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BEFORE THE WASHINGTON

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UTILITIES AND TRANSPORTATION COMMISSION

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In re Application No. GA-079254 of)
)Docket TG-040248

4

)Volume XV

KLEEN ENVIRONMENTAL TECHNOLOGIES,)
)Pages 1991-2034
INC.)

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For a Certificate of Public)
)
Necessity to Operate Motor Vehicles)
)
in Furnishing Solid Waste Collection)
Service.)

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A hearing in the above-entitled matter

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was held at 10:34 a.m. on Thursday, November 4,

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2004, at 1300 South Evergreen Park Drive, S.W.,

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Olympia, Washington, before Administrative Law

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Judge ANN E. RENDAHL.

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The parties present were as follows:

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COMMISSION STAFF, by Gregory J.
Trautman, Assistant Attorney General, 1400 S.
Evergreen Park Drive, S.W., P.O. Box 40128, Olympia,
Washington, 98504-1028.

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KLEEN ENVIRONMENTAL TECHNOLOGIES, INC.,
by Greg Haffner, Attorney at Law, 555 W. Smith, Kent,
Washington, 98035 (Via teleconference bridge).

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STERICYCLE OF WASHINGTON, INC., by
Stephen B. Johnson, Attorney at Law, Garvey Schubert
Barer, 1191 Second Avenue, 18th Floor, Seattle,
Washington 98101 (Via teleconference bridge).

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Barbara L. Nelson, CCR

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Court Reporter

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1 RUBATINO REFUSE REMOVAL, INC., HAROLD
2 LEMAY ENTERPRISES, INC., WASHINGTON REFUSE AND
3 RECYCLING ASSOCIATION, CONSOLIDATED DISPOSAL, by
4 James Sells, Attorney at Law, 9657 Levin Road, N.W.,
5 Silverdale, Washington 98383 (Via teleconference
6 bridge).
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4 EXHIBIT MARKED OFFERED ADMITTED

5 Numbers 52 and 53 Rejected p. 2026

6 Number 22 -- 2028 2029

7 Number 23 -- 2028 2029

8 Number 24 -- 2028 2029

9 Number 227 -- 2028 2029

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1 JUDGE RENDAHL: Okay. Let's be on the
2 record. Good morning. We're here before the
3 Washington Utilities and Transportation Commission on
4 Thursday, November the 4th, 2004, in Olympia,
5 Washington, for a status conference in Docket Number
6 TG-040248, which is captioned In the Matter of the
7 Application Number GA-079254, of Kleen Environmental
8 Technologies, Inc., for a Certificate of Public
9 Convenience and Necessity.

10 I'm Ann Rendahl, the Administrative Law
11 Judge presiding over this application proceeding.
12 Let's take the appearances of the parties, beginning
13 with the Applicant. Mr. Haffner.

14 MR. HAFFNER: Thank you, Your Honor. Greg
15 Haffner, for the Applicant, Kleen Environmental
16 Technologies, Inc. Also present on the bridge line
17 today are two of the owners of Kleen, Robert Olson
18 and Kenneth Lee.

19 JUDGE RENDAHL: Thank you. For Protestant
20 Stericycle.

21 MR. JOHNSON: Thank you, Your Honor. This
22 is Steve Johnson, Attorney for Protestant Stericycle
23 of Washington, Inc. And on the bridge line with us
24 today is Mike Philpott, District Manager for
25 Stericycle.

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1 JUDGE RENDAHL: Thank you. And on behalf of
2 the other Protestants, Mr. Sells.

3 MR. SELLS: Yes, Jim Sells, Attorney,
4 appearing on behalf of Protestants Washington Refuse
5 and Recycling Association, Rubatino Refuse, Inc.,
6 Consolidated Disposal, and Harold LeMay Enterprises,
7 Inc.

8 JUDGE RENDAHL: Okay. And Mr. Trautman is
9 not here. Well, here is Mr. Trautman.

10 MR. TRAUTMAN: I was in 108.

11 JUDGE RENDAHL: Oh, okay. Mr. Trautman has
12 just joined us. Apparently he followed the
13 directions in the notice, which was to Room 108,
14 which we had to change. So my apologies, Mr.
15 Trautman.

16 MR. TRAUTMAN: Okay.

17 JUDGE RENDAHL: So Mr. Trautman, you're here
18 just in time to make your appearance.

19 MR. TRAUTMAN: Thank you. Greg Trautman,
20 Assistant Attorney General, for Commission Staff.

21 JUDGE RENDAHL: Thank you. All right. So
22 this status conference is being held pursuant to
23 notice issued on November 1st, 2004, and the notice
24 correcting the time on November 2nd, 2004. The
25 purpose of the conference, as stated in the notice,

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1 is to determine whether and how to proceed with this
2 application, and how to address the testimony and
3 exhibits sponsored by Mr. McCloskey in this
4 proceeding.

5 By way of background, the Commission held a
6 hearing on Tuesday, October the 26th, 2004, to
7 address what's been withdrawn as Exhibit 203, and
8 what was marked as Exhibit 23, which was a letter
9 purportedly from the National Indian Health Board.

10 During cross-examination of Mr. McCloskey
11 concerning the letter and other matters on that day,
12 Mr. McCloskey became ill and the hearing was
13 recessed. Late on Friday, October 29th, 2004, Mr.
14 Haffner sent an e-mail to me and all parties to the
15 proceeding concerning Mr. McCloskey. That e-mail
16 triggered the need for the status conference.

17 As the e-mail hasn't been filed with the
18 Commission and is therefore not a part of the record
19 in this proceeding, Mr. Haffner, would you please
20 reiterate the contents of your e-mail on the record
21 and then address how your client wishes to proceed
22 with the application?

23 MR. HAFFNER: Yes, Your Honor. Would Your
24 Honor like me to just read the e-mail into the
25 record?

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1 JUDGE RENDAHL: That would be helpful. You
2 might want to speak up a bit for the court reporter.
3 You're coming in a bit faintly and we have the volume
4 turned up full.

5 MR. HAFFNER: Okay. I'll try and be a
6 little bit louder. The e-mail that I sent to Your
7 Honor and the other counsel was sent at 5:08 on
8 Friday afternoon, October 29th, by my record here.
9 It reads, Dear Judge Rendahl, Allen McCloskey has not
10 reported to me about the stress test he was supposed
11 to have today, and he has not returned my phone
12 calls. I am now concerned that he may be avoiding
13 both me, the people at Kleen Environmental, and the
14 rest of this proceeding.

15 Earlier this week, Bob Olson, President of
16 Kleen, spoke with Allen and it was agreed that Allen
17 should resign. He cleaned out his desk and told Mr.
18 Olson that he would bring in a letter of resignation
19 today after having it reviewed by an attorney. He
20 never showed up.

21 He sent an e-mail to the company that
22 contained a virus that caused the company's computers
23 to crash. The McCloskey Enterprises Web site appears
24 to be shut down. Mr. McCloskey has not been able to
25 be reached at his home or on his cell phone.

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1 I spoke with Lansing Birdinground by phone
2 on Wednesday evening, and I have no reason to doubt
3 what he says in his affidavit. It clearly
4 contradicts Mr. McCloskey's testimony.

5 I will continue to try to reach Mr.
6 McCloskey and keep you informed. I'm open to
7 suggestions from Your Honor and counsel as to how and
8 when to proceed. I've never had anything like this
9 happen in my 14 years of practice. I'm appalled at
10 what appears to have taken place and want to state
11 that neither I nor anyone in my firm had any
12 knowledge of any misrepresentations that may have
13 been made by Mr. McCloskey.

14 Kleen will wish to continue to have its
15 application considered by the Commission, although
16 there may need to be some thought about what to do
17 about Mr. McCloskey's testimony and the topics it
18 covered.

19 That's the extent of the e-mail.

20 JUDGE RENDAHL: Okay. And if you'd like to
21 go forward and explain further about how your client
22 wishes to proceed, that would be helpful.

23 MR. HAFFNER: Yes, Your Honor. And I might
24 also say we have continued to endeavor to contact Mr.
25 McCloskey. It does appear as though he has left his

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1 residence here in the state and moved back to
2 California. Mr. Olson has been in contact with some
3 of his family members and they believe that he is in
4 -- I think it's Trinidad, California.

5 Mr. Olson may have spoken to Mr. McCloskey,
6 but the person to whom he spoke, who sounded like Mr.
7 McCloskey, denied that it was him, so we have not
8 been able to hear anything from him, by anybody that
9 confirms to be him, since I sent out that e-mail on
10 Friday.

11 We don't know about his current medical
12 condition, other than what happened the night of the
13 hearing, when he was admitted into the hospital.

14 With respect to the application, my client
15 would like to go forward with the application and
16 have it considered. Obviously there are some
17 concerns that my client, as well as the other
18 participants in this proceeding have with respect to
19 the credibility of the testimony of Mr. McCloskey and
20 the exhibits that he sponsored.

21 We believe that most of that is credible.
22 The problem is we don't know what Your Honor is going
23 to believe and what not, so I think, from my client's
24 standpoint, we feel that we are being harmed in this
25 matter as much as the other parties to the proceeding

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1 and we need to get clarified what issues are going to
2 be of concern to allow us to resubmit testimony and
3 exhibits to correct what has happened.

4 JUDGE RENDAHL: All right. First, I'd like
5 to hear from Mr. Johnson and then from Mr. Sells and
6 then from Mr. Trautman. Mr. Johnson.

7 MR. JOHNSON: Thank you, Your Honor. I
8 think all of us are a little bit in unfamiliar
9 territory here. But as I understand Mr. Haffner's
10 e-mail, as I understood it and as I understand his
11 report to us today, it appears that Mr. McCloskey
12 most likely fabricated the letter that purported to
13 be from the National Indian Health Board and
14 attempted to commit a fraud on the Commission by
15 doing so. It also appears that Mr. McCloskey has
16 perjured himself with respect to his knowledge of the
17 letter and of Mr. Lansing Birdinground, the purported
18 author of the letter, and I believe from Mr.
19 Haffner's report and from his e-mail of October 29,
20 that the applicant has conceded that Mr. McCloskey
21 has attempted to commit a fraud on the Commission and
22 has committed perjury in this proceeding. Given --

23 MR. HAFFNER: I would not agree with that.

24 MR. JOHNSON: Well, given that situation, I
25 don't think there's any other conclusion we can draw

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1 when Mr. McCloskey absents himself from the hearing
2 on a claim of illness and then moves out of the state
3 so that we can't complete cross-examination.

4 So whatever Kleen's concession may be, I
5 don't think that Your Honor can come -- or the
6 Commission can come to any other conclusion but that
7 Mr. McCloskey manufactured the Birdinground letter,
8 that Mr. McCloskey perjured himself with respect to
9 that letter. I believe that Mr. Haffner's e-mail
10 cedes these points, but Mr. Haffner may have a
11 different point of view, and I understand that.

12 Given this situation, which, as I say, is
13 unusual, to put it mildly, for all of us, it seems to
14 me that the only thing that the Commission can do is
15 to strike Mr. McCloskey's testimony in its entirety
16 and all exhibits that Mr. McCloskey sponsored.

17 It seems to me, as well, that the
18 Applicant's application must be dismissed, and I say
19 that for two reasons. One is that Mr. McCloskey's
20 testimony deals with core issues on which the
21 Applicant's case depends. Mr. Haffner and his client
22 have represented to us repeatedly that Mr. McCloskey
23 was the person for the Applicant charged with
24 essentially primary responsibility, if not almost
25 exclusive responsibility, with respect to

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1 presentation -- preparation and presentation of the
2 Applicant's case in these proceedings.

3 That would include both responding to
4 discovery and preparation of testimony for these
5 proceedings, and it also includes the follow-on from
6 when we discovered that the Birdinground letter
7 appeared to be a fraud. And even in that case, I'm
8 referring to Exhibit 22, the Applicant submitted a
9 letter to the Commission that had been drafted by
10 McCloskey. This is a letter dated October 21, 2004,
11 but I believe submitted for the record on October
12 26th, in which various self-serving statements are
13 made on behalf or by the shareholders of the
14 Applicant to the effect that the responsibility for
15 the application and for the Applicant's case before
16 the Commission had been assigned to Mr. McCloskey,
17 and also that it attempts to indicate that steps had
18 been taken to rectify the situation, which in fact
19 were never taken, and were simply an effort by Mr.
20 McCloskey, it now appears, but supported by the
21 signatures of the Kleen shareholders, to exonerate
22 himself from the consequences of his attempted fraud
23 on the Commission in manufacturing the Birdinground
24 letter.

25 So I believe that the application must be

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1 dismissed both because the testimony of Mr. McCloskey
2 is central to that application and the application
3 cannot survive without it, and because the Applicant
4 itself has committed a grave misconduct in this
5 situation.

6 The attempt to sort of cut Mr. McCloskey
7 adrift here and not take responsibility for his
8 actions seems to me to be an unfortunate choice of
9 tactics by the Applicant here, and I believe the
10 application must be dismissed.

11 I also believe that one of the grounds that
12 permits the application to be dismissed, Your Honor,
13 is WAC 480-70-091, talks about applications and what
14 must be submitted with them.

15 But if you look at subparagraph (2)(c), it
16 says, The Commission may reject or dismiss an
17 application if it includes false, misleading or
18 incomplete information.

19 And in this particular case, I acknowledge
20 that the original application form was submitted back
21 in February, but all of the case that has been
22 presented in support of that application I think
23 needs to be considered as part of the Applicant's
24 application at this point.

25 And I don't think there's any doubt that Mr.

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1 McCloskey and the Applicant have submitted false,
2 misleading, or, at the very least, incomplete
3 information. So I believe the application must be
4 dismissed.

5 The application also has put -- imposed
6 great expense on the other parties to this
7 proceeding, including, in particular, Stericycle, my
8 client. It is our position that Stericycle must be
9 awarded its attorney's fees and costs for all efforts
10 related to exposing the Birdinground letter as a
11 fraud and for the hearing processes and other
12 processes that have been undertaken subsequent to
13 that exposure to address the situation with the
14 fraudulent letter and Mr. McCloskey's misconduct.

15 Stericycle also intends to seek an award of
16 its costs and attorney's fees for this entire
17 proceeding. We believe that the proceeding has been
18 rife with false statements by Mr. McCloskey, and that
19 both Applicant's counsel and the Applicant, if they
20 had been paying attention, should have known that.

21 We believe that the Commission has inherent
22 power, as an adjudicative body, to award sanctions in
23 the context of this kind of misconduct that have
24 imposed enormous costs on Stericycle and the other
25 parties to this proceeding.

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1 We believe that Kleen is clearly responsible
2 for Mr. McCloskey's fraud, and that they're
3 responsible for two reasons. One is that they left
4 the case entirely in Mr. McCloskey's hands. Number
5 two, when the problem with the Birdinground letter
6 was identified, Mr. Olson, the President and primary
7 shareholder of the Applicant, didn't even read the
8 Birdinground letter until the morning of October
9 26th, when we sat together in the hearing room to
10 address that issue.

11 Also, we understand, based on -- I believe
12 it was Mr. Olson's testimony, that Exhibit 22, the
13 letter to the Commission dated October 21, 2004, from
14 the Kleen shareholders, was drafted by Mr. McCloskey.
15 So it's apparent that the Kleen shareholders took no
16 responsibility for investigating or rectifying the
17 fraud committed by Mr. McCloskey when it was brought
18 to their attention. So in this context, I don't
19 think that any outcome -- any outcome is possible
20 except a dismissal of the application.

21 In any event, we would want further
22 proceedings with respect to the responsibility of the
23 Kleen shareholders for this fraud and we would
24 request that a further hearing be scheduled and that
25 all of the Kleen shareholders be required to attend

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1 to respond to examination of these issues. That's
2 our position, Your Honor.

3 JUDGE RENDAHL: Let me just clarify your
4 last statement. Are you saying that if the
5 application continues, that we need further hearings
6 concerning the shareholders, or regardless, we need
7 further hearings?

8 MR. JOHNSON: I think regardless, because
9 our position is that we are going to be seeking an
10 award of attorney's fees, and we ought to have -- and
11 costs, and we ought to have an opportunity to explore
12 further the issue of the responsibility of Kleen's
13 shareholders for the fraud committed by Mr. McCloskey
14 and what they did when that issue was brought to
15 their attention.

16 JUDGE RENDAHL: Okay. Mr. Sells.

17 MR. SELLS: Thank you, Your Honor. If Your
18 Honor please, this situation gets curiouser and
19 curiouser as we go along. If the application is
20 dismissed and there is no -- there are no further
21 hearings, as Mr. Johnson just alluded to, then,
22 really, the Applicant gets off the hook. Six months
23 later they can come in and try to do it all over
24 again and take what they've learned this time with
25 new people and put us all through this same thing

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1 again.

2 So in a way, at least one form of dismissal
3 of the application is kind of a bonus to the
4 Applicant, because they may not have to sit and
5 answer for their actions or, more likely, for their
6 inactions.

7 I don't see, short of an outright dismissal,
8 I don't see how this application can proceed to
9 decision without having the opportunity to examine
10 one more time all of the owners of this thing as to
11 what they knew about this McCloskey guy, when they
12 knew it, what they should have known, what they
13 didn't know, what efforts they made. I remember
14 asking one of them if they checked out his college.
15 Well, they didn't. Okay, fine, but how about the Web
16 site that listed their address as the Seattle office
17 of this big international company, McCloskey.

18 I don't see how Your Honor could make a
19 decision based upon a full hearing until all that is
20 done. And having said that, I don't see why my
21 clients and certainly Stericycle have to have two
22 hearings, two full hearings in this thing at our own
23 expense because of one guy and because of the failure
24 of the management of this company, rightly or
25 wrongly, and I'm not accusing anybody of doing

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1 anything other than not paying attention, but rightly
2 or wrongly, because of their failure to look at some
3 pretty obvious signs with this guy. You know, we're
4 ending up doing this twice.

5 In my view, Your Honor has the absolute
6 authority to dismiss this case, and perhaps, from our
7 perspective, I'm maybe more concerned or at least
8 equally concerned about the integrity of dismissing
9 and the integrity of the process, because obviously
10 we have not spent the kind of money that Stericycle
11 has spent here, and I'm certainly glad we didn't.

12 But to me, at least to one of my clients,
13 the WRRRA, to have somebody come in and convince alone
14 perjured testimony and perjured testimony in writing
15 and perpetuate a fraud not only on the parties to
16 this application, but upon the Commission itself, is
17 just incredible. And equally incredible with that is
18 to have the people that sponsored that testimony come
19 in and say, Oh, sorry, let's pick and choose out the
20 stuff that he sponsored and maybe we'll put some more
21 stuff in, and we're really good guys, which may be,
22 but they have not -- there is no way, in my view,
23 that this application demonstrates fitness on the
24 record so far, and there's nothing they could add to
25 this record that could demonstrate fitness.

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1 JUDGE RENDAHL: I'm sorry, I missed the last
2 bit there, Mr. Sells.

3 MR. SELLS: I don't -- we don't see that
4 there is anything that they could add to this record
5 to correct the deficiency, the fitness deficiency
6 created by sponsoring this McCloskey guy and his
7 information.

8 And you know, we've got more. We'll be
9 happy to come in and put it all in front of Your
10 Honor, but we'll end up doing this twice and, at the
11 very least, Kleen Environmental ought to have to pay
12 for it. Steve's right about that. But we think the
13 only way to do it is to out and out dismiss it. If
14 they want to come back and try again, fine, they've
15 got the right to do that, but let's not do this
16 twice.

17 JUDGE RENDAHL: All right. Mr. Trautman.
18 Thank you, Mr. Sells.

19 MR. SELLS: Thank you.

20 MR. TRAUTMAN: Thank you, Your Honor. Staff
21 would agree that this is a very serious situation,
22 and it certainly does appear that Mr. McCloskey did
23 fabricate information and it would appear that that
24 was done to perpetrate a fraud on the Commission.

25 It does leave the Commission in a very

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1 difficult position. We would certainly agree that,
2 at the least, all of his testimony would have to be
3 stricken and all of his exhibits, and we would have
4 to -- if the hearing were to continue, there would
5 have to be new testimony from a new witness who can
6 sponsor that testimony, because I do agree that
7 otherwise, there's a real question about any of his
8 testimony or exhibits being tainted by other fraud.

9 The Commission, I believe, has the authority
10 to dismiss the application if it desired, under the
11 authority stating that if the application includes
12 false or misleading information, and I would agree
13 that that would include information submitted in --
14 subsequent information submitted in support of the
15 application. I think the Commission could dismiss
16 this application.

17 I think it might be possible to have another
18 witness enter testimony, because it appears that --
19 it appears that none of the other witnesses to the
20 case were direct parties to the fraud. Having said
21 that, I would also agree that, even if that were
22 done, there does remain a serious question on the
23 Applicant's fitness because of the due diligence or
24 lack of due diligence taken in investigating the
25 fraud or the -- certainly the apparent fraud

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1 committed by Mr. McCloskey.

2 So that even if the Commission -- even if
3 the application were to go forward, I think there
4 would be a question of fitness. So I think that the
5 Commission has the authority to -- could dismiss the
6 application, but at the very least, it has to strike
7 all of Mr. McCloskey's testimony and have a new
8 witness to sponsor that testimony.

9 I would also agree that I do believe it
10 would be -- it would be proper to bring back the
11 Kleen shareholders and -- for testimony about the
12 extent of their involvement in the apparent fraud
13 perpetrated by Mr. McCloskey.

14 JUDGE RENDAHL: And again, Mr. Trautman,
15 even if it's dismissed, we should bring them back?
16 Even if the application is dismissed, we should bring
17 the witnesses back?

18 MR. TRAUTMAN: I would not take a position
19 on that. I'm not sure that that wouldn't -- I'm not
20 sure that would be necessary if the application were
21 dismissed.

22 JUDGE RENDAHL: Okay. Mr. Haffner.

23 MR. HAFFNER: Thank you, Your Honor. Boy, I
24 mean, we're caught in as difficult a position as
25 anybody here. As I think is recognized by most of

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1 the people here, the owners of this company did not
2 have -- did not see this coming, hindsight is 20/20,
3 and it certainly looks like we could have done
4 something better, but we had no reason to suspect Mr.
5 McCloskey would ever do something like this.

6 And I want to reiterate that we still
7 believe there's a chance that he was not directly the
8 sponsor of this document. We do believe that it's
9 possible that his sister or a person who was
10 represented to us as being his sister may have
11 participated in this and that he may be covering up
12 because of that or whatever. We don't know exactly.
13 We're still trying to piece things together.

14 But that's why I disagree with Mr. Johnson's
15 comment that we are admitting that Mr. McCloskey
16 perjured himself. I agree that everything right now
17 indicates that he did sponsor this document and that
18 he did perjure himself, but we are still of the
19 belief that it is possible that someone else did this
20 on his behalf, and we just don't know.

21 That being said, the owners of the company
22 are willing to make themselves available for
23 examination by the parties to explain what they know
24 about this matter. So that needs to be stated on the
25 record.

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1 I do not believe that the application should
2 be dismissed. There was -- there's no indication
3 that the other people involved with Kleen had any
4 knowledge that this fraudulent document was going to
5 be submitted, and I think the rest of the record
6 supports the application in terms of the fitness of
7 the company and the public sentiment for this service
8 to be provided.

9 I'm not sure what Mr. Johnson means in his
10 reference to Exhibit 22, that steps weren't taken to
11 rectify. I suppose that could be brought out later
12 if the owners are put back on the stand. I do not
13 think it is correct to attribute Mr. McCloskey's
14 misconduct, if, in fact, there was misconduct, to the
15 owners of Kleen. This is a simple case where the
16 owners trusted the wrong person. They put this thing
17 into his hands and, unfortunately, they're now paying
18 the price for that, as is everybody.

19 The request for fees by Mr. Johnson's client
20 I think is just outrageous. There are cases all the
21 time where applicants are unsuccessful in these
22 proceedings, and unfortunately, the protestants that
23 are protected by the statutes in this state to allow
24 their business to not be subject to a lot of
25 competition do pay a lot of money to protect that

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1 right, and that's the case that's gone on here.

2 Frankly, I think a lot of this proceeding
3 and expenses involved could have been curtailed had
4 Mr. Johnson handled things in a different mannr.
5 That being said, we're all being forced to incur
6 additional expense as a result of what appears to
7 have been done by Mr. McCloskey.

8 I'm -- I again don't know what Mr. Johnson's
9 referring to when he indicates that the record is
10 rife with false statements. I think that that's
11 something he's going to need to establish. Frankly,
12 if there are concerns by Your Honor about the
13 credibility of Mr. McCloskey, I think it's important
14 that we either determine what those matters are or,
15 if it's necessary to strike all of his testimony and
16 all those exhibits, that we be given the opportunity
17 to put on evidence from another witness regarding the
18 key matters that are stated in Mr. McCloskey's
19 testimony that go to the ability of this Applicant to
20 provide the service and the fitness of the Applicant
21 to provide the service.

22 JUDGE RENDAHL: Mr. Haffner, if we go that
23 route and Mr. McCloskey's testimony and any exhibits
24 that he sponsored are stricken, how much time would
25 you need?

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1 MR. HAFFNER: To present testimony?

2 JUDGE RENDAHL: To bring someone in and
3 submit exhibits. I wouldn't go for another round of
4 pre-filed testimony at this point. I think we'd just
5 do it on the record if we go that route. I'm not
6 saying that we will at this point. But how much time
7 would you need to locate that person that you would
8 need to sponsor the topics that Mr. McCloskey
9 sponsored?

10 MR. HAFFNER: I am thinking about two weeks.
11 When I look at the matters that Mr. McCloskey
12 sponsored, most of those matters are in-house, and I
13 think most of those things could be covered by the
14 people that are already involved in the organization,
15 Mr. Perrollaz or Mr. Lee or Mr. Olson.

16 However, I think there are statements about
17 things outside of the operation, such as Covanta and
18 the facility in Canada, that we would need to obtain
19 testimony from somebody from those facilities.

20 JUDGE RENDAHL: If the application is
21 dismissed, Mr. Haffner, is it your understanding that
22 the Applicant would resubmit an application?

23 MR. HAFFNER: I believe that they would,
24 given the fact that they currently want to continue
25 with this application, but I have not spoken with

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1 them directly about that possible scenario.

2 JUDGE RENDAHL: Okay. So you're thinking
3 you would not only need a witness to sponsor Mr.
4 McCloskey's testimony or the topics in Mr.
5 McCloskey's testimony, but also someone from Covanta
6 and someone from the Canadian facility?

7 MR. HAFFNER: Possibly, yes. And the reason
8 I say that is because I think that Mr. McCloskey's
9 testimony about those two facilities was hearsay, and
10 so absent -- I don't believe we have, through any
11 other witness on the record, testimony about --
12 information about those facilities as it would
13 pertain to this application.

14 JUDGE RENDAHL: And how, Mr. Haffner, would
15 you address the issue of the overall fitness of the
16 Applicant, given the situation that we have?

17 MR. HAFFNER: I would ask the Commission to
18 recognize that the Applicant delegated the
19 responsibility to oversee this application to Mr.
20 McCloskey, and that appears to have been a mistake.
21 That was a judgment decision made by that company.

22 I think that unless there is something that
23 ties them into knowing that Mr. McCloskey was
24 committing a fraud, that they shouldn't be faulted
25 for making one mistake in terms of trusting Mr.

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1 McCloskey. I don't think it's any different than any
2 other company hiring somebody to do a job and that
3 person turning out to not be the right person for
4 that job. In this case, it's gotten to a very
5 unfortunate and substantially strange scenario, but
6 we had no reason to believe that he was committing a
7 fraud on the Commission or doing anything false or
8 making misrepresentations to the extent that it now
9 appears he was involved in.

10 JUDGE RENDAHL: Thank you, Mr. Haffner. Mr.
11 Johnson, I have a question for you.

12 MR. JOHNSON: Certainly.

13 JUDGE RENDAHL: In terms of your request for
14 fees, can you explain to me, were you intending to
15 submit that in writing, anyway?

16 MR. JOHNSON: Yes.

17 JUDGE RENDAHL: All right. And can you
18 explain again -- just list what it was you were going
19 to request.

20 MR. JOHNSON: Right. What I would request I
21 would describe in two parts. First is compensation
22 for all attorney's fees and costs associated with
23 exposing the fraud committed by Mr. McCloskey,
24 apparently, and contacting Mr. Birdinground,
25 preparing filings, participating in the October 26th

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1 hearing, all activities associated with the
2 Birdinground letter, incident, through and including
3 today's status conference.

4 In addition, we intend to seek recovery of
5 our attorney's fees for the entire case, because we
6 think the Applicant is responsible for putting
7 McCloskey in this position and that the case itself
8 is entirely tainted by Mr. McCloskey's participation,
9 and that that's true from the very beginning.

10 And we can go back through, as Mr. Haffner
11 suggests, we can go back through and identify the
12 false statements that were made by Mr. McCloskey
13 along the way. A clear example, to my mind, was when
14 Mr. Haffner put Mr. McCloskey back on the stand for
15 rebuttal testimony and he suddenly remembered what
16 someone had told him at the hydroclave facility with
17 respect to the cost that Kleen would incur to process
18 waste at that facility when, in the earlier part of
19 the testimony, he said he didn't know what the cost
20 would be.

21 So the notion that Kleen had no reason to
22 know that Mr. McCloskey was spinning stories
23 throughout this proceeding, I think, is false. And
24 you know, we will intend to seek compensation for all
25 costs incurred by Stericycle from Mr. McCloskey's

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1 tainted participation, and I could go through chapter
2 and verse on that, but I don't think this is the time
3 to do that.

4 JUDGE RENDAHL: Okay. And is it your
5 position that you'd be seeking, again, to have the
6 testimony of Mr. Olson, Mr. Lee and Mr. Perrollaz,
7 regardless of whether the application is dismissed?

8 MR. JOHNSON: Right. We think that that's
9 necessary on the issue of the attorney's fees
10 question.

11 JUDGE RENDAHL: All right. Well, my intent
12 is not to let this drag on much longer. I think -- I
13 understand your concerns, Mr. Haffner, but I think
14 McCloskey's participation and his apparent fraud and
15 apparent perjury before the Commission creates such a
16 problem that I think it's appropriate to dismiss the
17 application.

18 On the issue of fees, what I'm going to ask
19 you to do, Mr. Johnson, is to submit a motion for
20 fees and request the hearing for Mr. Olson, Mr. Lee
21 and Mr. Perrollaz. And then, if you could do so by
22 next Wednesday, is that possible?

23 MR. JOHNSON: Your Honor, I'm afraid that's
24 not possible.

25 JUDGE RENDAHL: Okay. What is possible?

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1 MR. JOHNSON: Let me look at my calendar.
2 As I previously informed all of the parties, I am
3 traveling between the 10th and 14th of November. I'm
4 also out of town tomorrow afternoon, Friday, the 5th,
5 through the end of the weekend. So you know, if I
6 were to try to do that kind of a motion, I would have
7 maybe two days to do it. And frankly, that's not
8 enough time.

9 JUDGE RENDAHL: All right. I'm asking you
10 what's reasonable, because what my intent to do is to
11 issue an order dismissing the application and
12 establishing a briefing schedule for the sanctions.
13 And so it would be helpful to know your schedule and
14 what would permit, Mr. Johnson, because it seems
15 you're the primary proponent of this.

16 MR. JOHNSON: Thank you, Your Honor. Let me
17 just look at my calendar and try to come to grips
18 with that. I think we could reasonably submit a
19 motion on this issue -- well, we've got Thanksgiving
20 coming in here -- I would say by December 3rd.
21 That's basically two weeks after I return from my
22 travels on the 14th, taking into account the
23 Thanksgiving recess there.

24 JUDGE RENDAHL: Mr. Haffner, how much time
25 would you need for a response to that motion?

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1 MR. HAFFNER: I would think 10 days.

2 JUDGE RENDAHL: Okay. And since I don't
3 have a calendar in front of me, what day is the 13th?

4 MR. HAFFNER: The 13th is a Monday.

5 JUDGE RENDAHL: And is that acceptable?

6 MR. HAFFNER: That would be fine. Are we
7 planning on having these witnesses interviewed in
8 that time frame, or is this motion to seek an order
9 ordering the witnesses to be examined?

10 JUDGE RENDAHL: I think that would be part
11 of the motion.

12 MR. HAFFNER: Okay.

13 JUDGE RENDAHL: And if we establish a
14 response date by the following Monday, Mr. Johnson,
15 is that acceptable?

16 MR. JOHNSON: I think that would be, Your
17 Honor.

18 JUDGE RENDAHL: All right. And at that
19 point, I would determine a date for -- now, if you
20 all believe it's appropriate to have the witnesses --
21 have a hearing for the witnesses prior to that time
22 to avoid this dragging on much longer, that -- it
23 does seem to me reasonable to have the witnesses
24 testify as to their knowledge so that we determine
25 whether, in fact, it's appropriate to grant

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1 sanctions.

2 So I'm open to the possibility of scheduling
3 a hearing before it gets another month out, but I'm
4 also happy to address it on the motion and deal with
5 that first, and after having heard the motions,
6 determine whether it's appropriate to call the
7 witnesses. So why don't we do that.

8 So after hearing from all of you and hearing
9 the final word from Mr. Johnson on the 20th, I'll
10 endeavor to get an order out soon after the first of
11 the year that will resolve the motions and determine
12 whether or not a hearing is appropriate, and if a
13 hearing is appropriate prior to determining the
14 motions, then I'll do that first.

15 So that's my ruling today. I'll issue an
16 order early next week that dismisses the application,
17 addresses the basis for dismissing the application,
18 based on the conference this morning and the
19 arguments of the parties, and will establish in that
20 order the schedule for the motions for sanctions.
21 Mr. Trautman.

22 MR. TRAUTMAN: I just have one question.
23 Would the response date on December 13th, would that
24 be for all parties, for example, if Staff desired to
25 respond, or is that just for Mr. Haffner?

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1 JUDGE RENDAHL: Well, I would say any party
2 seeking sanctions in terms of attorney's fees and
3 costs would need to submit a motion at the same time
4 as Mr. Johnson. And if you're merely responding and
5 not seeking sanctions, then that's the appropriate
6 time to respond.

7 So Mr. Sells, if your client is seeking
8 sanctions, as well, you'd need to file on the 3rd.

9 MR. SELLS: My intent, Your Honor, is
10 probably to simply join in the motion, assuming I'm
11 allowed, and file declarations (inaudible).

12 JUDGE RENDAHL: I'm sorry, file declarations
13 --

14 MR. SELLS: Declarations of the amount of
15 our fees incurred since a certain time.

16 JUDGE RENDAHL: All right. Well, with that,
17 there are two remaining issues --

18 MR. HAFFNER: Your Honor, may I respond to
19 the dismissal?

20 JUDGE RENDAHL: Go ahead, Mr. Haffner.

21 MR. HAFFNER: I don't know if -- and I
22 understand Your Honor's ruling and I don't mean to
23 challenge it at this point, but I just want to
24 preserve any appeal rights that my client may have.
25 I don't know if they're even interested in appealing

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1 that decision, but I will object on the record to the
2 dismissal being granted.

3 I don't know what the procedures are for the
4 motion for dismissal based on the oral motion this
5 morning or if it needs to be in writing. I
6 understand the sentiment Your Honor wouldn't grant
7 the motion if it were in writing anyway, but I was
8 not prepared today to hear any motion to dismiss, as
9 much as I thought this was a hearing to determine
10 what the extent of the testimony of Mr. McCloskey
11 would be and how it would be treated.

12 So I just want to go ahead and state that
13 that was our thought about what today's hearing was,
14 and we are disappointed and disagree with the
15 dismissal.

16 JUDGE RENDAHL: All right. Well, I
17 understand. The notice did indicate that the purpose
18 of the hearing this morning was not just to address
19 Mr. McCloskey's testimony, but determine whether and
20 how to proceed with the application. And that was
21 based on communications that were sent to all parties
22 from Mr. Johnson indicating he may intend to seek a
23 motion to dismiss.

24 MR. HAFFNER: All right, Your Honor.

25 JUDGE RENDAHL: So I believe that it was an

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1 appropriate issue to discuss this morning, given the
2 serious events that have occurred in the last two
3 weeks in this proceeding. And the appropriate
4 procedure in my mind would be I will so note your
5 objection on the record today, but the order of
6 dismissal will be, in a sense, an initial order that
7 is subject to review before the full Commission. So
8 there is that administrative review right, and you
9 can consult the Commission's procedural rules on that
10 issue.

11 MR. HAFFNER: Thank you, Your Honor.

12 JUDGE RENDAHL: In terms of the remaining
13 issues, I was also prepared to address what's been
14 marked as Exhibits 52 and 53 in this proceeding.
15 During the hearing on October 8th, Mr. Haffner, you
16 offered Mr. Lee to provide rebuttal testimony and
17 offered what were marked as Exhibits 52 and 53.

18 MR. HAFFNER: Yes.

19 JUDGE RENDAHL: Mr. Johnson objected to the
20 exhibits and also the testimony of Mr. Lee as
21 improper rebuttal. I allowed the testimony subject
22 to further review, and I deferred ruling on the
23 exhibits until reviewing the transcripts of September
24 the 30th, when Mr. Philpott and Ms. Walker testified,
25 and also the October 8th transcript, and I received

1 pleadings from counsel on October 25th.

2 So having reviewed the transcripts and the
3 proposed exhibits, the pre-filed testimony of Mr.
4 Philpott and Ms. Walker, and the parties' pleadings,
5 I'm prepared to reject the exhibits as improper
6 rebuttal evidence.

7 Exhibit 52 was prepared, according to Mr.
8 Lee's testimony, after his cross-examination and
9 after his testimony in this proceeding, and he
10 intended to prepare them to document what he
11 testified to in person, and in particular, the cost
12 of -- per foot and the availability of property in
13 the area.

14 The information that Kleen would not be
15 using its own facilities for the proposed service did
16 come up during cross-examination, but it appears that
17 was information that should have and could have been
18 put in the pre-filed testimony, and that evidence of
19 any available commercial property or prices for such
20 property could also have been provided at that time.

21 In addition, Exhibit 53 was dated April
22 2004, and then was -- and therefore was available to
23 Mr. Lee prior to the time his pre-filed testimony was
24 filed and was available to document the availability
25 of or cost of leased vehicles. And so to the extent

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1 that they're offered as rebuttal, it appears that
2 it's to supplement the testimony, as opposed to
3 respond to anything in Mr. Philpott's or Ms. Walker's
4 testimony.

5 Despite, Mr. Haffner, your pleading, I
6 really can't view the exhibits in that way, and they
7 really are more appropriate as supplemental
8 testimony, so I'm going to reject those two exhibits.

9 And in addition, in terms of Mr. Lee's
10 testimony on October 8th, while there was not much
11 testimony, the bulk of it will be stricken, with the
12 exception of testimony that addresses the necessary
13 cash reserves for Kleen. And so specifically, the
14 testimony that will be stricken from the October 8th
15 transcript would be page 1468, beginning at line 22,
16 through page 1472, line three. And then there is
17 some remaining testimony which does address the cash
18 reserve issue, and I am not striking that testimony.

19 So that's my ruling verbally on that. If
20 you would like me to put that in writing in the order
21 of dismissal, I'm happy to do that, as well.

22 And then there's one last remaining issue,
23 and that has to do with the exhibits that were
24 marked, but weren't admitted in the October 26th
25 hearing. And those would be Exhibit 22 and 23.

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1 Twenty-two is the letter from the owners of Kleen,
2 including the fax from Mr. Lee, and the National
3 Indian Board letter, Mr. Johnson, that you offered,
4 as well as the declaration of Lansing Birdinground,
5 that's Exhibit 24. Then Exhibit 34 was the letter
6 and e-mail to Ms. Johnston -- or from Ms. Johnston
7 and Mr. McCloskey, correspondence between the two,
8 and then finally there's Exhibit 227, which was the
9 web pages of McCloskey Enterprises.

10 So since the bulk of those were offered by
11 you, Mr. Johnson, what do you want to do with those
12 exhibits?

13 MR. JOHNSON: Well, Your Honor, the exhibits
14 that we offered I think would include 23, 24, and
15 227. We'd like to have those admitted into the
16 record.

17 JUDGE RENDAHL: All right. And Mr. Haffner,
18 in terms of 22 and 34, you would want those in the
19 record?

20 MR. HAFFNER: Yes, Your Honor.

21 JUDGE RENDAHL: All right. And how do you
22 respond to Mr. Johnson's offer for 23, 24 and 27?

23 MR. HAFFNER: No objection.

24 MR. JOHNSON: Sorry, that was 227; right?

25 JUDGE RENDAHL: I'm sorry, 227.

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1 JUDGE RENDAHL: Mr. Sells?

2 MR. SELLS: No objection, Your Honor.

3 MR. TRAUTMAN: No objection.

4 JUDGE RENDAHL: All right. Well, those
5 three exhibits, 23, 24, and 27 will be admitted. And
6 as to -- 227, excuse me. I seem to have a mental
7 block on that number.

8 And as to exhibits marked as 22 and 34, Mr.
9 Haffner, you're offering those?

10 MR. HAFFNER: Yes, Your Honor.

11 JUDGE RENDAHL: Any objection?

12 MR. TRAUTMAN: No, Your Honor.

13 MR. SELLS: None here, Your Honor.

14 MR. JOHNSON: No, Your Honor.

15 JUDGE RENDAHL: Okay. Then those will be
16 admitted, as well. And in terms of Mr. McCloskey's
17 testimony and exhibits, since at this point I'm
18 proposing to dismiss the application, I see no need
19 to strike those exhibits at this time. So with that,
20 is there anything further we need to address?

21 MR. JOHNSON: Your Honor, this is Steve
22 Johnson. Just one thing that was outstanding. I
23 don't know -- we had requested certain information
24 when Mr. McCloskey was being cross-examined during
25 the hearing on October 26th, and I believe the

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1 response to that data requisition would be due
2 tomorrow. If I could just ask Mr. Haffner if that's
3 going to happen?

4 MR. HAFFNER: Can you restate what that was?
5 I forgot.

6 MR. JOHNSON: I'm not sure I can.

7 JUDGE RENDAHL: Well, I have in my notes
8 there were four record requisitions. The first was
9 Record Requisition Number 6, that had to do with all
10 forms or form letters that were sent out by Kleen.

11 And then Record Requisition Number 7 was who
12 was in the office on October 12th, who was in Kleen's
13 office, and I think it addressed the payroll records
14 to identify who was in the office.

15 Record Requisition Number 8 was a list of
16 e-mail addresses or persons to whom Mr. McCloskey
17 sent e-mails, and I don't have anything more specific
18 on that, but I'm sure the transcript would.

19 MR. JOHNSON: Those were the e-mails that
20 Mr. McCloskey, at least, said he had sent out to
21 inquire about the Birdinground letter.

22 JUDGE RENDAHL: Ah, okay. And the last one,
23 Record Requisition Number 9, was for the original
24 letter which was Exhibit 203, which is now withdrawn.
25 Have the original filed with the Commission, with a

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1 cover letter and copy sent to all parties.

2 MR. HAFFNER: And I'll have to apologize.

3 We've not done anything to try and locate those

4 documents. They had completely slipped my mind

5 during the commotion about his leaving the testimony

6 -- or the witness stand, so we will look for those.

7 I'm not -- hopefully, we can find the e-mail

8 information. It's my understanding that the system

9 was crashed, but I will talk with my client about

10 trying to locate all of those documents.

11 JUDGE RENDAHL: All right. And I assume you

12 would need an extension of time for that?

13 MR. HAFFNER: If we could, please.

14 JUDGE RENDAHL: And how about until next

15 Friday?

16 MR. HAFFNER: That would be acceptable.

17 Thank you.

18 JUDGE RENDAHL: Okay. So an extension of

19 time for Records Requisitions Number 6 through 9 will

20 be granted until next Friday, which is the 12th;

21 correct?

22 MR. HAFFNER: Correct.

23 JUDGE RENDAHL: All right. Again, those

24 would be submitted to counsel, not to me, and if any

25 counsel sought to have them admitted, then they would

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1 need to pursue that, either in writing with me or at
2 any later hearing that we might have.

3 MR. JOHNSON: Your Honor, this is Steve
4 Johnson again. The only exception to that might be
5 the original Birdinground letter and the cover
6 letter. I presume that would be submitted. That was
7 supposed to be submitted to the Commission.

8 JUDGE RENDAHL: Right. And that letter
9 would become -- would be included as Exhibit 203.
10 That's what that would be. The original would be
11 stamped as the exhibit.

12 MR. HAFFNER: And was that Requisition
13 Number 6?

14 JUDGE RENDAHL: That's Record Requisition
15 Number 9.

16 MR. HAFFNER: Nine, okay. So that one
17 should be delivered to the Commission, and then the
18 stamped copy of the delivered letter to counsel?

19 JUDGE RENDAHL: Yes, so you'll have to get a
20 stamped copy from the Commission, or I think my
21 understanding was that the cover letter, with the
22 letter that was submitted -- I don't know that the
23 request was for a stamped copy, Mr. Johnson. Was
24 that --

25 MR. JOHNSON: Oh, no, Your Honor, it was

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1 just for the transmittal letter, so we would know
2 that the original of Exhibit 203 had been found and
3 had been submitted.

4 MR. HAFFNER: Okay.

5 JUDGE RENDAHL: So I don't think there's a
6 need to have it stamped by the Commission and then
7 circulated to the parties. If you want to have a
8 copy of it once it's been stamped by the Commission,
9 I can certainly make arrangements for that, and so if
10 you find the original, then you'll need to file it
11 with the Commission and then send a cover letter to
12 the parties.

13 MR. SELLS: Excuse me, Your Honor. This is
14 Jim Sells. I think we're done with my part of it,
15 and I've got a lady here in a white coat, so I'm
16 going to sign off.

17 JUDGE RENDAHL: All right. Well, thank you
18 for participating, and get better.

19 MR. SELLS: Thank you very much. Bye-bye.

20 JUDGE RENDAHL: All right. Okay. Is there
21 anything further? I should have asked Mr. Sells if
22 he wanted a copy of the transcript. Does anybody
23 want a copy of the transcript this morning? Mr.
24 Trautman.

25 MR. TRAUTMAN: I just had one more matter,

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1 perhaps sort of housekeeping. Staff had made a
2 record requisition, I don't recall the number of it,
3 but it was for the Stericycle contract with the
4 Hospital Association, and I just wanted to note for
5 the record that we will -- Staff will not be moving
6 to put that into the record.

7 JUDGE RENDAHL: All right. That was Record
8 Requisition Number 3, so you're not moving to admit
9 that?

10 MR. TRAUTMAN: Correct. I wanted Mr.
11 Johnson to know that.

12 MR. JOHNSON: Thank you, Mr. Trautman.

13 JUDGE RENDAHL: Okay. Is there anything
14 further this morning? Hearing nothing, this status
15 conference is adjourned. Thank you very much for
16 appearing.

17 MR. JOHNSON: Thank you, Your Honor.

18 MR. TRAUTMAN: Thank you.

19 MR. HAFFNER: Thank you.

20 JUDGE RENDAHL: We'll be off the record.

21 (Proceedings adjourned at 11:32 a.m.)

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