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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In Re Application No. GA-079254 of

KLEEN ENVIRONMENTAL
TECHNOLOGIES, INC.

For a Certificate of Public Convenience and
Necessity

DOCKET NO. TG-040248

**PROTESTANT STERICYCLE OF
WASHINGTON, INC.'S MOTION FOR
AWARD OF ATTORNEYS' FEES AND
COSTS**

Protestant Stericycle of Washington, Inc. ("Stericycle") respectfully submits this Motion for Award of Attorneys' Fees and Costs for consideration by the Commission. This Motion is based on the Declaration of Stephen B. Johnson ("Johnson Decl."), dated December 3, 2004; the Declaration of Rebecca Johnston, dated October 25, 2004; and the Declaration of Dennis Hein, dated December 2, 2004, all filed herewith; Order No. 07 herein; and the other exhibits, files and records of this proceeding.

RELIEF REQUESTED

Stericycle respectfully requests the Commission to issue an order (1) directing Applicant Kleen Environmental Technologies, Inc. ("Kleen") to pay Stericycle an amount equal to all attorneys' fees and costs reasonably incurred by Stericycle (a) as a result of the filing by Kleen of a fraudulent letter of support for its application (hereinafter referred to as the "Birdinground letter"); and (b) as a

ORIGINAL

1 result of other false, misleading or deceptive testimony offered by Kleen in support of its application,
2 with interest thereon at the judgment rate; and (2) providing that the Commission will not docket or
3 process any future application for a certificate of public convenience and necessity that Kleen may
4 file under RCW 81.77.040 until all such amounts have been paid in full.

5 **I. INTRODUCTION AND SUMMARY**

6 This is an adjudicative proceeding pursuant to the Washington Administrative Procedure Act,
7 RCW chapter 34.05, initiated to consider Kleen's application under RCW 81.77.040 for a certificate
8 of public convenience and necessity to conduct biomedical waste collection activities in the state of
9 Washington. The case presented by Kleen in support of its application was based on false,
10 misleading and deceptive testimony by Kleen's primary operating witness Allen McCloskey and
11 other Kleen witnesses. On October 12, 2004, Kleen filed a fraudulent letter of support for its
12 application with the Commission (the "Birdinground letter"). On that same date, Kleen offered a
13 copy of the fraudulent letter for admission into the record of this proceeding. The fraudulent
14 character of the Birdinground letter was revealed through inquiries initiated by Stericycle. Stericycle
15 now seeks an award from the Commission of attorneys' fees and costs incurred by Stericycle (1) in
16 demonstrating the fraudulent character of the Birdinground letter and otherwise responding to that
17 letter and (2) in responding to other false, misleading and deceptive testimony offered by Kleen in
18 support of its application.

19 **II. STATEMENT OF FACTS**

20 **A. Kleen is Guilty of Serious Misconduct.**

21 **1. *Kleen Submitted a Fraudulent Letter in Support of its Case -- The "Birdinground 22 Letter"***

23 The basic facts relevant to Kleen's filing with the Commission of a fraudulent shipper support
24 letter -- referenced herein as the "Birdinground letter" -- are summarized in Order No. 07 herein,
25 Initial Order Dismissing Application; Establishing Procedural Schedule for Motions for Sanctions,
26 dated November 9, 2004. Stericycle's request for an award of attorneys' fees and costs incurred in

1
2 responding to this fraudulent filing is based on the discussion and findings of Order No. 07, which are
3 incorporated herein by this reference, and the following supplemental statement of relevant facts.

4 On October 12, 2004, Kleen offered a copy of a fraudulent letter in support of its application
5 for admission into the record of this proceeding. See Exh. 203; Tr. 1606-7. This letter, on what
6 appeared to be the letterhead of the National Indian Health Board (“NIHB”), was purportedly signed
7 by one “Lancing Birdinground” on behalf of “region ten” of the NIHB and the Indian tribes and tribal
8 health clinics listed in an attachment to the letter. The printed address for the NIHB shown on the
9 Birdinground letter was in Kingston, Illinois. The letter claimed an eleven year business relationship
10 between Kleen and the facilities of the NIHB. In offering the Birdinground letter for admission into
11 the record, counsel for Kleen made the following representation to the Commission:

12 [T]he letter is being offered as sentiment in the community from the
13 National Indian Health Board and the clinic and medical facilities they
14 represent throughout the state of Washington that are listed on the
15 second or the attachment to the letter. Mr. Birdinground was unable to
16 testify, and when Your Honor stated last week that you would consider
17 written testimony from other shipper witnesses, we went back to him
18 and asked him if he would provide the letter.

19 Tr. 1607:9-18 (Haffner). In fact, as we now know, the Birdinground letter was manufactured
20 by Allen McCloskey or persons working in concert with him. It has now been determined that
21 Lancing Birdinground did not sign this letter; that Lancing Birdinground has no connection with the
22 NIHB; that the NIHB does not have a “region ten;” that the NIHB has no office or address in
23 Kingston, Illinois; that Kleen has never had any business relationship with the NIHB or any tribal
24 healthcare facility; and that neither the NIHB nor the Indian tribes identified in the attachment
25 authorized submission of the letter to the Commission in support of Kleen’s application.

26 After the fraudulent character of the Birdinground letter was exposed, the Commission held a
hearing to permit examination of Kleen representatives Robert Olson and Allen McCloskey
concerning the origins of the letter. During cross-examination, Allen McCloskey denied that he
knew Lancing Birdinground. Counsel for Stericycle then presented the Declaration of Lansing

1 Birdinground, a member of the Crow Indian Tribe residing in Montana. See Exh. 24.

2 Mr. Birdinground testified in this declaration that he had met Allen McCloskey in 2001 when Allen
3 McCloskey visited the Crow Tribe to offer consulting services to the Crow tribal casino on behalf of
4 an entity known as "McCloskey Enterprises." Mr. Birdinground testified that he was the manager of
5 the Crow tribal casino at that time and that McCloskey spent a week with Birdinground, staying in
6 Birdinground's home and eating meals with Birdinground's family. Mr. Birdinground testified that
7 he had no connection with the NIHB and had no knowledge of the "Birdinground letter." Allen
8 McCloskey testified that, while he remembered visiting the Crow tribal casino, he did not recall
9 meeting Lansing Birdinground. Tr. 1965:18-21 (McCloskey).

10 On further cross-examination, McCloskey testified that "McCloskey Enterprises" was his
11 father's company; that he (Allen McCloskey) was not a shareholder, owner or principal of that
12 company; and that the only office of McCloskey Enterprises was in Eureka, California. Stericycle's
13 counsel then offered a copy of pages from the McCloskey Enterprises Internet Web site identifying
14 Allen McCloskey as a "principal" of McCloskey Enterprises and chair of that organization's
15 "Utilities and Transportation Services Division." See Exh. 227, p. 1. The Web site represented that
16 McCloskey Enterprises had offices in Los Angeles, San Francisco, Washington, D.C., Dallas, New
17 York City, San Diego and Seattle. The Web site showed Kleen's address in Seattle as the address of
18 the Seattle office of McCloskey Enterprises.

19 At this point in his cross-examination, Allen McCloskey requested a break in the proceedings.
20 During the break, McCloskey complained of chest pains and was taken by ambulance to a nearby
21 hospital. The hearing was recessed. Subsequently, Kleen's counsel reported that Allen McCloskey
22 had broken contact with Kleen, had vacated his residence in the state of Washington and was
23 believed to be residing in Trinidad, California. Tr. 1997:5-19, 1998:23-1999:4 (Haffner). Because
24 Allen McCloskey has absented himself from further participation in these proceedings and has
25 removed himself beyond the Commission's jurisdiction, the Commission can only conclude that
26 Allen McCloskey was responsible for the fabrication of the Birdinground letter.

1 Kleen has conceded that the Birdinground letter was fraudulent but has attempted to deny
2 responsibility for the fraud committed on its behalf by Allen McCloskey. Tr. 2011-17 (Haffner).
3 However, the record is clear that Kleen delegated responsibility for all matters related to the
4 preparation and presentation of its case to the Commission to Allen McCloskey. McCloskey's
5 prefiled testimony states:

6 I am a Development Consultant to Kleen Environmental Technologies,
7 Inc. My duties include overseeing this application before the
8 Washington Utilities and Transportation Commission to secure a
9 Certificate of Public Need and Necessity [sic]. If the certificate is
granted, I will be responsible for the oversight and implementation of
the services provided pursuant to that certificate

10 Exh. 25-T, p. 1:12-17. McCloskey is identified as Kleen's "Business Development Manager" and
11 issuing agent in the tariff filed with Kleen's original application, see Exh. 14, and in the revised tariff
12 filed for the record on September 28, 2004, see Exh. 32. In their October 21, 2004 letter to the
13 Commission, Kleen's principals represented to the Commission that McCloskey could speak for them
on the Birdinground letter, stating that "the duties and responsibilities relating to this process and the
15 overall efforts of Kleen Environmental to secure authority from the WUTC have been assigned to
16 Mr. McCloskey" Exh. 22. In arguing that Kleen's officers and shareholders should be excused
17 from testifying before the Commission on the origin of the Birdinground letter, Kleen's counsel
18 stated as follows:

19 It has been well-documented in this hearing that the authority to do
20 what is necessary to go forward with this application has been
21 delegated to Mr. McCloskey. For better or worse, they have put their
22 trust in Mr. McCloskey to do what is necessary to get them the
authority.

23 Tr. 1674:13-18 (Haffner; emphasis added). Allen McCloskey was Kleen's primary witness with
24 respect to the services Kleen proposed to provide if its application were granted and the features
25 claimed to distinguish those services from the services provided by existing biomedical waste
26 collection companies. See Exh. 25-T (McCloskey prefiled testimony). Allen McCloskey was

1 Kleen's primary representative at the hearings on Kleen's application. For all of these reasons, Kleen
2 is responsible for and bound by his actions.

3 The fraudulent character of the Birdinground letter was revealed as a result of inquiries
4 initiated by counsel for Stericycle with the National Indian Health Board ("NIHB") and several
5 Indian tribes identified in the attachment to the Birdinground letter. See Johnson Decl. On October
6 13, 2004, counsel for Stericycle obtained contact information for the NIHB from the NIHB's Internet
7 web site and sent an e-mail message to Mr. J. T. Petherick, Executive Director of the NIHB, asking
8 for information on the Birdinground letter. Johnson Decl. A copy of this e-mail message is attached
9 to the Johnson Decl. as Exhibit A. On October 14, 2004, counsel for Stericycle sent e-mail messages
10 to several attorneys representing Washington Indian tribes, including Alix Foster, an attorney with
11 the Swinomish Indian Tribe, asking whether these tribes had authorized submission of the
12 Birdinground letter to the Commission on their behalf. A copy of the e-mail message sent to Alix
13 Foster is attached to the Johnson Decl. as Exhibit B.

14 On the morning of October 15, 2004, responding to Stericycle's inquiry the day before, Leon
15 John, a member of the Swinomish Tribal Senate and the Swinomish Tribe's delegate to the American
16 Indian Health Commission for the State of Washington ("AIHC"), contacted Ms. Rebecca ("Becky")
17 Johnston, Director of the AIHC to inquire about the Birdinground letter. The AIHC is a non-profit
18 organization that works to improve the health of American Indians and Alaska Natives in
19 Washington State through increased tribal-state collaboration. AIHC's membership consists of
20 delegates appointed by the tribal leadership of 26 of the 29 federally recognized tribal governments in
21 Washington, as well as the two urban Indian health clinics located in Washington. As Director of the
22 AIHC, Becky Johnston is familiar with the organizations representing Native Americans nationally
23 on healthcare matters, including the National Indian Health Board, as well as the people and
24 organizations representing Washington Indian tribes on healthcare matters. See Declaration of
25 Rebecca Johnston, dated October 25, 2004, filed herewith.
26

1 Mr. John asked Ms. Johnston whether she knew anything about Kleen Environmental
2 Technologies and its pending application before the Washington Utilities and Transportation
3 Commission. Mr. John asked whether Ms. Johnston was familiar with a Mr. Lancing Birdinground
4 and whether Mr. Birdinground was affiliated with the National Indian Health Board. Ms. Johnston
5 told him that she was unfamiliar with any of these matters. Mr. John then forwarded a copy of the
6 October 12, 2004 Birdinground letter to Ms. Johnston. Id.

7 After reviewing the Birdinground letter, Ms. Johnston telephoned Mr. John and told him that
8 she would look into the matter because the NIHB did not have an office in Kingston, Illinois, there
9 was no "regional" structure at the NIHB, and Mr. Birdinground was not an NIHB delegate
10 representing any tribe in the Northwest, nor was he authorized to unilaterally represent the views of
11 Washington's sovereign tribal governments. Ms. Johnston then telephoned Kleen directly.
12 Mr. Robert Olson answered the phone. She told him who she was and why she was calling.
13 Mr. Olson transferred the call to Mr. McCloskey. Id.

14 Ms. Johnston then spoke with Mr. McCloskey. She identified herself, explained the AIHC's
15 organizational structure and expressed her concerns about the validity of the letter from
16 Mr. Birdinground. Mr. McCloskey replied that a widespread call for letters of support had been
17 issued and that Kleen had received a "stack" of supporting letters, including the one signed by
18 Mr. Birdinground. He said that he did not know Mr. Birdinground and was not familiar with the
19 NIHB's location or structure. He apologized for not conducting due diligence to verify its
20 authenticity and stated that it was one of many letters of support Kleen had received. Mr. McCloskey
21 said that he was sorry that the letter made it into the WUTC record because it would make Kleen look
22 bad. He said that he would contact Kleen's attorney and request that the letter be removed from the
23 record. Id.

24 Ms. Johnston asked Mr. McCloskey about the statement in Mr. Birdinground's letter in which
25 he claimed that the facilities of the National Indian Health Board had had a long business relationship
26 with Kleen and Mr. McCloskey replied that this statement was not true. Id.

1 The telephone conversations Rebecca Johnston had with Robert Olson and Allen McCloskey
2 of Kleen on October 15, 2004 were completed that day by approximately 10:00 a.m. Without further
3 investigation, without inquiry to the NIHB or any other source and without pause to consider
4 alternative explanations, Mr. McCloskey immediately accepted Ms. Johnston's suggestion that the
5 Birdinground letter was unauthorized and promised to have it removed from the record of this
6 proceeding. Mr. McCloskey himself informed Ms. Johnston that the eleven-year business
7 relationship with Kleen touted in the Birdinground letter was untrue. Obviously, Allen McCloskey
8 knew that the Birdinground letter was fraudulent before he was contacted by Rebecca Johnston.

9 At 10:23 a.m. on October 15, 2004, Alix Foster left a voice message for Stericycle's counsel
10 advising him that Becky Johnston had contacted Kleen with respect to the Birdinground letter and
11 had explained her concerns about the validity of the letter to Robert Olson and Allen McCloskey. A
12 true and correct transcription of this voice message is attached to the Declaration of Stephen B.
13 Johnson as Exhibit C.

14 At 11:35 a.m. on October 15, Allen McCloskey sent Ms. Johnston a letter by fax, repudiating
15 the Birdinground letter and assuring Ms. Johnston that Kleen would have it removed from the record
16 of the Commission's proceeding. A copy of the fax transmitting this letter to Ms. Johnston, showing
17 fax transmittal data, is attached to the Johnson Decl. as Exhibit D. See also Exh. 34. In his
18 October 15 letter to Rebecca Johnston, Mr. McCloskey acknowledged that the Birdinground letter
19 contained "fallacious statements" and expressed concern about the "false manner in which this letter
20 was issued." McCloskey stated further that "As agreed this morning I would personally be
21 contacting Kleens [sic] legal representative and instructing him to redact the record to not include this
22 unauthorized correspondence."

23 On October 15, 2004 at 12:55 p.m., after McCloskey learned that the fraudulent character of
24 the Birdinground letter had been discovered, counsel for Kleen notified Judge Rendahl and the other
25 parties by e-mail that Kleen would be withdrawing the Birdinground letter. A copy of the
26 October 15, 2004, e-mail message from Kleen's counsel is attached to the Declaration of Stephen B.

1 Johnson as Exhibit E. The e-mail message of October 15 from Kleen's counsel made no mention of
2 the reason for the withdrawal. Kleen did not notify the Commission that it had learned that the
3 Birdinground letter was fraudulent. The content of the e-mail message of October 15 from Kleen's
4 counsel is consistent with an intention to cover up Kleen's responsibility for the fraudulent letter.

5 On October 19, 2004, counsel for Stericycle received a copy of a letter to the Commission,
6 dated October 19, 2004, from Mr. J. T. Petherick, Executive Director of the NIHB, in which
7 Mr. Petherick informed the Commission that the Birdinground letter was "fraudulent."

8 On behalf of the National Indian Health Board (NIHB), I am writing in
9 response to information our organization has received indicating the
10 submission of a fraudulent letter purportedly sent to the Washington
11 Utilities and Transportation Commission, dated October 12, 2004, on
12 letterhead of the "NIHB", signed by a Mr. Lancing Birdinground and
13 issued on behalf of "region ten" of the NIHB in connection with a
14 proceeding before the Commission. I write this letter to correct a
15 number of misimpressions conveyed by that letter.

16 The NIHB has no association with Mr. Lancing Birdinground and
17 therefore he is not authorized to speak on behalf of the NIHB regarding
18 any proceeding pending before the Washington Utilities and
19 Transportation Commission. The NIHB has never been located in
20 Kingston, Illinois.

21 The National Indian Health Board has never operated under a
22 "Regional" system. . . . Further, the NIHB has no relationship with
23 Kleen Environmental Technologies, Inc. and has no knowledge of any
24 proceeding pending before the Commission involving that company.

25 Exh. 212 ("Petherick letter").

26 On October 19, 2004, counsel for Stericycle received a copy of a letter to the Commission
dated October 19, 2004, from the chairman of the Swinomish Indian Tribe in which he advised the
Commission that the Birdinground letter was not authorized by the Swinomish Tribe.

The Tribe has not authorized Mr. Birdinground to speak for it or the
tribal health clinic in connection with any proceeding before the
Washington Utilities and Transportation Commission.
Mr. Birdinground has no connection with the Tribe and is in fact
unknown to us.

1 The Tribe has no relationship with Kleen Environmental Technologies,
2 Inc. and has no knowledge of any proceeding pending before the
3 Commission involving that company.

4 Exh. 213.

5 On October 19, 2004, counsel for Stericycle also received a copy of a letter to the
6 Commission, dated October 19, 2004, from Brenda Nielson, Health Director of the Quileute Indian
7 Tribe in which she stated that the Quileute Tribe had not authorized Mr. Birdinground to represent
8 the views of the Quileute Tribe before the Commission.

9 The Quileute Tribe has not authorized Mr. Birdinground to speak for it
10 or the Quileute tribal health clinic in connection with any proceeding
11 before the Washington Utilities and Transportation Commission.
12 Mr. Birdinground has no connection with the Quileute Tribe and is in
13 fact unknown to us.

14 The Quileute Tribe was not aware of Mr. Birdinground's letter until
15 after it was submitted to the Commission.

16 The Quileute Tribe has no relationship with Kleen Environmental
17 Technologies, Inc. and has no knowledge of any proceeding pending
18 before the Commission involving that company.

19 Exh. 214.

20 On October 20, 2004, after receipt of the Petherick letter and the letters from the Swinomish
21 Tribe and the Quileute Tribe, counsel for Stericycle notified Administrative Law Judge Ann E.
22 Rendahl and counsel for the other parties by e-mail of the apparently fraudulent nature of the
23 Birdinground letter, provided her a copy of the Petherick letter and requested the opportunity to
24 examine Allen McCloskey and Kleen's three principals, Robert Olson, Kenneth Lee and Darin
25 Perrollaz, concerning the Birdinground letter. A copy of this e-mail message is attached to the
26 Johnson Decl. as Exhibit F. During a conference call on October 21, Judge Rendahl agreed to
schedule an additional day of hearing for the purpose of allowing at least some of Kleen's witnesses
to be examined concerning the Birdinground letter.

At the previously scheduled hearing on Friday, October 22, 2004, Judge Rendahl summarized the results of the October 21 conference call on the record and scheduled an additional day of hearing for the following Tuesday, October 26, to consider the Birdinground letter. At the hearing on October 22, Kleen's counsel presented a letter to the Commission signed by Kleen's three principals, dated October 21, 2004, in which they asked to be excused from testifying about the Birdinground letter. See Exh. 22. The Kleen principals stated, among other things, that "the duties and responsibilities relating to this process and the overall efforts of Kleen Environmental to secure authority from the WUTC have been assigned to Mr. McCloskey, and it is Mr. McCloskey who can best answer any questions that you or opposing counsel may have [about the Birdinground letter]." Id. Judge Rendahl required Kleen to make Robert Olson and Allen McCloskey available for examination at the hearing on October 26 but permitted Mr. Lee and Mr. Perrollaz to testify by affidavit concerning their knowledge of the Birdinground letter and any relationship between Kleen and the Indian tribes or tribal health clinics identified in the attachment to that letter.

Although Robert Olson, Kleen's president and majority shareholder, became aware of the fraudulent nature of the Birdinground letter no later than October 15, 2003, Tr. 1902:4-23 (Olson); Exh. 34, neither Mr. Olson, Kleen's other principals nor Kleen's counsel made any effort to determine the facts of the fraud or to disclose those facts to the Commission. Mr. Olson testified on October 26, 2004 that he had never seen or read the Birdinground letter until he arrived at the hearing room on October 26 for the hearing scheduled to inquire into the facts surrounding the Birdinground letter. Tr. 1879:15-25, 1880:1-2; Tr. 1885:12-14; Tr. 1913:22-23 (Olson).

The October 21, 2004 letter to the Commission by Kleen's three principals (Exh. 22) was drafted for them by Allen McCloskey. Tr. 1886:12-19 (Olson); 1956:13-19 (McCloskey). This letter can only be viewed as an effort to cover up Kleen's responsibility for the Birdinground letter. The Kleen letter of October 21 letter is full of false, misleading and self-serving statements intended to allow Kleen to evade responsibility for the fraud. Thus, the October 21 letter states:

2 We have made every effort to rectify this issue. We have been in
3 contact with the National Indian Health Board and the American Indian
4 Health Commission for Washington State and are working with them to
5 address the great deal of concern surrounding the letter in question.

6 In fact, the testimony of Mr. Olson and Mr. McCloskey on October 26, 2004 makes clear that no
7 representative of Kleen made any effort to contact the National Indian Health Board at any time.
8 Tr. 1913:17-21; Tr. 1925-26:25-4; Tr. 1928:16-22; Tr. 1929:1-19; Tr. 1935:5-1936-7; Tr. 1960:3-8;
9 1964:5-12; 1970:17-19 (McCloskey).

10 In their October 21, 2004 letter to the Commission, Kleen's shareholders claimed that the
11 Birdinground letter was based on a "form letter" Kleen had disseminated widely in seeking shipper
12 support:

13 Furthermore, this letter was one of three KET "form letters" sent out to
14 numerous shippers. Although we have control over who we send them
15 out to we do not have control over the manner in which they are
16 returned to us or the nature in which they are prepared. Just as we sent
17 out and received form letters of support from Hospital Shared Services
18 Association, Southwest Washington Medical Center, Multi-Care Health
19 Systems and others, we saw this to be no different. . . . [W]e did not
20 and do not know who Mr. Birdinground is and assumed he was
21 authorized as stated in the letter because of the form letters we sent
22 out.¹

23 However, when asked in Records Requisition No. 6 to produce the "form letter" on which the
24 Birdinground letter was supposedly based, Kleen was unable to do so. See Kleen Response to
25 Records Requisition No. 6, Johnson Decl. Exhibit I. No other shipper support letter with a text
26 similar to the Birdinground letter has been filed in connection with the Kleen application.² Thus,
Kleen has provided nothing to support the self-serving claim of its principals in their October 21
letter that the Birdinground letter was based on a widely distributed "form letter."

¹ Robert Olson repeated this claim in his testimony on October 26, claiming that McCloskey had shown him such a form letter. Tr. 1884:12-17 (Olson) ("[McCloskey] showed me a very standard form letter . . . and that appears to be the instrument that Mr. Birdinground had responded to.").

² Only two (2) shipper support letters were submitted by Kleen in support of its application -- one from Valley Medical Center and one from MultiCare. The texts of these letters bear no resemblance to the text of the Birdinground letter. Copies of these letters are found at Exhibit 192.

2 The October 21 letter attempted to mislead the Commission by suggesting that Kleen's prior
3 services to Indian tribes might explain why Kleen failed to recognize the fraudulent nature of the
4 Birdinground letter.

5 Although, Kleen Environmental has provided services to some of the
6 Tribal facilities found on the list attached to the letter, we did not and
7 do not know who Mr. Birdinground is and assumed he was authorized
8 as stated in the letter because of the form letters we sent out.

9 Exh. 23.³ However, the false claims of the Birdinground letter were obvious to anyone familiar with
10 Kleen's business. The Birdinground letter states,

11 As a regional representative of the National Indian Health Board and its
12 regional membership it is imperative that we see this application
13 granted. For the past eleven years our facilities have developed a
14 successful and collegial acquaintance with the owners and staff of
15 Kleen Environmental Technologies, Inc.

16 In fact, the testimony of Darin Perrollaz (Exh. 37) and Robert Olson made clear that Kleen never
17 provided any services whatsoever to the National Indian Health Board or any of the tribal health
18 clinics listed on the attachment to the Birdinground letter. Tr. 1880:12-15; 1915:18-23 (Olson).
19 Simply put, the claim in the Birdinground letter to a long business relationship between Kleen and the
20 NIHB and the healthcare facilities of its "regional membership" was obviously false. Yet, in their
21 October 21 letter to the Commission, Kleen's principals joined Mr. McCloskey in an effort to cover
22 up Kleen's responsibility for filing a fraudulent letter in support of its application.

23 Thus, the October 21 letter states:

24 We never had any reason to believe that this document was anything
25 other than what it appeared to be, a letter of support.

26 This statement is patently false. Despite these representations to the Commission, the truth is that the
Birdinground letter was fraudulent on its face and Kleen's principals had every reason to know that it
was fraudulent, based on its content alone. While it is possible that none of Kleen's principals looked

³ This effort at misdirection was supplemented by McCloskey's testimony on direct examination by Kleen's counsel on
October 26. See Tr. 1955:3-13 (McCloskey).

at the Birdinground letter prior to signing their letter of October 21, that would demonstrate that they had no interest in determining the truth about the Birdinground letter or its origins. By signing the October 21 letter Kleen's principals joined Allen McCloskey in an effort to cover up Kleen's responsibility for the Birdinground letter and to mislead the Commission.

Kleen's president and majority shareholder Robert Olson testified that he had not seen the Birdinground letter until he reviewed it in the hearing room on October 26, 2004 -- eleven days after he learned of the fraudulent character of the letter from Becky Johnston and five days after he signed a letter to the Commission representing that Kleen's principals had "made every effort to rectify this issue" and "never had any reason" to doubt the validity of the Birdinground letter. Notwithstanding the self-serving statements in the October 21 letter, it is apparent that Kleen's shareholders made no effort whatsoever to determine the facts behind the Birdinground letter or to rectify the attempted fraud on the Commission once the fraud was exposed. All of the efforts of Kleen's principals following exposure of the fraudulent nature of the Birdinground letter were aimed at covering up Kleen's responsibility for the fraud.

Robert Olson's testimony on October 26 makes clear that the fraudulent character of the Birdinground letter should have been apparent to him on its face. Olson testified that Kleen had never performed any services for any tribal clinic or tribal healthcare facility. Tr. 1915:18-23 (Olson). He testified that Kleen had no prior business relationship with the National Indian Health Board. Tr. 1880:12-15 (Olson). Olson stated that he had never heard of the National Indian Health Board or Lancing Birdinground prior to the flap about the Birdinground letter. Tr. 1880:9-17 (Olson). Accordingly, Olson clearly knew or should have known that the claim in the Birdinground letter to an eleven-year business relationship with Kleen was false.

Olson testified that he had been aware of the Birdinground letter before it was submitted to the Commission, Tr. 1888:5-8; 1891:10-1892:11 (Olson),⁴ but he was extremely evasive as to the

⁴ See also, Exh. 22 ("Although Mr. Olson was aware of the submission of this document the other partners were not aware of its existence until after we were contacted by Becky Johnston . . .").

2 extent of his knowledge prior to the exposure of the fraudulent character of the letter, contradicting
3 himself several times. Tr. 1888:5-1899:1; compare, e.g., Tr. 1891:16-1892:11 with Tr. 1895:18-19
4 and Tr. 1898:11-23 (Olson).

5 Olson's testimony on October 26 makes clear that he took no action to investigate the
6 Birdinground letter after it was exposed as fraudulent or to advise the Commission of the fraud.
7 Olson testified that he learned that the Birdinground letter was fraudulent as a result of a telephone
8 call made by Becky Johnston of the American Indian Health Commission for the State of Washington
9 on October 15. Exh. 22; Tr. 1882:16-1883:3; 1888:21-24; 1901:16-1902:22 (Olson). He testified
10 that he transferred Ms. Johnston's telephone call to Allen McCloskey and that McCloskey
11 immediately accepted Ms. Johnston's assertion that the Birdinground letter was not bona fide.
12 Tr. 1948:21-1949:25 (Olson). Olson testified that he personally took no action to determine the
13 origin of the Birdinground letter. Tr. 1903:6-15 (Olson). The only action he took after learning of
14 the fraudulent character of the Birdinground letter was to ask Allen McCloskey to look into the
15 matter. Tr. 1913:17-21; 1882:10-1883:19; 1903:6-15 (Olson). He testified that the only efforts that
16 McCloskey made to determine the origin of the Birdinground letter were telephone calls McCloskey
17 made to the telephone number shown on the Birdinground letter and voice messages left by
18 Mr. McCloskey at that telephone number, which calls were never returned. Tr. 1883:14-19; 1902:17-
19 1903:5; 1914:14-1915:3; 1926:5-10; 1929:10-19; 1935:5-15 (Olson). As previously noted, Olson
20 testified that he had not seen or read the Birdinground letter until the morning of October 26, 2004,
21 immediately prior to the start of the hearing at which he was expected to testify on that subject.
22 Tr. 1879:12-1880:2; 1885:12-14 (Olson). Clearly, Robert Olson had no interest in determining the
23 origin of the Birdinground letter, in advising the Commission of the fraud or in taking any action to
24 correct or otherwise address the fraud committed on his company's behalf. Although Olson knew
25 that Allen McCloskey was the person most likely responsible for the fraud, Olson left the
26 responsibility within Kleen for addressing the Birdinground letter entirely to Allen McCloskey.

On October 29, 2004 at 5:08 p.m., Kleen's counsel, Greg Haffner, advised Judge Rendahl and
2 counsel for the other parties that McCloskey had not reported on the results of the heart stress test he
3 was supposedly scheduled to have that day and that McCloskey had not returned Haffner's telephone
4 calls. The full text of the October 29 e-mail message was read into the record by Mr. Haffner at the
5 status conference held November 4, 2004 and appears at Tr. 1997:9-1998:18 (Haffner). Haffner's
6 e-mail reported that Robert Olson had spoken with McCloskey "earlier this week" and it had been
7 agreed that McCloskey should resign. Haffner's October 29 e-mail expressed concern that
8 McCloskey was avoiding both him and the people at Kleen and might seek to avoid further testimony
9 in this proceeding. Haffner also reported that he had spoken by phone with Lansing Birdinground
10 and that he (Haffner) had no reason to doubt the testimony provided in Mr. Birdinground's
11 declaration. Haffner noted further that Mr. Birdinground's testimony "clearly contradicts
12 Mr. McCloskey's testimony." Haffner acknowledged the obvious implication of McCloskey's
13 behavior, stating that he was "appalled at what appears to have taken place" and that "neither I nor
14 anyone in my firm had any knowledge of any misrepresentations that may have been made by
15 Mr. McCloskey."

16 On November 1, 2004, Judge Rendahl issued a notice scheduling a status conference on
17 November 4 "to address whether and how to proceed with the Kleen Environmental Technologies,
18 Inc., application and how to address the testimony and exhibits sponsored by Mr. McCloskey." At
19 the status conference on November 4, counsel for Kleen, reported that neither he nor Robert Olson
20 had been able to reach McCloskey. Haffner reported, "It does appear as though he [McCloskey] has
21 left his residence here in the state and moved back to California. Mr. Olson has been in contact with
22 some of his family members and they believe that he is in -- I think it's Trinidad, California."
23 Tr. 1998:23-1999:4 (Haffner).

24 As the Commission concluded in dismissing Kleen's application,

25 The testimony and evidence developed in the hearings, in particular the
26 October 26, 2004, hearing, as well as the facts surrounding the events

2 and the actions of Mr. McCloskey indicate that Mr. McCloskey
3 prepared or was involved in the preparation and dissemination of the
4 Birdinground letter, attempted to cover up his involvement with the
5 letter, and gave false testimony before the Commission concerning the
6 letter and other matters. Although the applicant insists that the
7 fraudulent document, misconduct of Mr. McCloskey and his apparent
8 perjury were a result of the actions of Mr. McCloskey and not the
9 applicant itself, the applicant must bear the responsibility of someone it
10 hired to conduct its affairs.

11 Initial Order Dismissing Application, etc., Order No. 07, p. 19.

12 2. ***Kleen's Entire Case Was Based on False, Misleading and Deceptive Testimony***

13 Kleen's entire case was based on false, misleading and deceptive testimony, including the
14 following:

15 (1) False Testimony Concerning Availability of Hydroclave Disposal Alternative.

16 In his prefiled testimony, Allen McCloskey stated that Kleen "will also be offering an additional
17 method of disposal not currently offered by existing providers, i.e., Hydroclave." Exh. 25-T at 3:3-4
18 (McCloskey). This statement was false. Kleen neither intended nor had the ability to offer a
19 "hydroclave" disposal alternative. Later in the same prefiled testimony, McCloskey stated,
20 "Biomedical waste generally produced by hospitals, health-care facilities, doctors, and dentists in the
21 course of delivering patient care will likely be transported to Covanta Energy waste-to-energy facility
22 located in Brooks, Oregon . . ." Id. at 7:5-7 (McCloskey). On cross-examination, McCloskey
23 admitted that all of the waste Kleen collected would be disposed of at the Covanta/Marion County
24 incinerator in Brooks, Oregon. Tr. 322:2-8, 330:22-24 (McCloskey). "As I said, the proformas are
25 based on taking waste to Covanta, and that's where waste would be taken at all times whenever
26 possible." Tr. 330:22-24 (McCloskey). During the hearing, Kleen submitted a revised tariff for its
27 proposed service eliminating all containers except a single cardboard box because of Covanta's
28 inability to handle reusable tubs. Tr. 367:11-24, 388:3-7 (McCloskey).⁵ McCloskey's testimony that

⁵ Although acknowledging that Canadian permits would be required to transport Washington-origin waste into Canada for processing at the hydroclave facility, McCloskey had never investigated the requirements of the Canadian regulations. Tr. 327:9-328:4 (McCloskey).

1 Kleen intended to offer “an additional method of disposal called hydroclave”, Exh. 25-T at 2:10-11,
2 was false and was known to be false at the time it was offered.

3 (2) False Testimony Concerning the Cost to Process Medical Waste at the HSS
4 Hydroclave Facility. When asked on September 27, 2004 whether he knew what it would cost to
5 process waste at the HSS hydroclave facility, Allen McCloskey replied, “I don’t know. . . . [W]e
6 haven’t negotiated a set dollar price to take medical waste there.” Tr. 322:23-323:4 (McCloskey).
7 Yet, on October 6, on rebuttal, Kleen’s counsel elicited testimony from McCloskey that directly
8 contradicted his testimony of September 27:

9 Q. . . . Is it your understanding that the cost of disposal quoted to
10 you by the hydroclave facility people is three [times] the cost of
11 incineration at Covanta?

12 A. . . . We had negotiated a rate not only with HSS, but with Iatron
13 Corporation, which is the parent company of this technology.

14 Q. What was the rate that you negotiated?

15 A. As I recall, based on the conversations I had with those people
16 and the agreement that we had come to, it was about \$240 per ton, U.S.
17 dollars.

18 Tr. 1053:12-25 (McCloskey). See also, Tr. 1070:20-1074:13 (McCloskey). Based on what we now
19 know about Mr. McCloskey, it is apparent that McCloskey’s October 6 about an “agreement” with
20 HSS for processing at \$240 per ton was a fabrication.

21 (3) False Testimony Concerning Availability of Reusable Tubs. Kleen filed a
22 proposed tariff as an attachment to the prefiled testimony of Kenneth Lee on August 13, 2004, see
23 Exh. 45, that purported to offer a service materially different from the service Kleen actually intended
24 to provide.⁶ Thus, the tariff filed on August 13 with Mr. Lee’s prefiled testimony indicated that
25 Kleen would make several sizes of reusable plastic tubs available to its customers. However, during

26 ⁶ Kenneth Lee’s prefiled testimony identifies Exh. 45 as “Proposed tariff for the proposed Bio-Hazardous (biomedical)
waste program.” However, the Kleen tariff was sponsored at the hearing by Allen McCloskey and McCloskey testified
that he prepared it. Tr. 295:25-296:9 (McCloskey).