

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

**STERICYCLE'S MOTION TO STRIKE
REBUTTAL TESTIMONY OF
KENNETH LEE AND TO EXCLUDE
EXHIBITS 52 AND 53**

Stericycle of Washington, Inc. ("Stericycle"), through its attorneys Garvey Schubert Barer and Stephen B. Johnson, moves to strike in its entirety the rebuttal testimony offered by Mr. Kenneth Lee on behalf of Applicant Kleen Environmental Technologies, Inc. ("Kleen") on October 8, 2004 for the reasons previously stated in Stericycle's oral motion at the hearing on October 8, 2004 and for the reasons stated herein.

1. The so-called "rebuttal" testimony offered by Mr. Lee on October 8, 2004 concerning (a) the cost and availability of warehouse, truck yard and office facilities in South King County that might be used by Kleen to base its hypothetical future biomedical waste collection service (Exhibit 52) and (b) the information allegedly provided to him by a person connected with the Harris Ford vehicle dealership (Exhibit 53) is entirely outside of the scope of and unresponsive to any direct testimony provided by any of the protestants' witnesses. Accordingly, it is improper rebuttal testimony.

2. Mr. Lee himself admitted in his testimony on October 8 that he was presenting Exhibits 52 and 53 in response to issues raised in his cross examination by Stericycle's counsel.

Thus, Mr. Lee's testimony was explicitly offered to cure defects in Mr. Lee's own direct

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testimony, rather than to respond to the testimony of Stericycle's witnesses or the witnesses of the other protestants. By his own characterization, Mr. Lee's October 8 testimony and Exhibits 52 and 53 thus cannot be considered rebuttal testimony and are improper.

3. Kleen's counsel argued on October 8 that Mr. Lee's "rebuttal" testimony, including Exhibits 52 and 53, were offered to rebut testimony offered by Stericycle witnesses Nanette Walker and Michael Philpott. However neither of these witnesses (nor any other witness for protestants) provided testimony concerning either (a) the cost or availability of warehouse, truck yard and office facilities that might potentially be used as a base in South King County for Kleen's hypothetical future biomedical waste collection service; or (b) the cost of acquiring route collection "box-van" trucks of the type that Kleen indicated it intended to use to provide that service. The only statement in the prefiled testimony of any of the Stericycle witnesses related to either of these issues is the following statement at p. 7 of Nanette Walker's prefiled testimony (Exhibit 115): "Although Exhibit KRL-3 [Exhibit 42] suggests that the vehicles required for the proposed service can be leased 'with minimal money down' from a particular vehicle dealership, Kleen has provided no statement or other evidence from this dealership to demonstrate that it is prepared to extend credit to Kleen in this form, for this purpose." Thus, Ms. Walker's testimony merely points out the absence of any evidence to support Mr. Lee's claim that the necessary vehicles could be acquired by Kleen by lease. Kleen may not cure this defect in its direct case on rebuttal.¹

4. Ms. Walker did not question the vehicle cost assumptions presented in Mr. Lee's prefiled testimony and instead used those costs in her own analysis. Thus, Ms. Walker's analysis of Kleen's cash needs in the first year of operation (Exhibits 122 and 128) are based on the vehicle cost assumptions set out in Exhibit 42. Ms. Walker's cost analysis (Exhibits 120 and

¹ In any event, Exhibit 53 provides no evidence that Harris Ford has agreed to lease vehicles to Kleen.
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126) accepted the vehicle lease cost assumptions set out in Mr. Lee's prefiled testimony at Exhibit 44 (subsequently modified in other respects by Exhibit 51).

5. "Rebuttal evidence, generally speaking, is receivable only where new matter has been developed by the evidence of one of the parties and is ordinarily limited to a reply to new points." W.E. Roche Fruit Company v. Northern Pacific Railway Company, 184 Wn. 695, 698-9, 52 P.2d 325 (1935) ("rebuttal testimony" excluded because it did not directly address opponent's expert testimony). The evidence presented by Mr. Lee on October 8 did not rebut any testimony given by Ms. Walker or Mr. Philpott.

6. For all of these reasons and for the reasons stated orally at the October 8 hearing, Mr. Lee's "rebuttal" testimony must be stricken from the record and disregarded and Exhibits 52 and 53 must be excluded from the Administrative Record of this proceeding.

DATED this 25th day of October, 2004.

Respectfully submitted,

GARVEY SCHUBERT BARER

By 

Stephen B. Johnson, WSBA #6196
Charles L. Cottrell, WSBA #31984
Attorneys for Protestant Stericycle of
Washington, Inc.

1191 Second Avenue, 18th Floor
Seattle, WA 98101
206-464-3939
Direct: 206-816-1385
Fax: 206-464-0125
Email: sjohnson@gsblaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document electronically in Adobe PDF format upon the persons and entities listed below:

STERICYCLE'S MOTION TO STRIKE REBUTTAL TESTIMONY OF KENNETH LEE AND TO EXCLUDE EXHIBITS 52 AND 53

For Kleen Environmental:

Greg Haffner
Curran Mendoza
555 W. Smith Street
Kent, WA 98035
Fax: 253-852-2040
Email: gwh@curranmendoza.com

For WRRRA, LeMay, Rubatino and Consolidated:

James K. Sells
Ryan Sells Uptegraft, Inc.
9657 Levin Road N.W., Suite 240
Silverdale, WA 98383
Fax: 206-360-307-8865
Email: jimsells@rsulaw.com

For Commission Staff:

Greg Trautman, Asst. Attorney General
1400 S. Evergreen Park Drive S.W.
P.O. Box 40128
Olympia, WA 98504-0128
fax: 360-586-5522
Email: Gtrautma@wutc.wa.gov

Carole Washburn, Executive Secretary
WUTC
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504
Email: records@wutc.wa.gov

Copies of the referenced document were also served on the foregoing by deposit today in the U.S. Mail.

DATED at Seattle, WA this 25th day of October, 2004


Kathi T. Butler