

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In re Application No. GA-079251 of	)	DOCKET NO. TG-040221
)	
HAROLD LEMAY ENTERPRISES, INC.	)	ORDER NO. 04
)	
	)	PREHEARING CONFERENCE
For an Extension of Certificate No.	)	ORDER; ADDRESSING
G-98 for a Certificate of Public	)	DISCLOSURE OF SHIPPER/
Convenience and Necessity	)	GENERATOR WITNESSES
)	
.....)	
In re Application No. GA-079254 of	)	DOCKET NO. TG-040248
)	
KLEEN ENVIRONMENTAL TECHNOLOGIES INC.	)	ORDER NO. 04
)	
	)	PREHEARING CONFERENCE
For a Certificate of Public	)	ORDER; ADDRESSING
Convenience and Necessity	)	DISCLOSURE OF SHIPPER/
	)	GENERATOR WITNESSES
)	
.....)	
In re Application No. GA-079226 of	)	DOCKET NO. TG-040553
)	
RUBATINO REFUSE REMOVAL, INC.	)	ORDER NO. 03
)	
	)	ORDER GRANTING
For an Extension of Certificate No.	)	WITHDRAWAL OF
G-58 for a Certificate of Public	)	APPLICATION; CLOSING
Convenience and Necessity)	
	)	DOCKET
.....)	

1 **NATURE OF PROCEEDING.** Docket Nos. TG-040221, TG-040248, and TG-040553 are applications by Harold LeMay Enterprises, Inc. (LeMay), Kleen Environmental Technologies, Inc. (Kleen Environmental), and Rubatino Refuse Removal, Inc. (Rubatino), respectively, for certificates and extensions of certificates of public convenience and necessity for collection of solid waste, in

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particular biomedical waste. The applications are consolidated for hearing and determination under WAC 480-07-320 and WAC 480-70-111, as the applications request overlapping territory and were filed within the time period required in the rule.

- 2 **CONFERENCE.** The Washington Utilities and Transportation Commission (Commission) convened a prehearing conference in consolidated Docket Nos. TG-040221, TG-040248, and TG-040553 at Olympia, Washington on August 3, 2004, before Administrative Law Judge Ann E. Rendahl.

- 3 **APPEARANCES.** James K. Sells, Ryan Sells Uptegraft, Inc., P.S., Silverdale, Washington, represents LeMay and Rubatino as applicants, as well as LeMay, Rubatino, Consolidated Disposal Services, Inc., and Washington Refuse and Recycling Association (WRRRA) as protestants to the Kleen Environmental application. Greg W. Haffner, Curran Mendoza P.S., Kent, Washington, represents Kleen Environmental as applicant and as an intervenor in the LeMay and Rubatino applications. Stephen B. Johnson, Garvey Schubert Barer, Seattle, Washington, represents Stericycle of Washington, Inc. (Stericycle) as a protestant to all three applications. Gregory J. Trautman, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).

- 4 **WITHDRAWAL OF RUBATINO APPLICATION.** On July 13, 2004, counsel for Rubatino filed a letter with the Commission advising that Rubatino was withdrawing its application No. GA-079266 for an Extension of Certificate No. G-58. Counsel for Rubatino confirmed the Company's withdrawal of the application during the August 3 conference. The withdrawal of Application No. GA-79266 is granted, and Docket No. TG-040553 is closed.

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- 5 **AMENDMENT TO LEMAY APPLICATION.** On August 3, 2004, counsel for LeMay advised the Commission that the Company wished to amend its Application No. GA-079251 to reduce the geographic scope of the authority requested to “Biomedical waste in King and Kitsap Counties.” This request was confirmed and allowed during the August 3 conference. Under WAC 480-07-395(5), the Commission will allow amendments to pleadings, including applications, on “terms that promote fair and just results.” A reduction in the territory need not be redocketed, as the change merely limits the scope of the application and will have no adverse effect on parties or persons who are not parties to the proceeding. *See Order M.V.G. No. 1451, In re Sureway Incineration, Inc., Hearing No. GA-868 at 6 (November 1990).*
- 6 **SHIPPER/GENERATOR WITNESS TESTIMONY.** On July 28, 2004, counsel for LeMay filed a letter with the Commission requesting clarification of Prehearing Conference Order No. 03 in Consolidated Docket Nos. TG-040221 and TG-040248, in particular whether the requirement to file prefiled testimony applies to shipper/generator witnesses. Counsel expressed concern that such witnesses generally do not submit prefiled testimony and are identified several days in advance of the hearing. By notice dated July 29, 2004, a prehearing conference was scheduled for August 3, 2004, to address the issues raised in counsel’s letter.
- 7 On August 3, 2004, counsel for Stericycle submitted a letter electronically to the Commission noting that Stericycle agrees that applicants should not be required to submit prefiled testimony of shipper/generator witnesses. Counsel for Stericycle noted that it has submitted data requests to the applicants requesting the identity of shipper/generator witnesses and that applicants must identify all witnesses they intend to call at the hearing, including shipper/generator witnesses, if known, on the date responses to data request responses are due.

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Counsel noted that Stericycle is preparing a motion to compel the applicants to provide the information requested.

- 8 During the August 3 conference, Applicants LeMay and Kleen Environmental argued that applicants should not be required to disclose shipper/generator witnesses more than a few days or a week in advance of hearing, as such a requirement might preclude applicants from designating additional witnesses, that shipper/generator witnesses are reluctant to participate in hearings, and that identifying such witnesses too far in advance could lead to commercial pressure on the witness by the protestants, including the offer of commercial incentives to retain the protestant as the service provider and dissuade testimony as a witness in the proceeding.
- 9 Counsel for Kleen Environmental noted that the applicant would not object to additional days of hearing, if necessary, to allow Stericycle to address or respond to the testimony of shipper/generator witnesses. Commission Staff supported the Applicants' position, stating that, historically, shipper witnesses are not disclosed until just prior to the hearing date.
- 10 Protestant Stericycle argued that the identity of witnesses and substance of anticipated testimony are appropriate subjects for discovery. As Stericycle has requested the information in data requests, Stericycle is entitled to responses to its requests. Stericycle asserted that its interest in knowing the witnesses and substance of anticipated testimony on the issue of need for the service outweighs any concern of witness solicitation or harassment. Stericycle asserted that the possibility of solicitation or harassment of shipper/generator witnesses is not likely, given that many of the witnesses are commercial enterprises, with highly educated staff, such as doctors or dentists who are fully capable of fending off

unwanted solicitation. Stericycle encouraged resolution of the pending discovery dispute in the prehearing conference.

- 11 *Discussion and Decision.* Shipper/generator witnesses are individuals or representatives of businesses who establish the need for the proposed service in the territory sought by the applicant. *RCW 81.77.040*. Such witnesses generally express their interest in the services proposed by an applicant, or dissatisfaction with the existing carrier's services, which is one of the elements an applicant must establish when seeking authority in an area already served by another carrier. *See RCW 81.77.040*.
- 12 Applicants need not prepare pre-filed testimony of shipper/generator witnesses. During a May 20, 2004, prehearing conference, prefiled testimony was limited to operational and economic witnesses. *Tr. at 34-35, 37*.
- 13 It has long been the Commission's practice in transportation application proceedings to allow applicants to disclose the identity of shipper/generator witnesses just prior to hearing. The reason for this limitation on disclosure of shipper/generator witnesses is not to allow "trial by ambush," as Stericycle's letter implies, but to prevent a protestant from either commercial solicitation and persuasion or harassment of shipper/generator witnesses prior to the hearing. The Commission's practice is also based upon the fact that the level of inquiry to which a consultant offering expert testimony may be accustomed would be daunting to shipper/generator witnesses. Shipper/generator witnesses are not consultants offering expert testimony, but business persons generally unaccustomed to litigation, who are taking time away from their offices to testify in the proceeding.

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- 14 Most shipper/generator witnesses receive service, or represent businesses that receive service, from a protestant, which has an interest in retaining its existing customers. The purpose of receiving testimony from shipper/generator witnesses is to determine if there is a sufficient need for the proposed service or competing service, not to allow the applicant or protestant to solicit the witnesses' business. The time to compete for the witnesses' business is not prior to or during the hearing, but after a decision is made, if any, to grant a competing certificate of public convenience and necessity. Generally, shipper/generator witnesses may also testify as to their concerns about the service of the existing carrier or carriers. Carriers are presumed to have knowledge of their own operations, including customer complaints or concerns about these operations, and have the opportunity to address these concerns.
- 15 While the protestant has a justifiable interest in understanding the nature of any complaints against it, this interest can be served by providing the identity of shipper/generator witnesses a week prior to hearing, allowing for cross-examination of the witnesses, and allowing additional hearing time, if necessary, to recall witnesses for additional questioning. Protestants will know in advance of the hearing the identity of the witnesses who will appear, their business affiliation, if any, and the nature of their testimony.
- 16 Given that hearings to present shipper/generator witness testimony are scheduled for October 6-8, 2004, October 12, 2004, and October 28, 2004, requiring applicants to disclose the identity of shipper/generator witnesses months in advance would be unreasonable as this may allow too great an opportunity for a protestant to persuade or harass these witnesses. In addition, the Applicants may not yet have identified all of their shipper/generator witnesses. Applicants must disclose the identity, business association, and subject of testimony of shipper/generator witness one week in advance of the

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relevant hearing, *i.e.*, September 29, 2004, for the October 6-8, 2004, hearings in Kent, Washington, October 5, 2004, for the October 12, 2004, hearing in Vancouver, Washington, and October 21, 2004, for the hearing scheduled for October 28, 2004, in Spokane, Washington.

- 17 **ELECTRONIC SUBMISSION OF PREFILED TESTIMONY.** Pursuant to WAC 480-07-145(6), the presiding officer grants parties a one-day extension of the paper-filing requirement for prefiled testimony and exhibits, allowing electronic submission of these documents with the Commission on the filing deadline. Parties must submit prefiled testimony and exhibits to records@wutc.wa.gov, and file an original, plus 6 paper copies, of the document with the Commission by the following business day.
- 18 **NOTICE TO PARTIES: Any objection to the provisions of this Order must be filed within ten (10) days after the service date of this Order, pursuant to WAC 480-07-430 and WAC 480-07-810. Absent such objection, this Order will control further proceedings in this matter, subject to Commission review.**

Dated at Olympia, Washington, and effective this 10th day of August, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge