

0001

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 In the Matter of the Petition of)
) DOCKET NO. A-050528
 4 WILLIAM L. STUTH and) Volume I
 AQUA TEST, INC.,) Pages 1 - 19
 5)
 For a Declaratory Order)
 6 -----

7
 8 A prehearing conference in the above matter
 9 was held on November 21, 2005, at 10:05 a.m., at 1300
 10 South Evergreen Park Drive Southwest, Olympia,
 11 Washington, before Administrative Law Judge C. ROBERT
 12 WALLIS.

13
 14 The parties were present as follows:
 15 AQUA TEST, INC., by RHYS A. STERLING,
 Attorney at Law, 1495 Northwest Gilman Boulevard,
 16 Issaquah, Washington 98027; telephone, (425) 391-6650.

17 WASHINGTON UTILITIES AND TRANSPORTATION
 COMMISSION, by CHRISTOPHER G. SWANSON, Assistant
 18 Attorney General, 1400 South Evergreen Park Drive
 Southwest, Post Office Box 40128, Olympia, Washington
 19 98504; telephone, (360) 664-1220.

20
 21
 22
 23
 24 Kathryn T. Wilson, CCR
 25 Court Reporter

0002

1 P R O C E E D I N G S

2 JUDGE WALLIS: Let's be on the record,
3 please. This conference will please come to order.
4 This is a prehearing conference in the matter of
5 Commission Docket No. A-050528, which is a petition of
6 William L. Stuth and Aqua Test, Inc., for a declaratory
7 order. This conference is being held in Olympia,
8 Washington, on November 21 of the year 2005 before
9 Administrative Law Judge C. Robert Wallis. The matter
10 at issue today is a request for a declaratory order as
11 to the Commission's authority to regulate large on-site
12 sewage systems.

13 I would like to begin with appearances and
14 would like counsel to identify themselves, your client,
15 and give your contact information for the record so we
16 have it in the transcript. Mr. Sterling, could we
17 begin with you, please?

18 MR. STERLING: Thank you, Your Honor. My
19 name is Rhys Sterling. I'm the attorney representing
20 William Stuth and Aqua Test, Inc., and the mailing
21 address is PO Box 218, Hobart, Washington, 98025, and
22 I've also filed a card with the court reporter for my
23 telephone number and fax number as well.

24 JUDGE WALLIS: Could you repeat that
25 information on the record, please?

0003

1 MR. STERLING: Office phone number is (425)
2 391-6650, and my fax number is (425) 391-6689.

3 JUDGE WALLIS: Thank you. For Commission
4 staff?

5 MR. SWANSON: Thank you. Chris Swanson,
6 assistant attorney general, on behalf of Commission
7 staff; address, 1400 South Evergreen Park Drive
8 Southwest, PO Box 40128, Olympia, Washington,
9 98504-0128; telephone, (360) 664-1220; fax number,
10 (360) 586-5522; e-mail, cswanson@wutc.wa.gov, and with
11 me is my client, Gene Eckhardt. He is, I believe,
12 assistant director for water and transportation with
13 Commission staff.

14 JUDGE WALLIS: Let me ask if there is any
15 person in the hearing room that desires to participate
16 in this docket as a party? Let the record show that
17 there is no response. Let the record also show that
18 our bridge line is connected and let me ask at this
19 time if there is anyone on the bridge line who desires
20 to participate in this docket as a party. Again, let
21 the record show there is no response.

22 Mr. Sterling, at the outset of the morning,
23 when I was asking about matters parties wished to
24 address, you identified that you have made a request
25 for public records from the Commission and asked an

0004

1 opportunity to make that statement for the record.

2 MR. STERLING: Thank you, Your Honor. It
3 came to my attention on this past Friday that staff
4 members and perhaps a program manager, Terry Hull and
5 Ron Shultz from the Puget Sound Action Team, a
6 government agency, have made contact probably within
7 the last month or so with who I believe to be an
8 executive director here at the UTC, a Mr. David Danner.

9 I just wanted to go on record as saying that
10 although several months ago we had been in contact with
11 Mr. Hull to see if PSAT would care to express any
12 interest in this particular matter or weigh in with a
13 statement of fact and law, which they are entitled to
14 do as a matter of public record, that they did not see
15 a desirability at that time to do so, but on the other
16 hand, this meeting reportedly is taking place.

17 So I filed a request for public records with
18 UTC, and I'm also trying to find out more information
19 from Mr. Hull as to more details and facts, but I
20 wanted to go on record as saying that Stuth and Aqua
21 Test do not support these types of meetings outside of
22 the public arena or outside of an area that there is,
23 in fact, a public record. So as soon as I can find
24 some more information, I will definitely turn it into
25 the UTC, Your Honor.

0005

1 JUDGE WALLIS: Thank you very much. Let me
2 ask if any party anticipates the need for discovery in
3 this docket?

4 MR. SWANSON: For Commission staff, at this
5 point, Staff does believe that discovery might be an
6 issue. My client has reviewed the petition but would
7 like some more clarification on -- although my client
8 does not believe the Commission has jurisdiction as has
9 been stated in our statement of fact and law, we would
10 like some more clarification on the scope of
11 jurisdiction that Stuth and Aqua Test are proposing
12 that the Commission take over the two companies and
13 over large on-site systems in general, and for that
14 reason, we would like the discovery rule invoked so we
15 could ask some of those questions either formally or
16 informally if need be.

17 JUDGE WALLIS: Very well. I would suggest in
18 light of the nature of the inquiry that you are
19 proposing that you proceed first with informal
20 discussions, and if those prove insufficient for your
21 needs, unless Mr. Sterling has a perceived need for
22 discovery, we try those first.

23 MR. SWANSON: I believe that's already
24 contemplated.

25 JUDGE WALLIS: Mr. Sterling?

0006

1 MR. STERLING: At this juncture, Your Honor,
2 what we had hoped to do was to file for a summary
3 determination, but I understand though that the
4 Commission perhaps wants to pursue it, and they are
5 entitled to that and we don't have a problem with that.
6 We would be more than happy to meet anytime or anyplace
7 with Commission staff to discuss our petition for
8 declaratory order and any kind of elaboration under
9 statement of fact and law, but I would like to say if
10 there is a way we can do this by summary judgment or
11 summary determination, we would be all for that.

12 JUDGE WALLIS: Very well. In terms of a
13 protective order, does any party see a need for an
14 order to protect proprietary information?

15 MR. STERLING: With our petition for
16 declaratory order framed the way it is, no, not at this
17 juncture. Later on though, and again, what we've
18 proposed, Your Honor, and not to kind of belabor the
19 issue, but our statement of fact and law is quite
20 complete, and it does contain a lot of information as
21 far as a proposed business model that we envision the
22 Commission regulating as a public service kind of
23 company as well as the type of information as far as
24 for tariffs and that type of thing.

25 At some point in time, perhaps I can envision

0007

1 when it comes to using any kind of proprietary
2 information for setting rates, we definitely have to
3 work with the Commission to figure out how that works,
4 but for the time being, I don't really perceive a
5 necessity at this time. If it comes up, I will bring
6 it to your attention, Your Honor, but I don't foresee
7 anything at this point in time.

8 JUDGE WALLIS: I will not enter either a
9 discovery finding or a protective order in this docket,
10 but the parties are free if circumstances later require
11 either of those matters to be addressed, we will do so
12 at that future time.

13 The next item that I had on my checklist of
14 things to look at today is, I believe, related to
15 Mr. Swanson's request, and that is to ask the parties
16 to define what they see as the issue that is being
17 presented to the Commission. Let me ask if you think
18 it is timely to do that or if you believe that further
19 discussions might be required to respond to that
20 question.

21 MR. STERLING: I can go on record now as
22 stating what it is we are seeking in our petition for
23 declaratory order, Your Honor, and that again is set
24 forth in great detail in our statement of fact and law,
25 but the gist of it is whether any person or

0008

1 corporation who manages, operates, and may own a larger
2 on-site sewage system anywhere in the State of
3 Washington and serving the public who relies on that
4 system with operation and maintenance or management
5 services on a full-time basis on demand that that type
6 of utility service constitutes and comprises a public
7 service company over which the UTC has jurisdiction.

8 And what we perceive then as far as
9 regulation is concerned is to insure that this utility
10 service is afforded fairly, reliably, safely under
11 reasonable tariff or rates and charges that protect the
12 public who are served by this, and also the public, I
13 might make mention, are not in any way, shape, or form
14 represented on this corporation or separate company.
15 It's going to be a separate for-profit business
16 operating and managing these types of large on-site
17 sewage systems.

18 So we perceive this as a waste water company.
19 It's not just Stuth and Aqua Test. Stuth and Aqua Test
20 are simply the petitioners to open the door that
21 basically would then allow any other person or
22 corporation who can qualify to be regulated as a public
23 service company to provide the service statewide.

24 JUDGE WALLIS: Mr. Swanson?

25 MR. SWANSON: I think for Commission staff,

0009

1 what should be clear from the statement of fact and
2 law, as an initial matter, Staff believes that
3 management, as that term in terms of a broad concept of
4 management of large on-site sewage systems, is outside
5 the scope of jurisdiction of the Commission.

6 That being said, in terms of if the
7 Commission were to determine if they had some type of
8 jurisdiction, and Commission staff, as I said, doesn't
9 believe that's the case, I believe it also would be an
10 important issue to determine what the scope of that
11 jurisdiction would be, so that may be a separate issue
12 in terms of how that would shake out in terms of
13 whether the Commission would have authority over
14 managers of these systems, owners of these systems, who
15 the customers are, what the scope of authority and
16 jurisdiction would be.

17 So again, to summarize, I guess the first
18 issue would be broadly whether the Commission can take
19 jurisdiction in the first place over management of loss
20 generally, and secondly, if the Commission did have
21 some jurisdiction, what the nature of that jurisdiction
22 would be.

23 JUDGE WALLIS: Mr. Sterling, do you agree
24 with that?

25 MR. STERLING: I don't necessarily understand

0010

1 exactly where the Commission is coming from as far as
2 the problem with operation and management. Basically,
3 this would be the providing the utility service,
4 operation, maintenance, including all of the necessary
5 testing repairs and operational aspects of providing
6 waste water treatment disposal service.

7 Basically, we are talking about a waste water
8 system that serves anywhere from several tens of people
9 to perhaps over a hundred individuals as a large
10 on-site sewage system falling under the State
11 Department of Health regulation as far as design is
12 concerned.

13 So we have here, and maybe this is where
14 Mr. Swanson is coming from, basically we have the State
15 Department of Health who regulates on-site sewage
16 systems by establishing design criteria and will
17 approve the design, installation, and construction of
18 these types of systems.

19 The second part of it is is once these things
20 are designed and constructed, we have to operate and
21 maintain them in order to provide that the service, the
22 actual utility service we are now talking about
23 providing through these companies is to operate and
24 maintain, manage, control all aspects of that facility
25 once it's in the ground on demand wherever located in

0011

1 the State of Washington as a public service, as a
2 public utility.

3 So as far as the UTC, what we are looking at
4 is to actually regulate the business enterprise of
5 providing that service to the public to make sure it's
6 done fairly, safely, securely, reliably, because right
7 now what's happening is we don't have that backup in
8 the State of Washington. We need to have that control
9 of the business itself to provide these services to the
10 public where needed, and it is definitely needed.

11 So again, if this is something that perhaps
12 informal discovery can better flesh out, then that's
13 fine.

14 JUDGE WALLIS: Mr. Swanson?

15 MR. SWANSON: Your Honor, I think that
16 Mr. Sterling is identifying what he perceives and what
17 maybe the Department of Health perceives as a public
18 need. As we said in our statement of fact and law, I
19 believe the Department of Health has some authority
20 jurisdiction over these entities, but in terms of the
21 scope of Commission authority, I think it is an
22 important issue, certainly with telephone, gas,
23 electric, water companies, the legislature has set out
24 in detail what the Commission may and may not regulate.

25 As we indicated in our statement of fact and

0012

1 law, it is unclear exactly what the Commission would
2 regulate should it even be determined that it had
3 jurisdiction. So that would be an important issue not
4 only in terms of the petitioners identifying
5 specifically what the scope of the Commission's
6 jurisdiction they seek to have but also in terms of the
7 scope of authority the Commission could have, assuming
8 that they have any jurisdiction.

9 MR. STERLING: This goes back, Your Honor,
10 to the fact that as far as the Commission's
11 jurisdiction is concerned, that was litigated in
12 Thurston County Superior Court, and we have a
13 determination by Judge Richard Hicks that the element
14 of determination to be made by the UTC is a question of
15 fact, whether or not what we are talking about, whether
16 a person or corporation providing these services on a
17 full-time basis to the public for the public served by
18 these type of systems is a public service company
19 subject to UTC regulation.

20 That's what I kind of thought that we would
21 be doing here is to have this factual determination,
22 and my understanding now, especially reviewing the
23 Commission's statement of fact and law, we are back
24 talking about Commission jurisdiction. I honestly
25 thought that we were past that. I thought that Judge

0013

1 Hicks indicated that this is a determination to be made
2 by the Commission as a finding of fact.

3 So what we tried to do in our statement of
4 fact and law is to present the facts, what it is we are
5 proposing to do, the public need and necessity for
6 doing that, the public interest served by it, and also
7 the statutory framework or basis for making that
8 factual determination, but if we are back to talking
9 jurisdiction of the UTC, then our position is is that
10 determination has already been made, and we are at a
11 fact-finding hearing in order to make a determination
12 as a question of fact.

13 MR. SWANSON: Your Honor, may I respond? I
14 didn't mean to interrupt you, Mr. Sterling. Are you
15 finished?

16 MR. STERLING: Go ahead.

17 MR. SWANSON: I believe Mr. Sterling is
18 correct and that we are back, and it's been remanded
19 for a fact-finding determination. However, I believe
20 by necessity, the facts, this opportunity is for
21 Mr. Sterling and his client to submit facts into the
22 record to show that the Commission has jurisdiction or
23 authority over large on-site sewage systems, and my
24 understanding is, Well, that's part of the reason. I
25 guess I'm concluding that that's part of the reason

0014

1 that the statement of fact and law has been filed by
2 Mr. Sterling and the opportunity has been given for
3 other parties to file those so that the Commission has
4 the facts on the record and can then apply those facts
5 to the scope of the Commission's jurisdiction or
6 authority. That is the law as the legislature has
7 given to the Commission.

8 So I believe Mr. Sterling is correct. It is
9 a fact-finding issue, but by necessity, the Commission
10 still needs to apply the law to those facts.

11 JUDGE WALLIS: Mr. Sterling, does that
12 satisfy your concern?

13 MR. STERLING: Not necessarily, and again, I
14 guess this is where we were coming from that this would
15 be most appropriate is a summary determination type of
16 proceeding, and I took the statement of fact and law
17 very seriously, and I don't know whether Your Honor has
18 had a chance to take a look at it or not --

19 JUDGE WALLIS: I have read it.

20 MR. STERLING: Thank you, but I believe that
21 we do set the factual underpinnings and basis for
22 meeting the public interest and public service law
23 tests required by Title 80 to be regulated as a public
24 service company.

25 If we are back at talking now the

0015

1 jurisdiction of the UTC to even entertain this type of
2 an enterprise, then I feel that I have to remind the
3 Commission that we've already been to the Thurston
4 County Superior Court and we have Judge Hicks'
5 determination, the mandatory fact-finding hearing and
6 that is what we are here for.

7 So I'm perhaps a little bit chagrined that we
8 are back talking about jurisdictional issues. I
9 thought that this would be a fact-finding where this is
10 the facts as we see them. This is the facts of the
11 factual basis for the company or type of public utility
12 that we would be proposing to provide to the public,
13 and then the question then put to the Commission is
14 rather straight-forward: Is this or is this not a
15 public service company? And this is why I thought
16 perhaps some preliminary or informal discovery is fine.
17 I don't have a problem with that, and maybe we can get
18 over a lot of these hurdles by undertaking this type of
19 discovery at this point in time.

20 But I would still like to at least reserve
21 the right to come back in with a motion for summary
22 determination at some point and ask this Commission or
23 yourself, Your Honor, to make that determination as a
24 question of fact.

25 JUDGE WALLIS: As I perceive our charge from

0016

1 the Superior Court in the context of the Commission's
2 authorizing statute to basically as you have described
3 it, determine whether based on a factual record the
4 companies whose operations you are describing are
5 public service companies as defined in the law of the
6 State of Washington.

7 So I do believe that Mr. Swanson is correct
8 that we have to look at both the facts that eventually
9 come to the record and the law to make that decision.
10 It is a fact-finding matter as determined, as described
11 in the statute that the judge cited, so I'm not sure
12 that we are terribly far apart on finding what the
13 Superior Court has charged us to do, but getting there
14 may, as you indicate, require some discussions.

15 Now, with that backdrop, I would like to ask
16 what kind of a schedule the parties would propose for
17 getting from here to there, and I would suggest for
18 this purpose we might go off the record and then make a
19 statement when we go back on the record as to what has
20 been determined. Would that be satisfactory?

21 MR. STERLING: Yes.

22 MR. SWANSON: Yes, Your Honor.

23 JUDGE WALLIS: Let's be off the record.

24 (Discussion off the record.)

25 JUDGE WALLIS: During the scheduling

0017

1 discussion, we have determined that the parties will
2 file or will have the opportunity to file cross-motions
3 for summary determination on Wednesday, January 4,
4 2006. Answers will be due on Wednesday, January 11,
5 2006, and the Commission will schedule a hearing in
6 this matter for the purpose of oral argument on summary
7 determinations for the morning of January 27, a Friday,
8 of the year 2006.

9 This scheduling is done before I have the
10 opportunity to check the availability of facilities,
11 and if there is a change, the order which is entered,
12 which I will try to have entered today, will tell us
13 what facilities are available. Then in the event that
14 both motions are denied, the matter would go to an oral
15 hearing, which we have tentatively scheduled for
16 Friday, March 3rd, 2006.

17 Mr. Sterling did indicate a receptiveness to
18 questions from the Bench in reading the statement from
19 the petitioners and from Commission staff. Several
20 questions did come to my mind. If, in light of the
21 time between now and then, I would propose to
22 articulate those questions in a letter to the parties,
23 if that would be acceptable, and to do that in
24 relatively short order?

25 MR. STERLING: That is acceptable and would

0018

1 be appreciated, Your Honor.

2 MR. SWANSON: That's fine for Commission
3 staff.

4 JUDGE WALLIS: Is there anything further to
5 come before the Commission at this time?

6 MR. STERLING: No, Your Honor.

7 MR. SWANSON: No, Your Honor.

8 JUDGE WALLIS: Thank you all very much. This
9 conference is concluded.

10 Excuse me. I would like to go back on the
11 record for just one matter. I don't believe that when
12 we were on the record I did mention my request to
13 Mr. Sterling that in conjunction with your public
14 records request for contacts with the -- help me with
15 the name of the team.

16 MR. STERLING: Puget Sound Action Team.

17 JUDGE WALLIS: -- Puget Sound Action Team,
18 you were going to supplement that request with the
19 names of people who are included within your request so
20 that we can identify them and respond.

21 MR. STERLING: I can do that, Your Honor, and
22 I can also do it in writing, Your Honor.

23 JUDGE WALLIS: If you could do it in writing
24 and submit that as you did the other. If you wish to
25 do it now, that's perfectly acceptable.

0019

1 MR. STERLING: The only two individuals with
2 Puget Sound Action Team that I'm aware of is, number
3 one, Terry Hull, and the other gentleman is Ron Shultz,
4 and I think it's S-h-u-l-t-z.

5 JUDGE WALLIS: And there is no other person,
6 to your knowledge, that staff contact would fall within
7 your request?

8 MR. STERLING: The individual with UTC would
9 be Mr. David Danner.

10 JUDGE WALLIS: As far as Puget Sound Action
11 Team.

12 MR. STERLING: Those are the only two I'm
13 aware of at this time.

14 MR. SWANSON: I just wanted to clarify.
15 Mr. Sterling, you will be submitting that in writing
16 with those names?

17 MR. STERLING: Yes.

18 MR. SWANSON: Thank you.

19 JUDGE WALLIS: Now we are concluded.

20 (Prehearing conference concluded at 10:51 a.m.)

21

22

23

24

25