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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In Re Application No. GA-079254 of

KLEEN ENVIRONMENTAL
TECHNOLOGIES, INC.

For a Certificate of Public Convenience and
Necessity

DOCKET NO. TG-040248

**PROTESTANT STERICYCLE'S REPLY
IN SUPPORT OF ITS MOTION FOR
AWARD OF ATTORNEYS' FEES AND
COSTS**

Protestant Stericycle of Washington, Inc. ("Stericycle") respectfully submits this Reply in
Support of its Motion for Attorneys' Fees and Costs.

The Commission has authority to award Stericycle the attorneys fees and costs it has incurred
in exposing and responding to Kleen's fraud, perjury and other misconduct in this proceeding.
Stericycle's claim for attorneys' fees is not based on the fact that it prevailed in this proceeding but,
instead, on the ground that an award of attorneys' fees against Kleen is necessary to protect the
integrity of the Commission's proceedings and to make Stericycle whole for the harm it has suffered
as a result of Kleen's gross misconduct. But for the efforts of Stericycle's attorneys, Kleen's
fraudulent conduct would never have been discovered. The exposure of Kleen's fraud was necessary
to protect the integrity of the Commission's proceedings and thus conferred a public benefit. Future

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1 litigants before the Commission must know that a party guilty of fraud, perjury and other misconduct
2 in Commission proceedings will be liable for litigation costs incurred by other litigants in exposing
3 such misconduct. Otherwise, unscrupulous litigants will see little risk (and much to gain) from such
4 misconduct, their opponents will have severely reduced incentives to incur the costs necessary to
5 expose it and the Commission's proceedings will be at risk of degenerating into farce. In the narrow
6 circumstances present here, where one party has committed fraud and perjury before the Commission
7 and the efforts of another party have brought that misconduct to light, the Commission's broad
8 authority to conduct adjudications must necessarily include the authority to award attorneys' fees
9 against the party guilty of misconduct and in favor of the party whose efforts resulted in exposure of
10 the fraud. The Commission should exercise its authority here and issue an award against Kleen and
11 in favor of Stericycle for the attorneys' fees incurred by Stericycle in exposing and otherwise
12 responding to Kleen's fraud and other misconduct in this proceeding.

15 As detailed in Order No. 07 dismissing Kleen's application, Allen McCloskey, the individual
16 given primary responsibility by Kleen for the management and presentation of Kleen's case before
17 the Commission, submitted a fraudulent shipper support letter, lied about the origin of the letter and
18 other matters at issue in the proceedings and fled the state when his fraud and perjury were exposed.
19 Although Kleen now seeks to hide behind the claim that McCloskey was an independent contractor,
20 rather than a Kleen employee, Kleen's responsibility for McCloskey's misconduct is commensurate
21 with the authority and responsibility that Kleen delegated to him.¹ Kleen presented McCloskey as its
22 primary operating witness. Kleen presented McCloskey as Kleen's spokesman for the purpose of
23 describing Kleen's proposed service. McCloskey prepared Kleen's proposed tariff and is shown on
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25 ¹ "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his
26 authority, to commit a fraud upon a third person is subject to liability to such third persons for the fraud." Restatement
(Second) of Agency, ¶ 260.

1 the proposed tariff as issuing agent for Kleen. Kleen submitted McCloskey's prefled testimony in
2 which he asserted that he would be responsible for managing Kleen's proposed biomedical waste
3 collection service if Kleen's application was granted by the Commission. Having delegated primary
4 responsibility for the management and presentation of its case to Allen McCloskey, having
5 authorized Mr. McCloskey to speak for Kleen throughout these proceedings and having identified
6 McCloskey as the individual who would manage Kleen's medical waste business if the application
7 was granted, Kleen is responsible for the consequences of McCloskey's misconduct -- undertaken on
8 Kleen's behalf.

10 Although Kleen's shareholders now seek to portray themselves as innocent victims, the record
11 demonstrates that Kleen's shareholders were complicit in McCloskey's wrongdoing. Robert Olson,
12 Kleen's president and majority shareholder, testified that he was aware of the Birdinground letter
13 before it was filed with the Commission. Tr. 1888:5-8; 1891:10-1892-11. See also Ex. 22. Although
14 Olson was evasive concerning the extent of his knowledge, Olson would have been aware of the
15 Birdground letter's fraudulent character if he had read it, because it was obviously fraudulent to
16 anyone knowledgeable about Kleen's business. If Olson did not read the letter before it was
17 submitted to the Commission, he should have. Thus, Olson knew or should have known of the
18 fraudulent character of the Birdinground letter before it was submitted to the Commission in support
19 of Kleen's case.

22 Although Robert Olson claimed in his October 26 testimony that he had not read the
23 Birdinground letter until the morning of October 26, he also claimed that McCloskey showed him a
24 "form" shipper support letter on October 15 "that appears to be the instrument that Mr. Birdinground
25 had responded to." Tr. 1884:12-17. The claim that the Birdinground letter was based on a widely
26

1 disseminated form letter used by Kleen to solicit shipper support was repeated in a letter to the
2 Commission dated October 21, 2004 in which Olson and Kleen's other shareholders asserted that
3 "this letter was one of three KET 'form letters' sent out to numerous shippers." Ex. 22. Yet, how
4 could Mr. Olson have known on October 15 or October 21 that the content of the Birdinground letter
5 resembled Kleen's form letter if he did not read the Birdinground letter until October 26? Clearly,
6 some of Mr. Olson's statements to the Commission were false -- either his testimony that he did not
7 read the Birdinground letter until October 26 was false or his representations in the October 21 letter,
8 Ex. 22, that the Birdinground letter was based on a Kleen form letter and his testimony on October 26
9 that McCloskey showed him a copy of this form letter on October 15 were false. Whatever role
10 Robert Olson played in Kleen's submission of the false document to the Commission, Mr. Olson
11 clearly made false statements to the Commission in an effort to cover up Kleen's responsibility after
12 the fraudulent character of the document was exposed.

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15 All three of Kleen's shareholders signed the October 21 letter to the Commission after the
16 fraudulent character of the Birdinground letter was exposed that can only be viewed as an effort to
17 cover up Kleen's responsibility for the fraud. As detailed in Stericycle's Motion, pp. 11-15, the
18 October 21, 2004 letter contained numerous false and deceptive statements concerning the
19 Birdinground letter and Kleen's response to the discovery of its fraudulent character. By signing this
20 letter, Kleen's principals clearly joined Allen McCloskey in an effort to disguise Kleen's
21 responsibility for the fraud.² Clearly, Kleen's principals do not have clean hands.

22
23 The Commission Staff agrees that the Commission has both the powers expressly granted to
24 the Commission by statute and "those that are necessarily implied from such statutory grants." Staff

25
26 ² While Kleen's shareholders may claim that they are not responsible for the false statements contained in their October 21 letter because it was drafted for them by Allen McCloskey, such a claim would demonstrate their utter disregard for the truth of their representations to the Commission when they signed that letter.

1 Response at 2, quoting Tuerk v. Dep't of Licensing, 123 Wn. 2d 120, 124-25, 864 P.2d 1382 (1994).

2 The Staff acknowledges that bad faith conduct “has been recognized as an equitable basis for an
3 award of attorneys’ fees” under the so-called American rule, as applied by the courts of this state.

4 Staff Response at 2-3. The Staff acknowledges that Washington courts have identified the authority
5 to award attorneys’ fees to a party injured by another party’s bad faith as “inherent” in (i.e., implied
6 by) their adjudicative functions. Staff Response at 3.

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8 From these premises, Stericycle concludes that the Commission has implied authority under
9 the broad grants of adjudicative power found in RCW titles 80 and 81 to award attorneys’ fees in the
10 narrow circumstances present here, where the fraudulent conduct and perjury of a party in
11 proceedings before the Commission threatens the integrity of the Commission’s processes and causes
12 injury to another litigant. Inexplicably, the Commission Staff argues for an interpretation of the
13 Commission’s implied powers under RCW titles 80 and 81 that would deny the Commission this
14 authority. In support of this position, the Staff relies primarily upon Cohn v. Department of
15 Corrections, 78 Wn. App. 63, 895 P.2d 857 (1995), and Trachtenberg v. Department of Corrections,
16 122 Wn. App. 491, 93 P.2d 217 (2004). But neither of these cases dealt with the authority of an
17 agency to award attorneys’ fees against a party guilty of fraud or other misconduct in the course of an
18 agency’s adjudicative proceedings. Neither is relevant to the case at hand or requires the conclusions
19 drawn from them by the Commission Staff.

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21
22 Cohn and Trachtenberg do not support the conclusion that the Commission lacks authority to
23 award attorney’s fees to a party injured by the fraud, perjury and other misconduct of a litigant in the
24 course of Commission proceedings. Cohn and Trachtenberg held that employees who were
25 “prevailing parties” in civil service appeals before the Washington Personnel Appeals Board did not
26

1 have a right to recover their attorneys' fees under RCW 49.48.030. These cases did not involve a
2 request for attorneys' fees based on a party's misconduct in the course of agency proceedings. Both
3 of these cases turned on the interpretation of a specific statutory scheme that is not involved here.

4
5 The court of appeals in Cohn analyzed the Board's authority to award attorneys' fees to an
6 employee who prevailed before the Board under the same standards as applied by the Washington
7 courts in determining whether to make such an award: "Washington follows the American rule that a
8 prevailing party ordinarily does not recover its attorney fees. Attorney fees are recoverable only if
9 specifically authorized (1) by statute, (2) by agreement of the parties, or (3) upon a recognized
10 equitable ground." Cohn, 78 Wn. App. at 66. The court then addressed Cohn's argument that RCW
11 49.48.030 provided a statutory basis for an award of fees and concluded that it did not.³ Cohn made
12 no argument that he had been injured by bad faith actions or other misconduct of the Department of
13 Corrections in the course of proceedings before the Board or that he was entitled to an award of
14 attorneys' fees under any other "recognized equitable ground."
15

16 In Cohn, the court of appeals pointed out that RCW 49.48.040 authorizes a court to award
17 attorneys' fees in circumstances where the court has rendered judgment in favor of an employee for
18 wages or salary wrongfully withheld by an employer but concluded that this statute did not authorize
19 the Board to award attorneys fees because (a) the Board is not a court and (b) no judgment had been
20 entered by a court against the Department of Corrections. The court of appeals noted further that the
21 Board's authority is specified in RCW chapter 41.64 and that neither that statute nor the state civil
22 service law, RCW 41.06.220(2), made any provision for awarding attorneys' fees to employees
23 injured by the wrongful acts of state employers. In fact, the court noted that RCW 41.06.220(2)
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25
26 ³ RCW 49.48.030 provides in pertinent part: "In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer"

1 “unambiguously provides for an award of specific benefits only, including back pay. There simply is
2 no room for construction of an ambiguous statute,” quoting Kringel v. Dep’t of Social & Health
3 Services, 45 Wn. App. 462, 464, 726 P.2d 58 (1986). Cohn, 78 Wn. App. at 68. Thus, the court of
4 appeals concluded that RCW 41.06.220(2) unambiguously limited an employee’s remedies and
5 excluded the recovery of attorneys’ fees. In this context, the court of appeals held that RCW
6 49.48.030, dealing with the authority of a court to award attorneys fees in circumstances where the
7 court has entered judgment against an employer for salary or wages wrongfully withheld, addressed
8 matters beyond the scope of the Board’s statutory responsibility and authority under RCW chapter
9 41.06 and RCW chapter 41.64, noting that “agencies do not have implied authority to determine
10 issues outside of that agency’s delegated functions or purpose.” Id. “Because an attorney fee award
11 for a successful administrative appeal is not listed as one of the ‘rights and benefits’ specifically
12 afforded to an aggrieved employee under RCW 41.06.220(2), attorney fees -- like interest on back
13 pay -- cannot be recoverable in an administrative appeal of state agency disciplinary action.” Id. at
14 69.

17 Like Cohn, Trachtenberg involved a civil service appeal under RCW chapter 41.64 and a
18 claim for attorneys’ fees under RCW 49.48.030 by an employee who prevailed before the state
19 Personnel Appeals Board. Following Cohn, the court of appeals in Trachtenberg held that “RCW
20 49.48.030 does not apply to state disciplinary appeals” Trachtenberg, 122 Wn. App. at 492.

22 In 1981, the legislature created the Board and gave it exclusive
23 authority to hear state civil service disciplinary appeals. See RCW
24 41.64.090. Under the statutory framework, the Board can hear
25 ‘appeals’ and can enter ‘orders.’ In addition, the Board is given the
26 authority to affirm, reverse, or modify disciplinary decisions. WAC
358-30-050. If the Board reinstates an employee, RCW 41.06.220
applies and the employee is entitled to restoration of back pay, sick
leave, vacation accrual, retirement, and OASDI (Old-Age, Survivors,

1 and Disability Insurance) credits. Attorney fees are notably absent
2 from the enumerated remedies available. . . . The legislature did not
3 give a civil service employee the right to bring an independent action or
4 suit to challenge a disciplinary decision and did not give the Board the
5 authority to enter a judgment or award attorney fees. Because of the
6 limitations placed on appeals to the Board, we conclude that the
7 legislature did not intend RCW 49.48.030 to apply to disciplinary
8 challenges before the Board.

9 Id. at 496-97. Thus, although there is some language in the Cohn and Trachtenberg decisions that
10 seems to support the argument of the Commission Staff when taken out of context, the holdings in
11 these cases address only the unique statutory framework governing civil service disciplinary appeals
12 and the authority of the Washington Personnel Appeals Board under RCW 49.48.030 to award
13 attorneys' fees to a state employee who prevails before the Board on a disciplinary appeal.

14 The decision in Cohn reinforces the conclusion that, in both administrative and judicial
15 proceedings, "Attorney fees are recoverable only if specifically authorized (1) by statute, (2) by
16 agreement of the parties, or (3) upon a recognized equitable ground." Cohn, 78 Wn. App. at 66.
17 Here, unlike the statutory claims asserted in Cohn and Trachtenberg, Stericycle relies on what the
18 Commission Staff concedes is a "recognized equitable ground" for the award of attorneys' fees -- a
19 litigant's bad faith conduct in the course of litigation proceedings. Staff Response at 2-3. The Cohn
20 court acknowledged that an administrative agency could award fees on the basis of such a
21 "recognized equitable ground." Cohn, 78 Wn. App. at 66. However, the Cohn and Trachtenberg
22 cases did not themselves involve claims for attorneys' fees based on recognized equitable grounds.
23 Thus, contrary to the assertions of Commission Staff, Cohn and Trachtenberg cannot be considered
24 authority for the proposition that the Commission lacks authority to award attorneys' fees in the
25 present case. To the contrary, the Cohn case actually acknowledges that an agency has authority to
26 award attorneys' fees based on equitable grounds.

1 The Washington Legislature has delegated to the Commission broad adjudicatory
2 responsibility and authority under RCW titles 80 and 81. The Commission has both the express
3 authority granted to it by these statutes and “those [powers] that are necessarily implied from such
4 statutory grants.” Staff Response at 2, citing Tuerk v. Dep’t of Licensing, 123 Wn. 2d 120, 124-25,
5 864 P.2d 1382 (1994). Stericycle contends that the authority to shift costs incurred as a result of one
6 party’s fraud and other misconduct in proceedings before the Commission to the party guilty of the
7 misconduct and away from the party injured by the misconduct through an award of attorneys’ fees is
8 a necessary incident of the Commission’s authority to conduct adjudications and therefore necessarily
9 implied by the statutory authority to conduct adjudications. Not every issue that may arise in the
10 context of administrative litigation can be addressed in advance by the Legislature. The Commission
11 must have the authority to regulate and control the conduct of parties appearing before it. This
12 authority must include the authority to sanction fraud and other wrongdoing committed in the course
13 of Commission proceedings and to compensate parties injured by such misconduct through an award
14 of attorneys’ fees. Otherwise, applicants that come before the Commission with marginal cases will
15 have every incentive to manufacture evidence and bend the truth, knowing that they have essentially
16 nothing to lose and everything to gain from such misconduct.

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19 Although the Commission Staff is correct that no Washington cases have directly addressed
20 the authority of an agency adjudicative body to award attorneys’ fees to a party injured by the fraud,
21 perjury or other misconduct of another party in the course of agency proceedings, neither has any
22 Washington case held that agency adjudicators lack such authority. Similarly, Stericycle is aware of
23 no Commission decisions that specifically address this issue. In the absence of controlling judicial or
24 Commission precedent, the Commission must interpret its authority under the relevant statutes.
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1 Stericycle contends that the Commission must adopt an interpretation that enhances, rather than
2 impedes, its ability to perform the adjudicative functions assigned to it by the Legislature.

3 The Commission's statutory responsibility to perform adjudicative functions in contested
4 cases necessarily carries with it the power to control and regulate the conduct of the parties appearing
5 before it and to protect the integrity of the Commission's processes. The courts have determined that
6 the power to award attorneys' fees based on "recognized equitable grounds" is a power inherent in
7 their adjudicative roles. There is no reason to conclude that the Commission's adjudicative powers
8 do not include similar authority. Bad faith is one such recognized equitable ground. To protect the
9 integrity of Commission proceedings, the Commission's power to conduct adjudications must include
10 the authority award attorneys' fees and costs to a party injured by another party's fraud, perjury, bad
11 faith or other misconduct in the course of Commission proceedings.⁴

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14 As pointed out in Stericycle's Motion at p. 31-34, the supreme courts of Delaware and
15 Colorado have acknowledged that an administrative agency with adjudicative functions has implied
16 authority to award attorneys' fees on equitable grounds. See Hawes v. Colorado Division of
17 Insurance, 65 P.3d 1008 (2003) (applying the "common fund" doctrine as an equitable exception to
18 the American rule that litigants must bear their own litigation costs):

19
20 [I]t is also well-established that agencies possess implied and incidental
21 powers filling the interstices between express powers to effectuate their
22 mandates. Thus, the lawful delegation of power to an administrative
23 agency carries with it the authority to do whatever is reasonable to
24 fulfill its duties.

25
26 ⁴ Commission Staff is correct that an agency's adjudicative authority, alone, is not a sufficient basis from which to infer the authority to award attorneys' fees to a party merely because that party has prevailed in litigation before the agency. Staff Response at 8. But this is not the issue. In Washington, attorneys' fees "are recoverable only if specifically authorized (1) by statute, (2) by agreement of the parties, or (3) upon a recognized equitable ground." Cohn, 78 Wn. App. at 66. The question here is whether the Commission may base an award of attorneys' fees to Stericycle on Kleen's bad faith conduct in the course of these proceedings. The Staff acknowledges that "bad faith" is a "recognized equitable ground" that would support an award of attorneys' fees in the context of judicial proceedings. Staff Response at 2-3.

1 Id. at 1015. Brice v. State of Delaware, Department of Correction, 704 A.2d 1176, 1179 (1998)
2 (agency may exercise its inherent equitable powers to award attorneys’ fees when “losing party has
3 ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons’”). “The purpose of this
4 exception is not to award attorney’s fees to the prevailing party as a matter of right, but rather to
5 ‘deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the
6 judicial process.’” Id. (citation omitted).

8 The Commission Staff cites a case from Oregon’s intermediate appellate court, Oregon
9 Occupational Safety and Health Div. v. Don Whitaker Logging, Inc., 861 P.2d 368 (Or. App. 1993),
10 in which the court held, over a vigorous dissent, that the Oregon Workers’ Compensation Board
11 lacked the authority to award attorneys’ fees to the prevailing party absent a specific statutory grant.⁵
12 Similarly, the Commission Staff cites Laborer’s International Union of North America, Local 478 v.
13 Myrtice Burroughs, 541 So. 2d 1160 (Fla. 1989), a case in which the Florida Supreme Court held that
14 the Metropolitan Dade County Fair Housing and Employment Appeals Board did not have authority
15 to award attorneys’ fees to a prevailing party under the terms of the Dade County ordinances
16 establishing the Board. However, neither of these cases involved the type of fraud, perjury and other
17 bad faith conduct in litigation before the agency that is at issue here. The holdings in both of these
18 cases can be explained as applications of the general rule that each party must bear its own litigation
19 costs unless an award of attorneys’ fees is “authorized (1) by statute, (2) by agreement of the parties,
20 or (3) upon a recognized equitable ground.”

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24 ⁵ Although the Board concluded that “the equities weigh in favor of an award of attorney fees” to the prevailing party,
25 there was no showing that the Oregon Occupational Safety and Health Division had acted in bad faith or engaged in other
26 misconduct before the Board or other “recognized equitable ground” for an award. Thus, although the Oregon court
asserted broadly that Oregon administrative agencies do not have the same equitable powers as courts, the case did not
address the propriety of an award of fees in the context of bad faith conduct or other “recognized equitable ground” for an
award of attorneys’ fees.

1 The Commission has the authority to award Stericycle the attorneys' fees it has incurred in
2 exposing and responding to Kleen's fraud, perjury and other misconduct in this proceeding. This is
3 an unusual case. Although the Commission Staff appears to be confused on this point, the issue here
4 is not whether the Commission has general authority to award attorneys' fees to a prevailing party.
5 This was the issue dealt with in the Cohn and Trachtenberg cases and in the other cases relied upon
6 by the Commission Staff. As the Commission Staff acknowledges, the conduct at issue here falls
7 squarely within one of the "recognized equitable grounds" that the Washington courts have found to
8 justify an award of attorneys' fees. The question here, then, is whether the Commission has the
9 implied authority to award attorneys' fees in these limited, narrow circumstances. Stericycle
10 contends that the Commission has the authority to award Stericycle its attorneys' fees in these limited
11 circumstances and that such authority is necessary to permit the Commission to control the conduct
12 of parties appearing before it and to preserve the integrity of the Commission's proceedings.
13
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15 For all of the foregoing reasons and the reasons previously cited in its Motion, Stericycle
16 respectfully requests that its Motion for Award of Attorneys' Fees and Costs be granted.

17 DATED this 20th day of December, 2004.

18 Respectfully submitted,

19 GARVEY SCHUBERT BARER

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this day served the foregoing document upon the persons and
3 entities listed below:

4 **PROTESTANT STERICYCLE OF WASHINGTON, INC.'S REPLY IN SUPPORT OF**
5 **ITS MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS**

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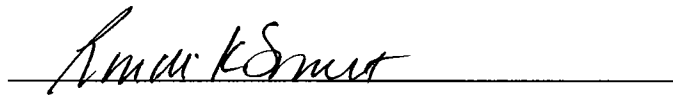
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26 Copies of the referenced document were served on the foregoing by hand delivery and/or
deposit today in the U.S. Mail.

DATED at Seattle, WA this 20th day of December, 2004



Rondi K. Susort