

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

WILLIAM STUTH, SR., and
AQUA TEST, INC.,

Petitioners,

vs.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Respondent.

)
)
)
)
)
)
)
)
)
)
)
)

CAUSE NO. 05-2-00782-3

REVERSAL OF SUMMARY FINDING

COPY

RULING OF THE COURT

BE IT REMEMBERED that on SEPTEMBER 2, 2005, the
above-entitled matter came on for hearing before the
HONORABLE RICHARD D. HICKS, Judge of Thurston County Superior
Court.

Reported by: Nancy L. Bauer, RPR, CCR#2099
Official Court Reporter
2000 Lakeridge Drive SW, Bldg No. 2
Olympia, WA 98502
(360) 709-3212
bauern@co.thurston.wa.us

APPEARANCES

FOR THE PETITIONER:

RHYS A. STERLING
ATTORNEY AT LAW
PO BOX 218
HOBART, WASHINGTON 98025-0218
(425) 391-6650
EMAIL: RhysHobart@aol.com

FOR THE RESPONDENT:

CHRISTOPHER G. SWANSON
ASSISTANT ATTORNEY GENERAL
PO BOX 40128
OLYMPIA, WA 98504-0128
(360) 664-1220
EMAIL: chriss3@atg.wa.gov

1 SEPTEMBER 2, 2005, in Olympia, Washington
2 Before the Honorable RICHARD D. HICKS, Presiding
3 Representing the Petitioner, RHYS A. STERLING
4 Representing the Respondent, CHRISTOPHER G. SWANSON
5 NANCY L. BAUER, Official Court Reporter

6 *****

7 RULING

8
9 THE COURT: I'll often make some kind of
10 notes if I have the time, and I did have time to make
11 notes in this case because everybody filed their briefs on
12 time. Sometimes I abandon the notes and just rule from
13 memory, and it's tempting to do that on a Friday afternoon
14 like we have here. But because I think this case is of
15 some importance, I want to demonstrate to any later
16 reviewer that I have considered all of the arguments that
17 were presented by both sides. Though the court reporter
18 may suffer, I'm going to do something I don't always do,
19 and that is in part read from my notes here.

20 On March 15, 2005, Stuth filed a petition with the
21 WUTC requesting hearing for the purpose of declaring
22 and/or designating Aqua Test, Inc., a public service
23 company subject to regulation.

24 Petitioner provides large on-site sewage systems
25 often used in residential developments and is regulated by

1 the Department of Health, which, it appears to this court,
2 supports this application of the petitioner being
3 designated a "public entity." The record before me
4 includes a letter from the Department of Health
5 representative to the WUTC of March 9, 2005, supporting
6 the petitioner being authorized as a public service
7 corporation, signed by Richard Benson from the Department
8 of Health and stating that there is a public need here.

9 Petitioner wants to be designated a "public entity."
10 Petitioner cites RCW 80.01.040(3) and argues their being
11 such an entity is a question of fact pursuant to
12 RCW 80.04.015; that the general test is found in *Inland*
13 *Rural Empire Electrification v. Department of Public*
14 *Service*, 199 Wash 527, 537 (1939), and other cases.

15 On April 8, 2005, the WUTC notified petitioner that
16 it will not enter such a declaratory order or order that a
17 fact finding hearing be held since they hold that they
18 have no jurisdiction over such companies without a
19 specific legislative declaration citing *Cole v. WUTC*, 79
20 Wn.2d 302, 306 (1971) and they distinguish the *Inland*
21 *Empire* case by saying that under Title 80, electricity is
22 specifically mentioned as being subject to regulation,
23 whereas there is no mention in Title 80 of regulation of
24 sewer systems.

25 On April 21, 2005, petitioner filed a petition in

1 this court couching it either as an appeal under the APA,
2 or, in the alternative, an application for a writ of
3 certiorari.

4 On May 11, 2005, WUTC filed a response claiming that
5 this is indeed an APA appeal but not a proper action for a
6 writ of certiorari, and further claims as an affirmative
7 defense that whether to convert a declaratory order into
8 an adjudicative proceeding is within the sole discretion
9 of the WUTC.

10 The parties filed cross-motions for summary judgment,
11 although if this is an APA appeal, there are separate and
12 distinct local rules that apply so that a summary judgment
13 wouldn't be appropriate; nevertheless, the issues are
14 joined for determination today.

15 Here's what I understand the parties are arguing:
16 The petitioner argues that they provide management and
17 operation services to large on-site sewage systems serving
18 the public, and this service is needed where there is an
19 inability to be reasonably connected to a public sewer
20 system; however, their services can only be offered where
21 there is a guaranteed backup provided by a city or a sewer
22 district in accordance with Department of Health rules.
23 The State Department of Health has identified this as a
24 growing problem since cities and special districts are
25 unable to accommodate the rapidly growing need for

1 required backup.

2 The State Department of Health has concluded that a
3 WUTC-regulated public service company would, in their
4 opinion, be an acceptable public entity to undertake this
5 State Department of Health requirement. Petitioners then,
6 in part at the urging of the State Department of Health,
7 have asked the WUTC to make a formal determination that,
8 pursuant to RCW 80.04.015, that they are indeed such a
9 company as set out in WAC 480-07-930 procedure. But WUTC
10 has declined a fact finding hearing as a "matter of law."

11 Petitioners argue first that statutory construction
12 is a question of law and reviewed *de novo* and no deference
13 is due an agency when the matter under review is general
14 law and therefore not within the agency's area of special
15 expertise but deals rather with their scope of authority.

16 Second, that RCW 80.01.040(3) has broad, inclusive
17 language such as "including, but not limited to," and
18 lists such things as water companies. Normally, they say,
19 this kind of language means that there are other items
20 that are not specifically listed but that are also
21 included, and this is underscored, they say, by it being
22 followed or by following this inclusive language with the
23 additional phrase "but not limited."

24 Even more, they point out, that at the same time RCW
25 80.04.010 defines the term "service" in its broadest and

1 most inclusive sense. They say the legislature has
2 expressly stated in RCW 80.04.015 that whether any
3 business is subject to this kind of regulation "shall" be
4 a question of fact to be determined by the WUTC.

5 Third, they argued, a long-standing Supreme Court
6 case, *Inland Empire*, mentioned above, at page 537, has set
7 out the test to be whether the corporation holds itself
8 out expressly or impliedly to supply its service to the
9 public as a class or whether to only particular
10 individuals of the corporation selection, and that this
11 determination is a question of fact.

12 Fourth, they argue that *Cole v. WUTC*, 79 Wn.2d 302
13 (1971) doesn't reach our issue and only dealt with WUTC's
14 inability to regulate companies not subject to their
15 jurisdiction when such companies were in competition with
16 companies that were subject to their jurisdiction.

17 Fifth, that the enumeration of public service
18 companies in Title 80 is exemplary, not exclusive, and
19 includes language such as "whether or not any person or
20 corporation is conducting business subject to regulation."

21 Sixth, they say that WUTC's shortcut bypassing the
22 fact finding hearing may itself evidence a prejudgment of
23 the question at issue, which would be evidence that it
24 was, in fact, arbitrary.

25 Finally, seventh, they point out that other states

1 with similar laws, in particular Tennessee, do regulate
2 these kind of sewage systems as a public utility.

3 Now, the Washington Utilities and Transportation
4 Commission, which I've been referring to as WUTC, responds
5 that review is governed by RCW 34.05.570(c) and (d).
6 First, WUTC's counsel argues it that their own rhetoric of
7 "could not possibly fall under the commission's
8 regulation" is simply rhetoric describing an opinion
9 regarding the *ratio decidendi* of prior Supreme Court
10 opinions and not a factual finding.

11 Second, they argue, although RCW 80.01.040(3) gives
12 broad authority by saying "including but not limited to,"
13 WUTC is still limited to those activities provided for in
14 the "public service laws."

15 Third, they argue that this issue was settled in
16 *Cole*, mentioned above, at pages 305 to 306, where there
17 was no power to regulate competition involving
18 nonregulated companies who were not public service
19 companies, arguing that an agency's authority must be
20 strictly construed.

21 Fourth, they point out in *Telephone Association v.*
22 *Ratepayers Association*, 75 Wn. App. 356 (1994), that the
23 court affirmed *Cole*. There the court stated at page 368
24 that no section of Title 80 permitted the WUTC to set up a
25 fund which all local exchange companies must contribute to

1 but from which not all could draw.

2 Fifth, they argue petitioner's interpretation might
3 extend to any business commodity such as gas, although
4 I'll add myself that water is just as much a commodity as
5 is gas.

6 Sixth, they say agency authority must arise from
7 specific legislative directive, and if WUTC decided to
8 regulate large on-site sewer systems, they would have to
9 promulgate rules with no legislative guidance as to the
10 extent of their authority and may even duplicate
11 regulation by other state agencies.

12 Seventh, they argue the WUTC may not institute a
13 special proceeding until it has formed a preliminary
14 belief that it has jurisdiction, they say, RCW 80.04.015
15 provides, "whenever the Commission believes," and they
16 emphasize the word "believes." There is no authority
17 cited for this position that personal belief alone rather
18 than findings of fact and legal principles can be, on its
19 own, a determinative factor, although I will say in oral
20 argument in answer to the Court's questions, counsel for
21 the Commission pointed out that all agencies at some point
22 have to operate on the belief or perception of what they
23 see in front of them.

24 Eighth, they say that RCW 80.04.015 and RCW 34.05.240
25 grant the WUTC discretion to choose to act or not so that

1 even if the WUTC "believed" it had jurisdiction, it still
2 "may or may not" choose to exercise it. They say it can
3 choose not to act if it believes the issues raised by
4 petitioners is not controversial under RCW 34.05.240(1)(a)
5 and (b). But I would only add here that the fact that the
6 Department of Health, another large state agency, is
7 supporting the petitioners in their application, it seems
8 to me on its face makes this controversial when two state
9 agencies are taking opposite positions on the same subject
10 matter.

11 Ninth, they argue that neither Title 34 nor Title 80
12 require the WUTC to conduct a proceeding in response to a
13 petition to determine its jurisdiction. And they say
14 *WEA v. PDC*, 150 Wn.2d 612, 622 (2003) holds an agency's
15 expression of an "opinion" in the form of guidelines as
16 opposed to rules or declaratory order is not an agency
17 action for court review.

18 Finally, tenth, the WUTC argues that there are no
19 liberty or property interest at issue, and therefore there
20 can be no violation of due process similar to the
21 situation in *WITA v. WUTC*, 149 Wn.2d 17, 24-26 (2003),
22 where no property interest was said to exist in a
23 determination that another provider could enter the area
24 where current providers were said to have an exclusive
25 service area.

1 Finally, the petitioner's reply to this response is,
2 first, WUTC's assertion that they have no authority to
3 regulate large on-site sewer systems misses the point that
4 regulation is currently under the Department of Health but
5 that the Department of Health supports this petition;
6 rather, WUTC is being asked to determine is this a public
7 service company or not, that can qualify, if it is, for
8 public safety backup the same way a municipality can or a
9 special district can now.

10 Second, they argue, *Cole* didn't settle WUTC's
11 jurisdiction in a way being asserted by the Commission
12 since Chapter 80.04 RCW's interpretation of its broad
13 scope is a question of fact and has to be determined on a
14 case-by-case basis, with the test explained in *Inland*
15 *Empire* at page 537.

16 Third, they say, as well explained in *Clark v. Olson*,
17 177 Wash. 237, 246 (1934), any business may be
18 characterized as a "public service" but whether it is
19 subject to regulation as such depends on the *Inland Empire*
20 test just stated.

21 Fourth, they say the WUTC cannot avoid its mandatory
22 duties under the guise of merely exercising discretion to
23 form a "belief" or "choosing whether to act," and that
24 jurisdiction is a *de novo* question for this or a higher
25 court.

1 And finally, fifth, even if discretion is involved,
2 they say, it must not be exercised contrary to a statutory
3 mandate, citing RCW 34.05.570(4)(b).

4 Now that concludes my notes, which is merely a
5 restatement of the written briefs and oral argument. And
6 I spent considerable time reflecting on this, and I am
7 convinced rightly or wrongly, I suppose, that the
8 petitioner is correct; that not only because of what's
9 taking place in Tennessee but that they're being urged by
10 the Department of Health to provide a service that is
11 ordinarily provided to the public by a municipality or
12 special government district; that this is the kind of
13 company that may qualify as a public service company such
14 that it should not be summarily dismissed as a matter of
15 law that no such qualification could ever be possible.
16 One could even argue this is an extension of the
17 regulation of water, though I don't think this case is
18 determined on that basis.

19 So I would reverse the summary finding by the
20 Commission and remand this matter back to the Commission
21 to hold the statutory mandated fact finding hearing.

22 I have no opinion as to how that fact finding hearing
23 should resolve itself. That would have to be determined
24 by the Commission based on the facts it finds and the law
25 it applies. But I do rule that the petitioners in this

1 case have set out a prima facie case that requires the
2 Commission to hold a fact finding hearing and make a
3 determination as to whether or not this kind of company
4 can be a public utility.

5 I'll say again that we live in a dynamic, growing
6 society and culture and that this is not so much "filling
7 the gap," which I think counsel for the WUTC is correct in
8 saying the agency shouldn't be doing; rather, this is
9 addressing a new bud on a growing tree.

10 There were times when toilets were outhouses. In
11 fact, I'm old enough to remember, or certain members of my
12 family used an outhouse and didn't have indoor plumbing.
13 But the world is changing. There was a time when
14 telephone wires had to be strung, and for a while all
15 they'd take is Morse code, and then all of a sudden they
16 could be voice by wire. Now wireless communication
17 through cell phones is overtaking the world. There are
18 many, many, many examples I could give about how the world
19 changes and is dynamic.

20 And I think that's exactly why the legislature has
21 this all-inclusive language, because they were wise enough
22 to see they couldn't foresee every possible service that
23 may come to be a public service. And the Supreme Court
24 was wise enough to give the test in the *Inland Empire* case
25 that says it isn't what you call yourself, it's what, in

1 fact, you do that must be determined as to whether or not
2 you qualify and should be regulated by the government.

3 I think the Department of Health sees this. That's
4 why they're urging action. I think this petitioner is
5 willing to step up to the plate, and there may be others,
6 if they're successful in this arena. And I think the
7 utilities and Transportation Commission, despite whatever
8 meager funding they have to do these kinds of things, need
9 to hold a fact finding hearing, and if they do determine
10 that this is the kind of thing that can be a public
11 service company the way it's been determined in Tennessee,
12 they will have to promulgate rules and regulations. But
13 there is guidance from the legislature through either the
14 Department of Health and the Department of Ecology, the
15 same way there is now with water systems. So I don't see
16 that it is a requirement that Title 80 mentioned sewage
17 systems. To me that's contrary to what both the
18 legislature and the Supreme Court have decided on prior
19 occasions.

20 So if counsel can agree on an order of remand, I will
21 negotiate it or sign it. If you need time, you can
22 present it, if you both sign off on it, ex parte,
23 otherwise you can note it for presentation.

24 MR. STERLING: Thank you, Your Honor.

25 THE COURT: I also want to thank both counsel

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

not only for the quality of their work but for their professionalism in which they were courteous to each other, courteous to the Court and the staff, and I appreciate that. Thank you.

(THE PROCEEDINGS CONCLUDED.)