BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of WILLIAM L. STUTH, AND AQUA TEST, INC., For a Declaratory Order Designating a Public Service Company	DOCKET NO. A-050528 COMMISSION STAFF'S ADMINISTRATIVE STATEMENT OF FACT AND LAW

I. PROCEDURAL HISTORY

1 Petitioners petitioned the Commission to enter an order under RCW 34.05.240 and WAC 480-07-930 declaring that a manager of a large on-site sewage systems (LOSS), as that term is defined by Department of Health WAC 246-272B-01001; WAC 246-272B-03001(5)(a), is subject to regulation by the Commission. The Commission declined to enter a declaratory order stating that it believed it lacked jurisdiction to regulate such companies as a matter of law. Petitioners appealed the Commission's action to the Thurston County Superior Court. The court did not decide whether or not the Commission had jurisdiction over LOSS, but ordered the Commission to hold a hearing. Based on the court's decision the Commission

called for Statements of Fact and Law addressing the Petition. Commission Staff now files this Administrative Statement of Fact and Law.

II. STATEMENT OF THE ISSUE

2 Does the Commission have jurisdiction over managers of LOSS?

III. STATEMENT OF LAW

A. The Commission does not have authority to Regulate LOSS managers.

3 Under RCW 80.01.040(3) the Commission has authority:

> to regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities, *including, but not limited to,* electrical companies, gas companies, irrigation companies, telecommunication companies, and water companies. [Emphasis added]

Under RCW 80.01.040(3) the Commission has broad authority to regulate public service companies.[1] However, the "including, but not limited to language" italicized above does not provide the Commission unbridled discretion to regulate any entity "in the business of supplying any utility service or commodity to the public for compensation and related activities."[2] Instead, a plain reading of the authority in RCW 80.01.040(3) makes it clear that the Commission's authority is limited to those activities provided for in the public service laws. Since the public

[1] RCW 80.04.010 defines "'public service company' as including "every gas company, electric company, telecommunications company, and water company."

[2] Interpreted correctly, this language means that the list of specifically enumerated activities in RCW 80.01.040(3) is not necessarily exhaustive.

service laws do not provide the Commission authority to regulate managers of LOSS, the Commission does not have jurisdiction over such companies.

4 In fact, RCW 80.01.040(3) was interpreted in *Cole v. Wn. Util. & Transp. Comm'n.*, 79 Wn.2d 302, 305 (1971) to limit the Commission's jurisdiction to those activities provided for in the public service laws.

5 In *Cole*, the Commission declined to permit a fuel oil dealer's institute to intervene in a Commission proceeding. Following a challenge by the institute, the court unambiguously interpreted the scope of the commission's authority. The court said "[a]lthough RCW 80.01.040(3) demands regulation in the public interest, that mandate is qualified by the following clause 'as provided by the public service laws . . .' Appellants fail to point out any section of title 80 which suggests that nonregulated fuel oil dealers are within the jurisdictional concern of the commission." *Cole, 79* Wn.2d at 306.

6 The court went on to say "[a]n administrative agency must be strictly limited in its operations to those powers granted by the legislature" and concluded "[s]ince the Commission had neither express nor implied authority to examine the institute's contentions, its denial of the institute's petition to intervene was both proper and reasonable." *Id.* Thus, RCW 80.01.040(3) does not provide authority for

the Commission to regulate unless the Commission is given authority in the public service laws.

7 In *Telephone Ass'n. v. Ratepayers Ass'n.*, 75 Wn.App. 356 (1994), the Court of Appeals properly followed the reasoning of *Cole* case with the same result. In that case, a Commission rule creating a special fund was challenged as not being authorized by law. The trial court invalidated the rule. The Washington Independent Telephone Association (WITA) appealed, arguing that RCW 80.01.040(3) permitted the Commission to determine the rule was in the public interest and "fill in gaps to effect the intent of the Legislature." *Telephone Ass'n*, 75 Wn.App. at 368. Telecommunications Ratepayers Association for Cost-Based and Equitable Rates (TRACER) defended the trial court's decision.

8 The Court of Appeals rejected WITA's argument and concluded that the court in *Cole* had already decided the issue. Following the *Cole* court's reasoning, the court in *Telephone Ass'n* reasoned "[h]ere, WITA has not cited any section of Title 80 of the Revised Code of Washington that permits the Commission to set up a fund[.]" The court concluded that "TRACER does not contest that the [rule] may be in the public interest, but it correctly observes that the [rule] is not authorized by the public service laws. As the court in *Cole* stated, '[a]n administrative agency must be strictly limited in its operation to those powers granted by the legislature.'"

75 Wn.App. at 368. Thus, the law is clear that the Commission may only regulate those activities that are provided for in the public service laws.

9 Petitioners have previously argued, citing *Inland Empire v. Department of Public Service,* 199 Wn. 527 (1939), that the test of Commission's jurisdiction is whether Stuth and Aquatest hold themselves out as public service corporations. However, in the *Inland* case the court engaged in a two step process: first, whether the entity is regulated under the public service laws (whether the entity is an electric utility within the jurisdiction of the commission), and second, whether the entity is a public service corporation. *Inland Empire,* 199 Wn.2d at 534-540. A similar analysis was conducted by the court *Clark v. Olson,* 177 Wn. 237 (1934), with regard to a purveyor of water. In two recent examples of application of the *Inland* test, the courts also looked first to whether the entity fell within the public services laws before turning to the question of whether or an entity held itself out as a public service corporation. *See West Valley Land Company v. Nob Hill Water Association,* 107 Wn.2d 359 (1986), *UICAN v. WUTC,* 106 Wn.App. 605 (2001). Those cases analyzed purveyors of water and telecommunication services respectively.

10 In the case of managers of LOSS, there is no authority in the public service laws for the Commission to assert jurisdiction. Thus, the issue of whether the companies are holding themselves out as public service corporations is moot.

B. Even if RCW 80.01.040(3) did not limit the Commission's authority, the Commission's authority does not provide sufficient guidance.

11 If the Commission jurisdiction extended to any business "supplying any utility service or commodity to the public for compensation," the Commission may, very well, have authority to regulate all kinds of businesses, including agricultural products, gasoline, oil, coal, wood, etc. Virtually any business that sells commodities to the public or could be characterized as a utility would be fair game.

12 Petitioners' interpretation is also inconsistent with legal principles dictating the extent of agency authority to regulate absent specific legislative directive. *See Green River Cmty. Coll. v. Higher Educ. Pers. Bd.*, 95 Wash.2d 108, 112 (1980). (Administrative agencies do not have the power to promulgate rules that would amend or change legislative enactment, but agency rules may be used to fill in the gaps in legislation if such rules are necessary to the effectuation of a general statutory scheme). It can hardly be said that Commission authority to pick and choose which business and industries it will regulate is simply "filling in the gaps" left by the Legislature.

13 Similarly, once the Commission decides to regulate a business or industry, it would be faced with promulgating agency rules with almost no guidance as to the extent of its authority. *State v. Simmons*, 152 Wn.2d 450, 455 (2004) (In order to

constitutionally delegate authority to an administrative agency, the legislature must provide standards to indicate what is to be done and procedural safeguards must exist to control arbitrary administrative action and abuse of discretionary power). The Commission, in fact, would be left with the unbridled authority to regulate "the rates, services, facilities, and practices" of these business. Read broadly, Commission authority could be virtually unlimited.[3]

C. The Legislature has already provided authority to regulate LOSS to another agency.

14 The Legislature has, in fact, mandated that another agency of the State of Washington regulate LOSS. RCW 43.20.050 provides in pertinent part:

> (2) In order to protect public health, the state board of health shall:
> . . .
> (b) Adopt rules and standards for prevention, control, and abatement of health hazards and nuisances related to the disposal of wastes, solid and liquid, including but not limited to sewage, garbage, refuse, and other environmental contaminants; adopt standards and procedures governing the design, construction, and operation of sewage, garbage, refuse and other solid waste collection, treatment, and disposal facilities.

The Commission has not been provided concurrent authority over LOSS by the Legislature as it has, for example, with regard to water systems. *See e.g. RCW 80.28.030.*

[3] This is to be distinguished from the traditional utilities, such as telephone, water, electric, and gas companies for which the Legislature has provided the Commission specific statutory guidance on the extent of its authority in Title 80 RCW (and Title 81 relating to transportation).

That being the case, it appears that the reason that the Petition for a Declaratory order in this case was filed was the need to comply with Department of Health regulation and concerns related to public health. Petition, paragraphs 2.1 through 2.7. These issues are best handled, consistent with legislative delegation, by the Department of Health.

D. The Tennessee model for regulation of LOSS is not helpful in interpreting the scope of the Commission's authority because the applicable Tennessee statutes provide broader authority to regulate.

15 Petitioners have suggested that the Commission look to Tennessee's regulation of LOSS as a model. However, Tennessee regulatory authority is different from that of the State of Washington because Tennessee's scope of authority is broader. *See* Tennessee Attorney General Opinion 98-149 (1998), page 5-6 (attached as Exhibit A), Tennessee Code (T.C.) 65-4-101, 65-4-104, 65-4-105 (attached as Exhibit B). More precisely, Tennessee's authority over public utilities is not limited by RCW 80.01.040(3), as interpreted by the Washington state courts, which expressly states that the Commission must have authority under the public service laws to regulate. Therefore, an analysis of Tennessee statutory authority is only helpful in that it points out the limited authority of the WUTC as compared to

its Tennessee equivalent. In summary, it is not the law of Tennessee that dictates the Commission's authority, it is the law of the State of Washington.

IV. STATEMENT OF POLICY AND FACT

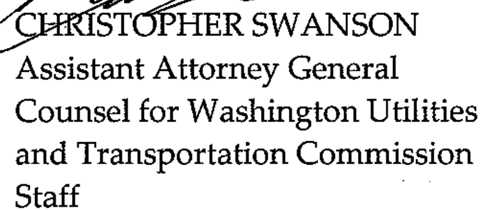
16 The Department of Health has expressed it policy opinion that it supports the concept of regulating LOSS management, but has clarified that it does not take a position on whether or not the Commission has authority over LOSS. Letter of Department of Health dated November 10, 2005, attached as Exhibit C. The Department of Health properly determined that it was inappropriate for it to interpret another agency's statutory authority. However, it continues to be unclear why the Department of Health would make the policy choice that regulation is important, but fail to use its own regulatory authority to remedy the issues it has identified. It is clear that the Department of Health's decision not to regulate under its own authority does not provide a policy and, more importantly, legal justification for the Commission to regulate. After all, it's the Legislature's job to make policy or, in the alternative, properly delegate the authority for state agencies to make policy. It inappropriate for an agency to undertake a regulatory program merely because another agency chooses not to regulate, despite its clear authority. It is, therefore, proper for the Commission not to undertake regulation of LOSS managers.

V. CONCLUSION

17 The law and facts are clear. The Commission does not have authority of mangers of LOSS.

DATED this 16th day of November, 2005.

ROB MCKENNA
Attorney General



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