificate of public convenience and necessity as a condition of operating in interstate commerce was a direct rather than an incidental burden on interstate commerce. However, rather than find the statute invalid per se, the District Court allowed the State to show that the statute served a legitimate State purpose and that no other means could legitimately serve that purpose. The court applied this test on the basis of its interpretation of Maine v. Taylor, 477 U.S. 131 (1986), a quarantine case in which the State of Maine prohibited the importation of live baitfish in order to protect its own fish population from parasites. In Medigan, the court concluded that the State failed to meet its burden and found the state regulation to be invalid.

In this case, although the Washington statutory requirements appear to be similar to those of West Virginia, the undersigned is not persuaded that the requirements of RCW 81.77.040 are a direct burden on interstate commerce. Rather, the burden is applied equally to anyone who wishes to operate as a solid waste collection company within the state and likewise applies equally regardless of where the waste is ultimately disposed of. Thus, there is only an incidental or indirect burden on interstate commerce.

Under the standard set forth in Pike v. Bruce Church, inc., 397 U.S. 137 (1970), statutes which burden interstate commerce only incidentally are invalid only if the burden is clearly excessive in relation to the local benefits.

C. Does the regulatory scheme serve a legitimate state purpose?

If the statute is subject to analysis under Maine, there must be a showing of a legitimate state purpose; if the analysis is under Pike, there must be a showing of some local benefit. It seems to be a matter of degree, with the showing of a legitimate state purpose to be a somewhat stricter test than merely establishing local benefit.

In this case, the testimony of both Mr. Rowland and Wayne Turnberg establishes that there is a significant public health risk posed by medical waste and that the state and local governments have a strong interest in regulating the companies who collect and transport the waste for disposal. In recognition of this, the Commission has promulgated specific rules governing handling of medical waste, WAC 480-70-500, et seq. Although this finding of a significant public health risk associated with medical waste differs from the factual finding on this issue in the Medigan case, the evidence in this case supports that finding

and is obviously different from that which was considered in West Virginia.

In addition to regulating collection companies for purposes of ensuring compliance with requirements designed to promote public health and safety, there is the additional state interest in ensuring universal service at fair, nondiscriminatory rates. Professor Dempsey testified at length about the results of unregulated competition in the transportation industry in general and in the solid waste/medical waste field. It is clear from his testimony, and from the testimony of intervenors AEMC and Clark County Disposal, that unregulated entry and competition in this field would be highly detrimental to the goal of universal service at fair rates. In fact, the result would likely be that densely populated areas such as King County would have many companies operating, thereby duplicating service and not operating in an efficient manner while sparsely populated areas such as Eastern Washington or the Olympic Peninsula would find no service available, or available only at prohibitive rates.

Not only has a local benefit been shown, which is all that is required under Pike, but it seems clear that the regulatory scheme in Washington serves a legitimate State purpose as well.

D. Could that purpose be accomplished as well without discriminating against interstate commerce?

Under Pike, the only question is whether the incidental burden on interstate commerce is clearly excessive in relation to the local benefits. In this case, the burden is slight and the local benefits and interest are great. Although the requirement of a certificate of convenience and necessity may prevent some companies (both in-state and out-of-state) from operating in Washington, the requirement does not prevent waste from being disposed of out-of-state.

Under the stricter test of Maine v. Taylor, the question is whether the state purpose could be accomplished as well without the same or a similar impact on those companies who might want to dispose of the waste out of state. The conclusion is no, it could not be accomplished as well because regulated entry and rates are an integral part of accomplishing safe, universal service at non-discriminatory prices. Again, the Medigan court found otherwise. The court stated "it may be, as plaintiffs suggest, that experience elsewhere demonstrates that adequate statewide medical waste transportation service can be provided without restricting competition." Memorandum Order, August 9, 1991. However, evidence supporting that proposition is not in this record and that finding cannot be made in this case.

CONCLUSION

Kleenwell is operating as a solid waste collection company subject to the provisions and requirements of chapter 81.77 RCW. Kleenwell's operations in collecting medical waste and transporting it to Des Moines for storage are intrastate commerce subject to regulation by the Washington Utilities and Transportation Commission. Even if Kleenwell's operations were interstate in nature, transporting solid waste directly from the generators in Washington to the incinerator in California, the operations in the state of Washington are subject to State regulation and that regulation is not contrary to the Commerce Clause.

FINDINGS OF FACT

1. On April 8, 1992, the Commission served a complaint, order and notice of hearing initiating this classification proceeding pursuant to RCW 81.04.110 and 81.04.510. The issue to be determined is whether Enoch Rowland, d/b/a Kleenwell Biohazard and General Ecology Consultants, is in the business of transporting solid waste for collection and disposal for compensation over the public highways of the state without certificate authority as required by RCW 81.77.040.

2. The respondent, Kleenwell Biohazard, operates a medical waste transportation business in the greater King County area in the state of Washington. The business is a Washington corporation and its sole shareholders and employees are Mr. Rowland and his daughter. Mr. Rowland operated his business as a sole proprietorship prior to incorporating in August 1990. The company provides a medical waste collection and disposal service for doctors and dentists. In general, these customers are also customers of Mr. Rowland's medical supplies company.

3. Kleenwell collects medical waste from the generators on a weekly basis and supplies its customers with disposal containers and instructions on the proper handling of medical waste. Kleenwell transports the waste to a warehouse in Seattle where it is held in cold storage for up to 90 days until it is loaded into a truck and transported to California for disposal by incineration.

4. The testimony of Mr. Rowland and Mr. Turnberg establishes that medical waste in the waste stream poses a significant public health risk. Precautions must be taken in handling medical waste which are not required with solid waste generally.

5. Professor Paul Dempsey testified as to the impact of unregulated entry into the field of solid waste collection.

Unregulated entry into this field would likely cause unfair and discriminatory pricing and a lack of service in certain areas of the state.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this proceeding.

2. The respondent[3] is operating as a solid waste collection company within the state of Washington as defined in RCW 81.77.010 and is required by RCW 81.77.040 to have a certificate of public convenience and necessity to conduct those operations. This is so notwithstanding the fact that the solid waste is ultimately transported out of state for disposal. The respondent should be ordered to cease and desist those operations until it obtains such a certificate from the Commission.

3. Whether transportation is inter- or intrastate in nature is determined by the shipper's fixed and persisting intent at the time the shipment is made. Baltimore & Southwestern R.R. Co. v. Settle, 260 U.S. 166 (1922). The transportation which Kleenwell provides from the customers' premises to the Seattle warehouse location is wholly intrastate. The shippers have no intent regarding out of state shipment of the waste, a decision which is made by the carrier in this case and over which the waste generators have no control.

4. The provisions of chapter 81.77 RCW may be applied to respondent without violation of the Commerce Clause of the United States Constitution.

O R D E R

IT IS HEREBY ORDERED That Enoch Rowland and Kleenwell Biohazard and General Ecology Consultants are directed to cease and desist from operating motor vehicles for the collection or transportation of solid waste for compensation over the public highways of the State of Washington.

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[3] Although the complaint was brought against Mr. Rowland as an individual operating under a d/b/a, the corporation formed in 1990 appears to be essentially the same business.

DATED at Olympia, Washington, and effective this 31st day of August, 1992.

OFFICE OF ADMINISTRATIVE HEARINGS

Lisa A. Anderl

LISA A. ANDERL
Administrative Law Judge

NOTICE TO PARTIES:

This is an initial order only. The action proposed in this order is not effective until a final order of the Utilities and Transportation Commission is entered. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within a time limit as outlined below.

Any party to this proceeding has twenty (20) days after the service date of this initial order to file a Petition for Administrative Review, under WAC 480-09-780(2). Requirements of a Petition are contained in WAC 480-09-780(4). As provided in WAC 480-09-780(5), any party may file an Answer to a Petition for Administrative Review within ten (10) days after service of the Petition. A Petition for Reopening may be filed by any party after the close of the record and before entry of a final order, under WAC 480-09-820(2). One copy of any Petition or Answer must be served on each party of record and each party's attorney or other authorized representative, with proof of service as required by WAC 480-09-120(2).

In accordance with WAC 480-09-100, all documents to be filed must be addressed to: Office of the Secretary, Washington Utilities and Transportation Commission, 1300 South Evergreen Park Drive S.W., P. O. Box 47250, Olympia, Washington, 98504-7250. After reviewing the Petitions for Administrative Review, Answers, briefs, and oral arguments, if any, the Commission will by final order affirm, reverse, or modify this initial order.