

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In re Application No. GA-079254 of)	DOCKET NO. TG -040248
)	
KLEEN ENVIRONMENTAL)	ORDER NO. 08
TECHNOLOGIES, INC.)	
)	ORDER DENYING MOTION
For a Certificate of Public)	FOR SANCTIONS; AFFIRMING
Convenience and Necessity)	AND ADOPTING INITIAL
)	ORDER DISMISSING
)	APPLICATION
.....)	

1 **Synopsis.** *This Order affirms and adopts the initial order dismissing the application of Kleen Environmental Technologies, Inc., on the basis that the applicant presented false and misleading information to the Commission as a part of its application. This Order also denies the motion for sanctions filed by Protestant Stericycle, on the basis that the Commission has no authority to grant the remedy requested.*

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.** No party sought administrative review of the initial order. On the motion for sanctions, Stephen B. Johnson, Garvey Schubert Barer, Seattle, Washington, represents movant Stericycle of Washington, Inc. (Stericycle); Greg W. Haffner, Curran Mendoza P.S., Kent, Washington, represents Kleen, the respondent, and Gregory J. Trautman, Assistant Attorney General, Olympia, Washington, represents the Commission’s regulatory staff (Commission Staff or Staff).

A. History

- 4 Kleen filed application, No. GA-079254, for authority to provide solid waste collection service consisting of biomedical waste in the state of Washington. The application was protested, and was set for hearing before Administrative Law Judge Ann Rendahl.
- 5 During a hearing session on October 12, 2004, Kleen offered as an additional statement of shipper support a letter purportedly from the National Indian Health Board, signed by one Lancing Birdinground.¹ 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.
- 6 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 by contacting the National Indian Health Board that the letter marked as Exhibit 203 was fraudulent, and presented a letter from J.T. Petherick, Executive Director of the National Indian Health Board, concerning the letter in question.
- 7 The administrative law judge scheduled a hearing session to allow the parties to cross-examine the witness who presented the questioned document and to argue the consequences of the information. At that session, the witness reported feeling chest pains and excused himself from the hearing, which was then recessed. Subsequently, the witness resigned from service for the applicant firm, and the principals reported that they were unable to contact him.

¹ A person by that name does exist and had met Mr. McCloskey, but is engaged in a different business, lives in a different location from that specified in the letter, and has no connection with the NIHB.

8 The principal issue relates to a letter of shipper support ostensibly from Mr. Birdinground of region ten of the National Indian Health Board. It appears that the letter was fabricated, which its sponsor, Mr. McCloskey apparently stated in correspondence with a third party. Kleen retained the person who presented the letter, Allen McCloskey, to assist Kleen in the presentation of evidence in support of the application.

9 Stericycle moved to dismiss the application on the basis of WAC 480-70-091(2)(c),² 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 the request for fees and costs.

B. Initial Order

10 **The Initial Order.** The administrative law judge entered an initial order finding that the applicant appeared to have filed a fraudulent document with the Commission, to have offered the document as an exhibit in the proceeding, and to have presented a primary witness whose testimony is not credible, who may have perjured himself before the Commission, and who has absented himself from further inquiry. The initial order would grant Stericycle's motion and dismiss the application pursuant to WAC 480-70-091(2)(c), based on the fraudulent exhibit. The initial order also set out a schedule for presentation and consideration of parties' motions for sanctions.

² “(c) The commission may reject or dismiss an application if it includes false, misleading, or incomplete information.” WAC 480-70-091(2)(c).

11 **Review of the Initial Order.** No party sought administrative review of the
initial order. We have reviewed the order and the record, and find that the result
is appropriate. We affirm and adopt the initial order as the Commission order
dismissing the application.

C. Motion for Sanctions

12 **Motion for Attorneys' Fees.** Stericycle moved for reimbursement of attorneys'
fees in the amount of approximately \$60,000. No other party sought sanctions of
the Applicant. The Applicant and Commission Staff answered the motion;
Stericycle replied, and the matter is now appropriate for decision.

13 Stericycle argues both that the facts warrant an award of attorneys' fees and that
the Commission is empowered to grant its motion to award fees.

14 **1. Authority to impose sanctions.** Petitioner argues that the filing of improper
evidence directly caused it to incur extensive attorneys fees, and that it is
equitable to require the applicant whose improper actions caused the expense to
bear that expense. It argues that the power to impose sanctions in such settings
is an inherent power of the courts, that the administrative law judge and the
Commission are fulfilling the functions of the courts, and that courts in the states
of Delaware³ and Colorado⁴ have determined that administrative agencies do
possess the inherent power to assess sanctions in that setting.

15 The Applicant and the Commission Staff filed separate answers to the motion.
They note that the majority of cases cited by the movant address the implied
authority of *courts* to impose sanctions, not administrative agencies. They argue
that the Commission has no statutory authority to impose sanctions, and that the

³ *Brice v. State of Delaware Dept. of Corrections*, 704 A.2d 1176 (1998)

⁴ *Hawes v. Colorado Division of Insurance*, 65 P.3d 1008 (2003)

courts of this state have not found the implied authority to do so to exist. They cite *Cohn v. Dept of Corrections*, 78 Wn. App. 63, 895 P.2d 857 (1995), *Turek v. Dept. of Licensing*, 123 Wn.2d 120, 864 P.2d 1382 (1994), and *Trachtenberg v. Washington State Dept. of Corrections*, 122 Wn. App. 491, 93 P.3d 217 (2004).

16 **Discussion and Decision.** It is clear that the Commission has no specific statutory authority to grant the requested relief. Most of the decisions cited by Stericycle relate to implied authority of the courts. While we perform analogous functions in a quasijudicial setting to those performed by the courts, we are not courts of record and we do not have the powers inherent in those bodies. Instead, we are an administrative agency tribunal, solely dependent on the statutes creating and empowering us for the authority that we exercise.

17 We would be loath to find the implied power to do so ourselves, when a review of the parties' citations reveals that the only analogous cases cited to us decline to find such powers in administrative agencies.

18 The Commission has never imposed sanctions of the sort requested. It has imposed sanctions in the form of penalties for the violation of Commission rules, when a party has failed repeatedly to comply and that failure has caused hardship to the Commission and to other parties in the proceeding.⁵ While we are sympathetic to the costs imposed on the parties and the Commission by the allegedly fraudulent behavior, we find no authority to grant the request and impose sanctions in the form of attorneys' fees.

19 **2. Do the Facts warrant an award of Attorneys' fees?** Stericycle argues that inaccuracy or deceit so suffused the information presented to support the application that the applicants' principals knew or should have known that the

⁵ *WUTC v. Olympic Pipe Line Company*, Docket No. TO-011472, 13th Supp. Order of June 3, 2002, and 16th Supp. Order, July 23, 2002.

evidence was tainted. In addition, the motion and its accompanying Declarations allege that Kleen engaged in a cover-up, that there was extensive inaccuracy in the submission, and that Kleen should be held responsible.

20 Kleen responds that it is guilty of nothing more than relying extensively on Mr. McCloskey, who was an independent contractor. It points out that there is no testimony regarding assertions of the protestant (other than that relating to the Birdinground letter), and that there are flaws in the information provided. It asserts that the proper picture of all of the evidence is of the principal of an independent contractor who suffered, along with other parties, from the apparent activity of the contractor.

21 We will not rely on the declarations supplied by the movant that imply broader improprieties than the Birdinground letter, as they are of insufficient credibility for reliance in this setting, absent an opportunity for cross examination. That leaves only the Birdinground letter. There is no question that the letter was responsible for the termination of the proceeding, that its submission and discovery caused expense to the parties and to the Commission, and it is likely that the letter was created by the Applicant's consultant and presented with the intention to mislead the tribunal. The Applicant asserts that it should be absolved from responsibility because the consultant was an independent contractor, but the Commission rule relating to false or misleading application places the ultimate responsibility on the applicant, and does not visit consequences only on the author of the false or inaccurate material.

22 We find it unnecessary to resolve the issue. We ruled above that the Commission lacks authority to impose sanctions. If that decision is reversed in the courts, the Commission will consider conducting such other proceedings as are necessary.

23 **Conclusion.** The Commission denies the motion for sanctions, concluding that it has no authority to impose sanctions.

FINDINGS OF FACT

24 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.

25 (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.

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

27 (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 to be signed by a person named Lancing Birdinground.

- 28 (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 neither the National Indian Health Board nor the tribes authorized 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.
- 29 (5) Kleen Environmental Technologies, Inc., admits that the letter is fraudulent, but states that it had no prior knowledge of the letter.
- 30 (6) The Commission held a hearing on October 26, 2004, to address the Birdinground letter, at which hearing Mr. Olson, a principal of the applicant, and Mr. McCloskey, the applicant's consultant for purposes of pursuing the application, testified under oath.
- 31 (7) Mr. McCloskey testified that he received the letter in the mail at Kleen's office, discarded the envelope, did not know how the letter was prepared, and did not know a Lansing Birdinground.
- 32 (8) An Affidavit of 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 Allen McCloskey.
- 33 (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.

- 34 (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.
- 35 (11) Pages from the website of McCloskey Enterprises identify Allen McCloskey as a principal in that 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.
- 36 (12) After being confronted with Exhibit 227 during the hearing, Mr. McCloskey either fell ill or feigned illness and was taken by ambulance to St. Peter's Hospital in Olympia, Washington, requiring the proceeding to be recessed.
- 37 (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 may have moved to the state of California, removing himself from the jurisdiction of the state of Washington.
- 38 (14) The presiding administrative law judge entered an initial order proposing that the application be denied. No party asked for administrative review of the decision.
- 39 (15) Stericycle moved for the imposition of sanctions in the form of reimbursement of its attorneys' fees in the amount of \$59,969, stating that the fees represented costs imposed on the company because of the improper actions of the applicant.

CONCLUSIONS OF LAW

40 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.

- 41 (1) The Commission has jurisdiction over the subject matter of this
proceeding and the parties to the proceeding.
- 42 (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.
- 43 (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.
- 44 (4) Mr. McCloskey appears to have given false testimony under oath 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 then and since that
time.

- 45 (5) Kleen Environmental Technologies, Inc., is responsible for the actions of Mr. McCloskey that led to a violation of WAC 480-70-091(2)(c). The company hired Mr. McCloskey as a consultant, and delegated to him its responsibility for the application and preparation for the hearing on the application. It cannot escape regulatory responsibility by purporting to delegate the responsibility to others.
- 46 (6) The Commission should dismiss the application on the basis that it contains false information.
- 47 (7) The Commission has no legal authority to grant sanctions against a party in a proceeding before the Commission in the form of attorneys' fees payable to another party in the proceeding.
- 48 (8) The Commission should deny the Stericycle motion for sanctions in the form of attorneys' fees.

ORDER

THE COMMISSION ORDERS:

- 49 (1) Application No. GA-079254, in the name of Kleen Environmental Technologies, Inc., is dismissed.
- 50 (2) Stericycle's motion for sanctions against Kleen Environmental Technologies, Inc., in the form of attorneys' fees in the amount of \$59,969, is denied.

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

Dated at Olympia, Washington, and effective this 31st day of January, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.