

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re the Petition of

WILLIAM L. STUTH and AQUA TEST,
INC.

For a Declaratory Order Designating a
Public Service Company

DOCKET NO. A-050528

STAFF'S ANSWER TO
PETITIONERS' MOTION FOR
SUMMARY DETERMINATION

1 Commission Staff responds to Petitioners' motion for summary determination as follows.

2 Petitioners ask the Commission to ignore the superior court's explicit direction to apply the facts and law as the Commission comprehends them to come to an ultimate conclusion about the scope of its jurisdiction.¹ Instead Petitioners advocate that the Commission adopt language from the superior court's transcript in which the court hypothesizes how the Commission might analyze the issue of its jurisdiction.²

3 The court's holding, after all, was that the Commission must hold a hearing. In fact, this is what the Petitioners sought in the first place. As Petitioners point out, the court uses the term "prima facie" to describe its reasoning. However, use of such language does

¹ The court said "I have no opinion as to how that fact finding hearing should resolve itself. That would have to be determined by the Commission based on the facts it finds and the law it applies." Remand Order, page 12 of attached court transcript.

² Such language is dictum since it has no bearing on the outcome. *In the matter of the Marriage of Rideout*, 150 Wn.2d 337, 354 (2003).

not change the nature of the court's decision, as Petitioners appear to contend.³ Nor does it alter the Commission's duty to apply the facts to the law as it comprehends them.

4 In fact all the court said was that there was prima facie evidence that the Commission *must hold a hearing* based on the record before the court. Remand Order, page 12 of attached court transcript. It appears the court based this decision in part on its conclusion of a "statutorily mandated fact finding hearing". *Id.* It may very well be that in the court's mind, a case for a hearing has been made since the applicable statutes required such a hearing for a determination of Commission jurisdiction.

5 To the extent the court referred to the record with regard to the "prima facie" language, it only referred to two items in the limited record before the court: 1) Tennessee law, and 2) the Department of Health's letter. Remand Order, page 12 of attached court transcript. It appears, therefore, that the judge believed that it was "possible" that the Commission had jurisdiction over petitions based on these two parts of the record as argued and submitted by Petitioners. The record before the Commission now is materially different than the record and pleadings in front of the court on these two points since the Department of Health has clarified that it is not drawing a legal opinion about the scope of the Commission's authority and as Staff pointed out in its Statement of Fact and Law, Tennessee and Washington law are different. Drawing a conclusion that jurisdiction may be possible based on extremely limited facts is markedly different than a Commission conclusion about the scope of its authority following a proceeding in which the full record is considered.

³ The Superior Court speculated on how the law might be applied to the facts based on the limited record in front of it and, in addition, determined that the Commission must hold a full fact finding hearing in order to properly apply the facts to the law.

6 It certainly cannot be contended by Petitioners that the court wholesale adopted their arguments as conclusions of law. Nor can the court's decision be interpreted as closing the record and disallowing the Department of Health's clarification of its position or foreclosing further discussion of Tennessee law. Thus, the courts decision may only be interpreted as requiring the Commission to start over and hold a hearing, nothing more and nothing less.⁴

7 Finally, it is important to note that Petitioners' arguments center around the idea that since the Department of Health and other parties think regulation by the Commission is a good idea, the Commission should regulate. This is a noble concept in principle. However, the proper forum for any party, be it an agency or anyone else, to advocate for public policy change, in the absence of statutory authority, is to petition the Legislature, not an agency.

8 For all of the above reasons, Commission Staff requests that its motion be granted and Petitioners' motion be denied.

DATED this 11th day of January, 2006.

ROB MCKENNA
Attorney General

CHRISTOPHER SWANSON
Assistant Attorney General

⁴ Additionally, it should be noted that only a specific conclusion of law by the court on a particular point has operative effect. It is inappropriate for Petitioners to attempt to draw legal conclusions from the Remand Order that just aren't there.