

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

In re Application No. GA-079254 of)	DOCKET NO. TG-040248
)	
KLEEN ENVIRONMENTAL)	ORDER NO. 07
TECHNOLOGIES, INC.)	
)	INITIAL ORDER DISMISSING
For a Certificate of Public)	APPLICATION; ESTABLISHING
Convenience and Necessity)	PROCEDURAL SCHEDULE FOR
)	MOTIONS FOR SANCTIONS
.....)	

1 **Synopsis.** *This Order dismisses the application of Kleen Environmental Technologies, Inc., on the basis that the applicant has presented false and misleading information to the Commission as a part of its application. The applicant filed a fraudulent document with the Commission and offered the document as an exhibit in the proceeding. In addition, the applicant’s primary operating witness, Mr. McCloskey, has demonstrated by his words and actions that his testimony is no longer credible, that he may have prepared the fraudulent document, and that he may have committed perjury before the Commission. This Initial Order also establishes a procedural schedule for motions for sanctions.*

2 **Nature of Proceeding.** Docket No. TG-040248 is an application by Kleen Environmental Technologies, Inc., (Kleen) for a certificate of public convenience and necessity for collection of solid waste, in particular biomedical waste, on a statewide basis.

3 **Appearances.** Greg W. Haffner, Curran Mendoza P.S., Kent, Washington, represents Kleen. Stephen B. Johnson, Garvey Schubert Barer, Seattle, Washington, represents Stericycle of Washington, Inc. (Stericycle) as a protestant. James K. Sells, Ryan Sells Uptegraft, Inc., P.S., Silverdale, Washington, represents Harold LeMay Enterprises, Inc. (LeMay), Rubatino Refuse Removal, Inc. (Rubatino), Consolidated Disposal Services, Inc. (Consolidated Disposal), and

Washington Refuse and Recycling Association (WRRRA) as protestants. Gregory J. Trautman, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).

- 4 **Procedural History.** On February 13, 2004, Kleen filed an application, No. GA-079254, for a certificate of public convenience and necessity to operate motor vehicles in furnishing solid waste collection service consisting of biomedical waste in the state of Washington. Notice of the application was published in the Commission's weekly Docket of February 23, 2004. On March 1, 2004, LeMay and the WRRRA filed protests to Kleen's application. On March 4, Consolidated Disposal and Rubatino filed protests to the application, and on March 8, 2004, Stericycle filed a protest to the application.
- 5 In Order No. 01 in this proceeding, the Commission consolidated Kleen's application with the February 11, 2004, application of LeMay in Docket No. TG-040221 for an extension of authority under its Certificate No. G-98. LeMay sought to provide solid waste collection service consisting of biomedical waste in King, Pacific, Kitsap, Wahkiakum, Cowlitz, Clark, and Skamania Counties. LeMay filed a letter with the Commission on September 9, 2004, withdrawing its application. On October 14, 2004, the Commission granted LeMay's withdrawal and closed Docket No. TG-040221 in Order No. 06 in this proceeding.
- 6 On May 13, 2004, in Order No. 02 in this proceeding, the Commission consolidated for purposes of hearing the Kleen and LeMay applications with the March 22, 2004, application of Rubatino in Docket No. TG-040553 for an extension of authority under its Certificate No. G-58. Rubatino sought to provide solid waste collection service consisting of biomedical waste in Skagit, Whatcom, and Snohomish Counties. Rubatino filed a letter with the Commission on July 13, 2004, withdrawing its application. On August 10, 2004, the Commission granted Rubatino's withdrawal and closed Docket No. TG-040553 in Order No. 03 in that docket.

7 The Commission held prehearing conferences in this application proceeding on May 20, August 3, August 25, and September 23, 2004, in Olympia, Washington, before Administrative Law Judge Ann E. Rendahl.

8 The Commission held hearings concerning Kleen's application in Kent, Washington, from September 27 to 30, 2004, October 6 to 8, 2004, and on October 12, 2004. The Commission held additional hearings concerning Kleen's application in Olympia, Washington on October 22 and 26, 2004.

9 During the hearing on October 12, 2004, Kleen offered as an additional statement of shipper support a letter purportedly from the National Indian Health Board, signed by a Lancing Birdinground. Administrative Law Judge Rendahl marked the document as Exhibit 203, and deferred ruling on the document until the hearing scheduled for October 22, 2004. On October 12, 2004, Kleen faxed a copy of the letter to the Commission for filing in this proceeding.

10 On October 15, 2004, counsel for Kleen advised the Administrative Law Judge and all parties to the proceeding via e-mail that Kleen would withdraw the document marked as Exhibit 203.

11 On October 20, 2004, counsel for Stericycle informed the Administrative Law Judge and all parties to the proceeding via e-mail that he had learned from contacting the National Indian Health Board that the letter marked as Exhibit 203 was fraudulent and attached a letter from J.T. Petherick, Executive Director of the National Indian Health Board, concerning the letter in question. Stericycle submitted the e-mail and attachment to the Commission for filing in this proceeding on October 27, 2004.

12 On October 21, 2004, the Administrative Law Judge held a brief conference call with counsel for Kleen and Stericycle to determine how to proceed during the hearing scheduled for the next day, October 22, 2004. The Administrative Law Judge informed all parties via e-mail following the conference call that no

argument on the issue of the Birdinground letter was heard during the call, that the hearing on October 22, 2004, would go forward to address rebuttal testimony, and that the parties should be prepared to discuss scheduling an additional hearing to address the letter.

- 13 On October 21 and 22, 2004, the Commission received letters from the Quileute Health & Human Services and the Swinomish Tribal Community, respectively, concerning the Birdinground letter.
- 14 During the hearing on October 22, 2004, the parties agreed to the date of Tuesday, October 26, 2004, to hold an additional day of hearing to inquire into the knowledge of Kleen's President, Mr. Robert Olson, who is also a shareholder of Kleen, and Mr. Allen McCloskey, Kleen's primary operating witness and a consultant hired by Kleen. Over the objection of Stericycle's counsel, the Administrative Law Judge directed Kleen to prepare and file affidavits or declarations from two other Kleen shareholders, Mr. Kenneth Lee and Mr. Darin Perrollaz.
- 15 The October 26, 2004, hearing was recessed during the cross-examination of Mr. McCloskey after he became ill claiming he had chest pains.
- 16 On Friday, October 26, 2004, counsel for Kleen sent an e-mail to all parties that Mr. McCloskey had resigned from Kleen, and that counsel and Kleen personnel had not been able to contact Mr. McCloskey.
- 17 By notice issued on November 1, 2004, and corrected on November 2, 2004, the Administrative Law Judge scheduled a status conference for November 4, 2004, "to address whether and how to proceed with the Kleen Environmental Technologies, Inc., application and how to address the testimony and exhibits sponsored by Mr. McCloskey."

18 At the status conference, counsel for Stericycle made an oral motion to dismiss the application on the basis of WAC 480-70-091(2)(c), and indicated that Stericycle would seek attorneys' fees and costs incurred relating to its protest of the application. Counsel for LeMay, Rubatino, Consolidated Disposal, and the WRRRA supported the motion and request for fees and costs.

19 **Initial Order.** The presiding administrative law judge proposes to grant Stericycle's oral motion and dismiss the application pursuant to WAC 480-70-091(2)(c). The applicant filed a fraudulent document with the Commission, offered the document as an exhibit in the proceeding, and presented a primary witness whose testimony is clearly not credible, who may have perjured himself before the Commission, and who has absented himself from the proceeding.

DISCUSSION

20 **A. Stericycle's Motion to Dismiss.** Determining whether to grant Stericycle's motion to dismiss or continue with the application proceeding involves an in-depth review of the facts concerning Kleen's application and Mr. McCloskey's testimony and exhibits, the facts and evidence concerning the Birdinground letter, as well as other testimony and exhibits from the October 26, 2004, hearing, and Mr. McCloskey's actions since October 26, 2004. The discussion of the issue will begin with the facts surrounding Kleen's application and its reliance on Mr. McCloskey as a primary witness and will conclude with the facts presented and discussion during the November 4, 2004, status conference.

21 **Kleen's Application and Mr. McCloskey's Role.** Kleen proposed in its application to provide collection, transportation, and disposal of biomedical waste on a statewide basis using both reusable tubs and cardboard boxes. *See Ex. 14.* Kleen filed prefiled direct testimony and exhibits on August 16, 2004, from Robert L. Olson, Mr. Allen McCloskey, Mr. Kenneth Lee, Mr. Darin Perrollaz,

and Mr. Richard Vanderwal.¹ These witnesses were subject to cross-examination on the direct pre-filed testimony and exhibits during hearings held on September 27-29, 2004. Mr. McCloskey and Mr. Lee gave rebuttal testimony on October 6 and 8, 2004, respectively. On October 6-8, and October 12, 2004, Kleen presented witnesses who generate and ship biomedical waste in support of its application.

22 Mr. Olson is the President, General Manager and one of the shareholders of Kleen. *See Ex. 1-T at 1.* Mr. Lee is the Chief Financial Officer, Secretary, Registered Agent and a shareholder of Kleen. *See Ex. 40-T at 1.* Mr. Perrollaz is the Vice-President, Technical Services and Safety Compliance Manager and a shareholder of Kleen. *See Ex. 35-T at 1.* Mr. Graves is the Technical Services Manager of Hydroclave Systems Corporation, a Canadian company that designed and installed the Hydroclave units at the Hospital Sterilization Services (HHS) facility in Port Coquitlam, B.C. *See Ex. 55 at 1; Ex. 56.*

23 Mr. McCloskey is a Development Consultant to Kleen and responsible for overseeing the application for a solid waste certificate before the Commission. *Ex. 25-T at 1.* Mr. McCloskey's prefiled testimony states "I was formerly an active Development Manager for McCloskey Enterprises." *Id.* His prefiled testimony identifies a number of advantages of Kleen's proposal over existing biomedical waste haulers, including a new way of disposal, via hydroclave, and the provision of certificates of destruction to generators of waste. *Id. at 2-3, 8.*

24 During the hearing on September 27, 2004, Mr. McCloskey testified that he is not employed by Kleen, but has been hired as an independent consultant to facilitate Kleen's application. *Tr. 302.* He prepared the proposed tariff attached to Mr. Lee's testimony as Exhibit 45, participated in preparing the *pro forma* statements filed as exhibits to Mr. Lee's testimony, *i.e.*, Exhibits 44 and 46, and drafted Kleen's biomedical waste standard operating procedures, attached to Mr. Perrollaz's testimony as Exhibit 36. *Tr. 296-297; 354-55.*

¹ When Mr. Vanderwal was unable to testify at the hearing, Kleen substituted the testimony of

25 Mr. McCloskey testified that Kleen's *pro forma* statements do not include waste going to the HHS facility, and that Kleen had not negotiated a price with HHS to process waste.² *Tr.* 322-23. Mr. McCloskey testified that the proposed tariff filed with the application and Mr. Lee's prefiled testimony includes reusable tubs that cannot be used at the Covanta facility in Marion County, and that the proposed tariff is not the one Kleen would use if granted a certificate. *Tr.* 342, 365-8; *Ex.* 45. Mr. McCloskey offered a revised proposed tariff to eliminate all reusable tubs as well as a reinstatement charge in the tariff. *Tr.* 391-95; *see Ex.* 32. Following Mr. McCloskey's testimony, the "revised" Kleen application proposes to transport waste solely to the Covanta facility and to use only 33-gallon cardboard boxes for collection of waste. *Tr.* 444-446.

26 **The Lancing Birdinground Letter.** As stated above, during the hearing on October 12, 2004, Kleen offered as an additional statement of shipper support a letter signed by a Mr. Lancing Birdinground. *Tr.* 1606. Counsel for Kleen stated:

The letter is being offered as sentiment in the community from the National Indian Health Board and the clinic and medical facilities they represent through the state of Washington that are listed on the second or the attachment to the letter. Mr. Birdinground was unable to testify, and when Your Honor stated last week that you would consider written testimony from other ship witnesses, we went back to him and asked him if he would provide the letter.

Tr. 1607. The letter was marked for identification as Exhibit 203, but the Administrative Law Judge reserved ruling on the proposed exhibit until the hearing scheduled for October 22, 2004. *Tr.* 1612-13.

Mr. Allen Graves.

² In his rebuttal testimony, Mr. McCloskey identified a price of \$240 per ton in U.S. dollars that Kleen negotiated with the owners of the HHS facility. *Tr.* 1053. He testified that this was an oral agreement contingent on Kleen obtaining authority from the Commission and in exchange for promoting the HHS hydroclave facility and developing interest in building a hydroclave facility in the United States. *Tr.* 1071-73, 1083-85.

- 27 Mr. Birdinground identifies himself as an Executive Regional Board Member of the National Indian Health Board, and sends the letter on behalf of region ten of the National Indian Health Board. The letter asserts an eleven-year history of service by Kleen to facilities of the National Indian Health Board and supports the proposal. Mr. Birdinground also states that he has “reviewed Kleen Environmental [*sic*] proposal both in its original form and revised and have addressed the revised proposal with the regional membership.” *Ex. 23*.³ The letter attaches a two-page directory of tribes and tribal health clinics.
- 28 On October 12, 2004, Kleen faxed a copy of the letter to the Commission for filing in this proceeding. On October 15, 2004, counsel for Kleen advised the Administrative Law Judge and all parties to the proceeding via e-mail that Kleen would withdraw the document marked as Exhibit 203.
- 29 On October 20, 2004, counsel for Stericycle informed the Administrative Law Judge and all parties to the proceeding via e-mail that he had learned from contacting the National Indian Health Board that the letter marked as Exhibit 203 was fraudulent and attached a letter from J.T. Petherick, Executive Director of the National Indian Health Board concerning the letter in question. On October 21 and 22, 2004, the Commission received letters from the Quileute Health & Human Services and the Swinomish Tribal Community, respectively, concerning the Birdinground letter.
- 30 During the hearing on October 22, 2004, Kleen formally withdrew the Birdinground letter, marked as Exhibit 203, stating that the company has learned “that the author of the letter does not have authority to speak on behalf of the National Indian Health Board, and we do not know who that person is. ... Unfortunately we did not do our due diligence to confirm the authority of this individual and it has since been discovered that this individual does not have the

authority to write this letter.” *Tr. 1665, lines 12-21.* Kleen offered a letter from its shareholders, Mr. Olson, Mr. Lee, and Mr. Perrollaz asserting, in particular as to Mr. Lee and Mr. Perrollaz, no knowledge of the letter. *See Ex. 22.* On the basis of this letter, the Administrative Law Judge scheduled a hearing on October 26, 2004, to inquire into the knowledge of Mr. Olson and Mr. McCloskey concerning the Birdinground letter. Over the objection of Stericycle, Kleen was directed to submit affidavits or declarations from Mr. Lee and Mr. Perrollaz stating the extent of their knowledge of the letter. *Tr. 1678-79.*

31 At the hearing, counsel for Kleen stated that “the record is clear that they [Kleen] had delegated to Mr. McCloskey responsibility for doing all of the groundwork to try and prepare for this application and try to obtain the permit that’s sought in this application, and that included trying to get shipper support, which this letter was believed to be an exhibit of.” *Tr. 1671, lines 2-8.*

32 **The October 26, 2004, Hearing.** Both Mr. Olson and Mr. McCloskey were made available for questioning at the October 26, 2004, hearing. A copy of the Birdinground letter as filed with the Commission was marked and admitted as Exhibit 23. Other exhibits, including the declarations of Mr. Lee and Mr. Perrollaz were marked and admitted. Prior to taking the testimony of Mr. Olson and Mr. McCloskey, counsel for Stericycle moved to exclude one witness from the room while the other witness testified to avoid the witnesses cueing each other’s answers and to avoid any changes in testimony that might occur as they hear each other’s testimony. The motion was denied upon the objection of counsel. *Tr. 1877-78.*

33 Mr. Olson testified that he was aware that Kleen had received the Birdinground letter and that it would be submitted at the hearing, but was not aware of any issues concerning the letter until he received a phone call from a Ms. Becky

³ While Kleen withdrew Exhibit 203 as an exhibit, Stericycle offered a version of the letter as filed with the Commission as Exhibit 23.

Johnston stating that the letter was false.⁴ *Tr. 1888-92; 1922-25.* Mr. Olson testified that he forwarded the call to Mr. McCloskey, who talked further with Ms. Johnston. *Tr. 1923.* Mr. Olson testified that Mr. McCloskey appeared shocked upon learning of the problem with the letter. *Tr. 1948-49.* Mr. Olson testified that he did not read the letter until just prior to testifying at the October 26 hearing. *Tr. 1885.*

34 Mr. Olson testified that Mr. McCloskey drafted the letter from Kleen to the Commission, Exhibit 22, and that he signed it. *Tr. 1886-87.* Mr. Olson testified that he had no idea who would prepare such a letter. *Tr. 1941-42.* He has never heard of the National Indian Health Board or Mr. Birdinground. *Tr. 1880.* Mr. Olson testified that Kleen has performed some work for the Makah, Nez Perce, and Suak-Suiattle tribes in removing tank farms from tribal lands. *Tr. 1916-17.*

35 Mr. Olson testified that he first became aware of Mr. McCloskey when Kleen performed work for the Makah tribe. *Tr. 1932.* Mr. McCloskey was responsible for the tribe's economic development work and was responsible for overseeing Kleen's work for the tribe. *Tr. 1932-33.* Mr. Olson testified that he hired Mr. McCloskey after being impressed by his work, but did not contact Mr. McCloskey's prior employers, nor conduct a background check. *Tr. 1881; 1936-37.* Mr. Olson testified that Kleen does not share space with any other company at its facility at 754 Garfield Street. *Tr. 1930.*

36 Mr. McCloskey testified that he recalls that the Birdinground letter came in to Kleen's offices on October 11, 2004, through the mail. *Tr. 1952, 1961.* He testified that he discarded the envelope that the letter came in, but recalls that the address was handwritten and that the return address was printed. *Tr. 1974.* He testified that he opened the letter, and that he frequently opens the mail at Kleen's offices. *Tr. 1975.* He testified that he did not pay attention to the date of the letter,

⁴ Mr. Olson appeared to be confused as to when he first learned of the letter, engendering significant questions during the hearing. Despite this issue, Mr. Olson appears to be a credible witness.

October 12, 2004. *Tr.* 1962. He testified that he was not familiar with the National Indian Health Board, had no contact with the organization prior to receiving the letter, and did not know a Lancing Birdinground. *Tr.* 1952. Mr. McCloskey testified that he faxed the letter to the Commission following the hearing on October 12, 2004. *Tr.* 1977.

37 Mr. McCloskey testified that he was aware that Kleen had performed work for Indian tribes, in particular the Makah tribe and the Suak-Suiattle tribe, relating to tank farm demolition and historical site remediation. *Tr.* 1954-55. He testified that he recognized names of tribes who had attended meetings concerning Kleen's proposed biomedical waste service. *Tr.* 1955.

38 Mr. McCloskey testified that his initial reaction was positive, believing the letter to be shipper support similar to form letters that Kleen sent out. *Tr.* 1952, 1954. He testified that he notified many organizations and tribes of the application and sent them draft form letters via U.S. mail, fax and e-mail. *Tr.* 1957. He testified that he may have sent one to the National Indian Health Board. *Id.* He learned that the letter was false after Mr. Olson took Ms. Johnston's phone call and forwarded the call to him. *Tr.* 1952. He testified that he was as shocked as Mr. Olson was, and was concerned about the impact of the letter on the application proceeding. He testified that after speaking to Ms. Johnston, he assured her that he would take steps to rectify the situation. *Tr.* 1953.

39 Mr. McCloskey testified that he has called the number at the bottom of Exhibit 23, the Birdinground letter, to contact Mr. Birdinground, but has never been able to locate Mr. Birdinground, nor has Mr. Birdinground returned his telephone calls. *Tr.* 1963. He spoke to and sent a letter to Ms. Johnston of the National Indian Health Commission for Washington State, but not to the National Indian Health Board. *See Ex. 34. Tr.* 1964. He testified that he believed the National Indian Health Commission and the National Indian Health Board were the same entity, although he now understands them to be different. *Tr.* 1960, 1964. He testified that Becky Johnston indicated that Mr. Petherick of the National Indian

Health Board has called Ms. Johnston prior to her calling Kleen, and that Mr. Petherick has requested that she call Kleen. *Tr. 1970*. He testified that he has not contacted the National Indian Health Board. *Id.*

40 He testified that he prepared the letter from Kleen shareholders, Exhibit 22, for the signatures of Mr. Olson, Mr. Lee, and Mr. Perrollaz, concerning the company's efforts to rectify the situation. *Tr. 1956*. Mr. McCloskey testified that the last sentence of the third paragraph in Exhibit 22, indicating the company had contacted both the National Indian Health Board and the National Indian Health Commission, was not false, but it would be "if you take it in its literal sense." *Tr. 1972*.

41 Mr. McCloskey repeated his testimony that he did not know Mr. Birdinground. *Tr. 1963*. Counsel for Stericycle then offered as Exhibit 24 an affidavit signed by a Mr. Lansing Birdinground of Montana. In his affidavit, Mr. Birdinground states that he has no connection with the National Indian Health Board, and has never been an Executive Regional Board Member of the Board. *Ex. 24 at 1*. Mr. Birdinground states that he has never had a business relationship with Kleen. *Id.* Mr. Birdinground states that he knows Mr. McCloskey, having met him in 2001. *Id. at 1-2*. Mr. Birdinground states that, as the Manager of the little Big Horn Casino, the casino received a brochure from McCloskey Enterprises concerning consulting services for tribal casinos. *Id. at 2*. He contacted Mr. McCloskey, expressing interest in hiring the company to provide consulting services. Mr. Birdinground states that Mr. McCloskey stayed in his house and ate meals with his family while visiting the Little Big Horn Casino and the area for a week in July 2001. *Id.* Mr. Birdinground asserts that he did not authorize submission of the October 12, 2004, letter in his name, did not sign it, and has no knowledge of the letter. *Id.*

42 Mr. McCloskey testified that he remembers going to Montana to the casino, but does not recall meeting with the casino manager or staying in the home of Mr. Birdinground during that time. *Tr-1965-66*.

- 43 Mr. McCloskey gave testimony concerning what is purportedly his father's company, McCloskey Enterprises, Inc., stating that its principal office is located in Eureka, California, but that satellite offices are sometimes set up to handle specific projects. *Tr.* 1986. He testified that he is not aware how his father has structured the business, and that he is not an owner, shareholder, or principal in the business. *Tr.* 1986-87. Counsel for Stericycle offered as Exhibit 227 copies of pages from the website of McCloskey Enterprises, Inc., which identifies Allen McCloskey as a principal in the business and as the Chair of the Utilities and Transportation Services Division of the company, and identifies the address as 754 Garfield Street in Seattle, the same address as Kleen. *Tr.* 1987-88; *Ex.* 227.
- 44 After reviewing the exhibit, but prior to cross-examination concerning the exhibit, Mr. McCloskey requested a break, which request was granted. *Tr.* 1988. Counsel for Kleen reported several minutes later that Mr. McCloskey has taken ill, was experiencing chest pains, and that an ambulance had been called. *Id.* Mr. McCloskey was taken by ambulance to St. Peter's Hospital in Olympia and the hearing was recessed due to the medical emergency. The Administrative Law Judge indicated that an additional hearing day would be scheduled and that counsel would be contacted early the following week to determine an appropriate date. *Id.*
- 45 On October 29, 2004, counsel for Kleen circulated an e-mail to all parties and to the Administrative Law Judge raising concerns about Mr. McCloskey's credibility and whether Mr. McCloskey would be available to continue his cross-examination. The Administrative Law Judge scheduled a status conference for November 4, 2004.
- 46 **The November 4, 2004, Status Conference.** During the November 4, 2004, status conference, counsel for Kleen read into the record the contents of his October 29, 2004, e-mail concerning Mr. McCloskey's actions since October 26, 2004. The relevant portions of the e-mail are as follows:

Allen McCloskey has not reported to me about the stress test he was supposed to have today and he has not returned my phone calls. I am now concerned that he may be avoiding both me, the people at Kleen Environmental, and the rest of this proceeding. Earlier this week, Bob Olson, president of Kleen, spoke with Allen and it was agreed that Allen should resign. He cleaned out his desk and told Mr. Olson that he would bring in a letter of resignation today after having it reviewed by an attorney. He never showed up. He sent an email to the company that contained a virus that caused the company's computers to crash. The McCloskey Enterprises website appears to be shut down. Mr. McCloskey has not been able to be reached at his home or on his cell phone.

I spoke with Lancing Birdinground by phone on Wednesday evening and I have no reason to doubt what he says in his affidavit. It clearly contradicts Mr. McCloskey's testimony. I will continue to try to reach Mr. McCloskey and keep you informed.

47 During the hearing, counsel reported that Mr. McCloskey is likely in Trinidad, California, but that representatives of Kleen have not been able to contact Mr. McCloskey or determine where he is. Despite these facts, counsel indicated that the applicant wished to continue with the application proceeding. Counsel agreed that the testimony of Mr. McCloskey and any exhibits he sponsored be stricken, and proposed submitting the testimony and exhibits of a different witness or witnesses within a few weeks to sponsor the same topics that Mr. McCloskey addressed in his prefiled testimony and exhibits.

48 Counsel argued against dismissing the application, asserting first that Kleen was not prepared to address such a motion at a status conference, and second, that there is ample testimony in the record concerning the applicant's willingness and ability to serve, the sentiment in the community, and the fitness of the applicant. Counsel asserted that it was a mistake for Kleen to delegate the responsibility for the application to Mr. McCloskey, but that it is not correct to attribute Mr. McCloskey's misconduct to the owners of Kleen.

49 Counsel for Kleen objects to sanctions, asserting that in cases where the applicant is not successful, the protestants continue to bear the costs of the proceeding.

50 Counsel for Stericycle made an oral motion to dismiss the application, asserting that the applicant, through Mr. McCloskey, had committed a fraud upon the Commission as well as perjury. Counsel argues that the Commission has authority under WAC 480-70-091(2)(c) to dismiss an application if it includes false, misleading or incomplete information. Counsel argues that dismissal is the only option. Counsel argues that Mr. McCloskey's testimony is central to the application, as his responsibility for the application extends to responses to discovery, preparation of testimony, and the evidence concerning how the applicant addressed the discovery that the Birdinground letter was fraudulent. If the application proceeding were to proceed, Stericycle requests that Mr. McCloskey's testimony and exhibits be stricken. Counsel also stated that Stericycle will seek sanctions, including attorney's fees and costs for the effort spent in discovering and demonstrating the fraud and Mr. McCloskey's credibility.

51 Counsel for LeMay, Rubatino, Consolidated Disposal, and the WRRRA asserted that dismissing the application is a bonus for the applicant, as they can simply reapply in six months with no consequences for the applicant. On the other hand, counsel asserted that his clients were more concerned with the integrity of proceedings before the Commission. Counsel asserted that if the proceeding went forward, it would be difficult to establish fitness given the company's failure to oversee Mr. McCloskey's actions. Counsel supports Stericycle's request for sanctions.

52 Commission Staff asserts that it appears that Mr. McCloskey has perpetrated a fraud on the Commission and that the matter is very serious. Staff supports the request that Mr. McCloskey's testimony and all exhibits be stricken. Staff asserts that it might be possible to have another witness sponsor testimony on the matters that Mr. McCloskey addressed, but that the issue of the applicant's

fitness would remain a serious question given the lack of due diligence by the applicant into Mr. McCloskey's actions and the fraud committed by Mr. McCloskey. Staff asserted that the Commission has the authority to dismiss the application pursuant to WAC 480-70-091(2)(c). Finally, Staff agreed that it would be proper to have a hearing at which Kleen's shareholders would testify concerning their knowledge of the apparent fraud.

53 **Discussion and Decision.** The testimony of Mr. McCloskey, his actions after the October 26, 2004, hearing, and Exhibits 22, 23, 24, 212, 213, and 214, and 227, make clear that the Birdinground letter is false, that Mr. McCloskey most likely perpetrated a fraud on the Commission in preparing and submitting the letter to the Commission, and that Mr. McCloskey likely gave false testimony to the Commission under oath.

54 Mr. Lansing Birdinground's affidavit clearly contradicts Mr. McCloskey's testimony. Mr. McCloskey's testimony concerning his knowledge of the letter, its contents and derivation, and awareness of the National Indian Health Board are suspect. He testified that Kleen had sent form letters to a number of tribes, yet denied knowledge of the organization at the time he received the letter. He had knowledge of the true Mr. Birdinground, which he denied, and could have manufactured a letter in Mr. Birdinground's name for submission to the Commission. The letter included reference to the Kleen application "in its original and revised" form. It is likely that only persons intimately familiar with the application proceeding, such as Mr. McCloskey, would refer to the original and revised form of the application. In fact, Mr. McCloskey prepared the revised tariff for the application, Exhibit 32, which significantly changed the scope of the application.

55 Mr. McCloskey's testimony concerning McCloskey Enterprises, Inc., was clearly false, and when faced with an exhibit demonstrating his false testimony, he requested a break. It is unclear whether Mr. McCloskey experienced heart problems or anxiety, or whether he fabricated the health problem to excuse

himself from the hearing and avoid further exposure of his false testimony. By removing himself from the state, and secreting himself, he avoids the Commission's subpoena power, and cannot be called to continue cross-examination on the issue of the Birdinground letter and his credibility.

56 The Commission has clear authority under WAC 480-70-019(2)(c) to "reject or dismiss an application if it includes false, misleading, or incomplete information." Although the rule could be interpreted to apply only at the time an application is filed, it is also reasonable to apply the rule at any time during the application proceeding. The Commission must have some recourse for the misconduct that has occurred in this proceeding.

57 The testimony and evidence developed in the hearings, in particular the October 26, 2004, hearing, as well as the facts surrounding the events and the actions of Mr. McCloskey indicate that Mr. McCloskey prepared or was involved in the preparation and dissemination of the Birdinground letter, attempted to cover up his involvement with the letter, and gave false testimony before the Commission concerning the letter and other matters. Although the applicant insists that the fraudulent document, misconduct of Mr. McCloskey and his apparent perjury were a result of the actions of Mr. McCloskey and not the applicant itself, the applicant must bear the responsibility of someone it hired to conduct its affairs.

58 The Commission has dealt numerous times with the issue of credibility of witnesses in application hearings, and addresses credibility in assessing the fitness of the applicant, without dismissing the application. In this proceeding, however, there are issues of fraud and apparent perjury, and the witness at issue absented himself from the state, apparently to avoid a subpoena.

59 The Administrative Law Judge provided notice that she might dismiss the application in the November 1, 2004, notice by stating that the status conference was scheduled "to address *whether* and how to proceed with the Kleen

Environmental Technologies, Inc., application and how to address the testimony and exhibits sponsored by Mr. McCloskey.” *Emphasis Added.*

60 The Commission will not allow such misconduct in its proceedings, and will not allow an applicant to continue with an application after such misconduct is discovered. Allowing an application proceeding to continue under such circumstances would undermine the integrity of the Commission’s application and hearing process. Stericycle’s motion to dismiss is granted.

61 **B. Procedural Schedule for Motions for Sanctions.** Stericycle stated during the November 4, 2004, status conference that it would file a motion seeking sanctions against Kleen, specifically seeking attorneys’ fees and costs relating to the discovery and demonstration that the Birdinground letter was fraudulent and that Mr. McCloskey’s testimony lacked credibility. Stericycle also requested the opportunity to cross-examine all of Kleen’s owners, Mr. Olson, Mr. Lee, and Mr. Perrollaz, concerning their knowledge concerning Mr. McCloskey’s actions and the Birdinground letter.

62 The following procedural schedule governs the filing of motions for sanctions, and any answers and replies relating to such motions:

<u>Pleading</u>	<u>Deadline</u>
Motions for Sanctions	Friday, December 3, 2004
Answers to Motions	Monday, December 13, 2004
Replies to Answers	Monday, December 20, 2004

63 Motions should include any requests for sanctions, including attorney’s fees and costs, as well as the need for a hearing to inquire into the knowledge of Kleen’s owners of Mr. McCloskey’s actions and the Birdinground letter. Parties filing motions, answers, or replies must file the pleadings with the Commission by the close of business on the deadline set forth above. Parties seeking to submit an electronic version of the pleading on the due date and file paper copies on the

following business day pursuant to WAC 480-07-146(6), must first seek permission from the presiding officer.

FINDINGS OF FACT

64 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

65 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to grant or deny applications for certificates of public convenience and necessity to collect, transport and dispose of solid waste, including biomedical waste, for compensation in the state of Washington. The Commission also regulates the rates and conditions of service of solid waste companies within the state.

66 (2) Kleen Environmental Technologies, Inc., a company operating in Washington state, has filed an application with the Washington Utilities and Transportation Commission requesting statewide authority to collect, transport, and dispose of biomedical waste.

67 (3) Kleen Environmental Technologies, Inc., offered as an exhibit and filed with the Commission a letter dated October 12, 2004, purportedly from the National Indian Health Board and signed by a Lancing Birdinground.

68 (4) Representatives of the National Indian Health Board, the Swinomish Tribal Community, and Quileute Health & Human Services filed letters

with the Commission asserting that there is no region ten of the National Indian Health Board, that the National Indian Health Board and tribes did not authorize Mr. Birdinground to speak for them, and that there is no relationship between Kleen Environmental Technologies, Inc., and the National Indian Health Board or the two tribes. *See Exs. 212, 213, 214.*

- 69 (5) Kleen Environmental Technologies, Inc., admits that the letter is fraudulent, but states that it has knowledge of the letter. *See Ex. 22.*
- 70 (6) The Commission held a hearing on October 26, 2004, to address the Birdinground letter, at which hearing Mr. Olson and Mr. McCloskey testified under oath.
- 71 (7) Mr. McCloskey testified that he received the letter the mail at Kleen's office, discarded the envelope, does not know how the letter was prepared, and does not know a Lansing Birdinground.
- 72 (8) An Affidavit of Mr. Lansing Birdinground, of Crow Agency, Montana, states that he did not write or sign the letter sent to the Commission, but that when he was the Manager of the Little Big Horn Casino near Crow Agency in 2001, he met and spent time with Mr. Allen McCloskey. *See Ex. 24.*
- 73 (9) Mr. McCloskey testified that he does not know Mr. Lansing Birdinground, but remembers traveling to Montana to the Little Big Horn Casino on business for his father's business, McCloskey Enterprises.
- 74 (10) Mr. McCloskey testified that he is not an owner, principal, or shareholder in McCloskey Enterprises, Inc., that the company is his father's and that it is based in Eureka, California.

- 75 (11) Pages from the website of McCloskey Enterprises identify Allen McCloskey as a principal in the company and Chair of the company's Utilities and Transportation Services Division and show the company's address as 754 Garfield Street in Seattle, the address of Kleen Environmental Technologies, Inc. *See Ex. 227.*
- 76 (12) After being confronted with Exhibit 227, Mr. McCloskey either fell ill or feigned illness and was taken by ambulance to St. Peter's Hospital requiring the proceeding to be recessed.
- 77 (13) Since October 26, 2004, Mr. McCloskey has stopped communicating with counsel and representatives of Kleen Environmental Technologies, Inc., has apparently resigned from Kleen Environmental Technologies, Inc., and has most likely moved to the state of California, removing himself the jurisdiction of the state of Washington.

CONCLUSIONS OF LAW

- 78 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.
- 79 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 80 (2) The Commission may dismiss a solid waste application, at any time, pursuant to WAC 480-70-091(2)(c) if the application includes false, misleading, or incomplete information.

- 81 (3) Kleen Environmental Technologies, Inc., through its consultant and primary witness Mr. Allen McCloskey, submitted to the Commission a fraudulent document in this proceeding, purporting to be a written statement of shipper support from the National Indian Health Board.
- 82 (4) Mr. McCloskey has likely given false testimony under oath, *i.e.*, perjury, to the Commission concerning his knowledge and the derivation of Exhibit 23, the Birdinground letter, and concerning his involvement with and position with McCloskey Enterprises, Inc., demonstrated both through his testimony on October 26, 2004, as well as his actions since that time.
- 83 (5) Kleen Environmental Technologies, Inc., must be held responsible for the actions of Mr. McCloskey. The company hired Mr. McCloskey as a consultant, and delegated to him all responsibility for the application and preparation for the hearing on the application.
- 84 (6) The Commission will not allow an applicant to continue with an application after discovering that a fraudulent document has been submitted and false testimony has been given in the proceeding. Allowing an application proceeding to continue under such circumstances would undermine the integrity of the Commission's application and hearing process.

ORDER

THE COMMISSION ORDERS:

- 85 (1) Application No. GA-079254, in the name of Kleen Environmental Technologies, Inc., is dismissed.
- 86 (2) A procedural schedule is established for filing of motions for sanctions and any answers and replies relating to such motions.

- 87 (3) The Commission retains jurisdiction to effectuate the provisions of this Order.

Dated at Olympia, Washington, and effective this 9th day of November 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge

NOTICE TO THE PARTIES: This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4)(b) states that any *Answer* to any Petition for review may be filed by any party within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a *Petition to Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

One copy of any Petition or Answer filed must be served on each party of record, with proof of service as required by WAC 480-07-150(9). An original and six copies of any Petition or Answer must be filed by mail delivery to:

**Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250.**