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 CLOSING BRIEF OF COMMISSION STAFF

I. INTRODUCTION

While many of the issues in this case have been briefed and re-briefed many times over, there are five significant issues, three of which have not yet been addressed by the parties. First, the law is clear that the threshold issue of subject matter jurisdiction may be raised at any time. Second, under the Administrative Procedure Act, the Commission may not lawfully issue an advisory opinion. Third, Petitioners have not demonstrated, pursuant to RCW 34.05.240(d), that the adverse effect of any alleged uncertainty on them outweighs any adverse effects on the Commission or on the general public. Further, Petitioners do not meet the plain definition of "public service

company" set forth in RCW 80.04.010. The State Supreme Court has interpreted RCW 80.01.040(3) to prohibit the Commission from exercising authority over matters not specified in the public service laws. Finally, the Legislature has assigned the task of regulating on-site sewage systems to the Department of Health. For these reasons, the Commission should either decline to enter a declaratory order or enter such an order determining that the Commission lacks statutory authority to regulate on-site sewage systems.

II. ARGUMENT

A. Subject Matter Jurisdiction May Be Raised At Any Time

Petitioners continue to argue that Judge Hicks' ruling precludes the Commission and the Commission Staff from entertaining the basic jurisdictional question whether the Commission has the statutory authority to regulate on-site sewage systems. They argue in their Closing Statement:

> So what's left to put into play where the facts are undisputed and are against you? You play the law card. But WUTC staff has already argued in a most vigorous and competent fashion to a court of law that the WUTC has no jurisdiction in this case as a matter of law. Someone should remind staff that they lost that battle and do not have a right to resurrect those same arguments in this administrative proceeding. Under whichever name or doctrine one wishes to choose and apply, be it res judicata, collateral estoppel, law of the case, or just plain simply—you've already had your one fair bite of the apple and you don't get another—, the attempt to relitigate the jurisdictional issue of law is barred in this forum as a matter of law. When Judge Hicks remanded this matter to the WUTC for a fact finding hearing testing Stuth and Aqua Test's *prima facie* case, he intended only for WUTC to apply the body of

> Washington public service law to such facts—he certainly did not sanction the WUTC reopening the basic jurisdictional issue that was fully, fairly and vigorously argued to him and decided by him against the WUTC staff's position. The door is not open even one iota—it is closed and locked.

Id. at 17-18.

Petitioners simply are incorrect on the law. It is well settled that subject matter jurisdiction may be raised at any time. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 692 (1998) ("Any party to an appeal, including one who was properly served, may raise the issue of lack of subject matter jurisdiction at any time."). Moreover, litigants themselves may not waive subject matter jurisdiction. *Id*; *Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 409, 403 P.2d 54 (1965) (Donworth, J., concurring in part and dissenting in part.). Therefore, Petitioners' argument that Commission Staff somehow has "waived" the jurisdictional issue by not appealing the Court's ruling has no merit. Put simply, subject matter jurisdiction cannot be conferred by waiver and may be raised at any time. It is lawful and appropriate to raise the issue now.

Significantly, Petitioners misstate the Court's ruling. They state that "[T]he WUTC presented the identical issue and argument (lack of jurisdiction as a matter of law) to the Court; it was soundly rejected by Judge Hicks; and no appeal was taken by WUTC." Stuth and Aqua Test's Initial Brief for Summary

Determination, at 14-15. Contrary to the argument of Petitioners, Judge Hicks expressly did *not* rule that the Commission has jurisdiction over on-site sewage systems. He expressly reserved that issue for the Commission's determination. The Court stated in its oral ruling:

> So I would reverse the summary finding by the Commission and remand this matter back to the Commission to hold the statutory mandated fact finding hearing. *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*. But I do rule that the Petitioners in this case have set out a prima facie case that requires the Commission to hold a fact finding hearing and make a determination as to *whether or not this kind of company can be a public utility*.

Transcript of Oral Ruling, at 12-13, No. 05-2-00782-3. (Emphasis added.)

In addition, the Courts' Order does not state that the Commission has jurisdiction over on-site sewage systems. The Court's Order provides in relevant part:

> This matter is hereby ***REMANDED*** to the WUTC to hold the statutory mandated fact finding hearing in accordance with RCW 80.04.015 and determine as a question of fact *whether the type of company and services offered to the public by Stuth and Aqua Test are to be regulated by the WUTC as a public service company*.[1]

Order Granting Stuth and Aqua Test's Petition for Relief, at 2. (Second emphasis added.)

[1] Subsequent to the Court's Order, the parties filed cross-motions for summary determination, thereby eliminating the need for a "fact finding hearing."

In short, the issue of jurisdiction could not have been overlooked by the Court. To the contrary, that issue was squarely before the Court. Had the Court decided the jurisdictional question in Petitioners' favor, as they now claim, that decision surely would have found its way into the Court's Order, as the jurisdictional issue is central to this case. It did not, in all likelihood because the Court would not have signed such an order, given the Court's express oral ruling.

B. The Commission May Not Lawfully Issue An Advisory Opinion

The Commission may not lawfully enter a declaratory order in this case because, under the Administrative Procedure Act, the Commission may not issue an advisory opinion. RCW 34.05.240 provides in relevant part:

> (1) Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency. The petition shall set forth facts and reasons on which the petitioner relies to show:
>
> (a) That uncertainty necessitating resolution exists;
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> (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
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> (c) That the uncertainty adversely affects the petitioner;
>
> (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested;
>
> *** * ***

Petitioners' petition fails to satisfy at least two of the above statutory criteria. First, it does not describe an actual controversy such that a declaratory

order from the Commission will not be merely an advisory opinion. *Id*. at (1)(b). Second, it does not show that the adverse effect of uncertainty on the Petitioners outweighs any adverse effects on others or on the general public that may likely arise from the order requested. *Id*. at (1)(d). This second deficiency is discussed below. Based on these dispositive deficiencies, the Commission should decline to enter a declaratory order, as provided in RCW 34.05.240(5)(d).

Petitioners rely heavily on *Inland Empire Rural Electrification, Inc. v. Department of Pub. Serv.*, 199 Wash. 527, 92 P.2d 258 (1939), for the proposition that "[T]he question of the character of a corporation is one of fact to be determined by the evidence disclosed by the record. . . . What it does is the important thing, not what it, or the state, says that it is."[2] *Id*. at 538. Here, when one examines what Petitioners *do*, it is undisputed that Stuth and Aqua Test are consultants who *propose* to provide service only so long as the Commission will commit to regulating a corporation that has yet to be formed:

> Petitioners *intend to form* a separate, private for-profit (i.e., for hire) corporation that *will provide* the utility services of ownership, operation, maintenance, and management of all types and sizes of

[2] "The classification statute, RCW 80.04.015, clearly focuses on whether a person *or a corporation* conducts business subject to regulation under Title 80 RCW. It is the conduct that makes the corporation subject to regulation." *United and Informed Citizen Advocates Network v. Washington Utils. & Transp. Comm'n*, 106 Wn. App. 605, 611, 24 P.3d 471 (2001). (Emphasis in original.)

> on-site sewage systems to the public as a public service company *regulated by the WUTC* (*i.e.*, a 'Wastewater Company'").

Petitioners' Proposed Agreed Statement of Facts, at 2.

Petitioners claim they have "the expertise, background and fundamental capabilities *to develop and implement* a sound business plan to ensure financial stability and success as to not only the operation and management of large on-site sewage systems, but the ownership of such facilities as well. Stuth and AquaTest's Statement Regarding Jurisdiction and Closing Statement, at 15.

Petitioners make reference to "what it is that a wastewater company *will* in fact perform." *Id*. at 17. "This is precisely the service that Stuth and Aqua Test *will provide* to the public dependent upon large, on-site sewage systems for wastewater collection and treatment and disposal on a permanent basis, wherever located in the State of Washington." *Id*. at 19. Petitioners request the Commission to "make the determination that a person or corporation owning, operating and managing large on-site sewage systems *under the model proposed* by Stuth and Aqua Test qualifies as and is a public service company subject to regulation by the WUTC. *Id*. at 18. "It's a question of fact, what that person does, what the service *will be*." Counsel for Petitioners, Tr. of Oral Argument, at 0043. "It's what *we are proposing to do* and how that interest *is going to be served* and how the need *will be met* and how the interest will then

be protected by UTC regulation, those are the questions that have to be addressed, and that's the focus of the Commission in this proceeding. *Id*.

Petitioners' proposal is both speculative and hypothetical. As such, Petitioners' petition essentially is a request for an advisory opinion from the Commission. There is no actual controversy:

> In order to fill this need to serve the public interest as identified by DOH, Stuth and Aqua Test must first have answered the question whether a private company providing LOSS services to the general public constitutes a public service company subject to WUTC authority. The WUTC has never before answered this specific query and its affirmative answer is essential to providing this service.

Stuth and Aqua Test's Initial Brief for Summary Determination, at 5; Petitioners' Statement of Fact and Law, at 3.

The record is replete with admissions that Petitioners do not currently "own, operate and manage on a continuous basis large on-site sewage systems for hire, on demand and for profit wherever located in this State."[3] Stuth and Aqua Test's Statement Regarding Jurisdiction and Closing Statement, at 21. Rather, Petitioners contend that the Commission has "a duty to make a determination as to whether a person or corporation which owns, operates and

[3] In their petition for a declaratory order, Petitioners request the Commission to include in its order "a directive that any private company desiring to provide such LOSS management services to the public shall apply to the WUTC for tariff and operating plan approval." Petition, at 9. Petitioners variously describe themselves as intending to manage, maintain, own, or operate on-site sewage systems. However, Commission Staff is not aware of any instances in which the Commission has regulated a management or maintenance company.

manages large on-site sewage systems for hire for the public service thereby on demand wherever located in the State of Washington is a public service company subject to its regulatory control." *Id*. at 21-22. Notably, no mention is made of Stuth and Aqua Test, but rather to a hypothetical, theoretical "person or corporation" providing such services.[4] Petitioners even submitted what they call a "Proposed Business Model." Petitioners' Statement of Fact and Law, 13-14. Petitioners make reference to and describe "the attributes of such a company." *Id*. at n.10. In short, Petitioners are asking the Commission to engage in an unlawful academic exercise.

The State Supreme Court has held that there must first exist a justiciable controversy before jurisdiction may be invoked. In *Washington Educ. Ass'n v. Public Disclosure Comm'n*, the Court stated:

> We steadfastly adhere to 'the virtually universal rule' that there must be a justiciable controversy before the jurisdiction of a court may be invoked. [Citations omitted.] For a justiciable controversy to exist there must be:

[4] There is no record evidence that Petitioners even own any on-site sewage facilities or physical assets. Instead, Mr. Stuth and Aqua Test currently provide consulting services. According to Aqua Test's web site, Mr. Stuth has extensive experience "designing, installing and troubleshooting on-site systems." He sees a need to "monitor" on-site systems. Mr. Stuth "has traveled the United States extensively consulting and troubleshooting." His Aqua Test colleague, Mr. Lee, functions "as an on-site wastewater consultant both locally and nationally." The professional staff at Aqua Test have experience in "evaluating and designing both commercial and residential onsite wastewater systems." Aqua Test's staff "currently lectures and trains engineers and consultants throughout the nation on proper design and troubleshooting of onsite wastewater systems. *See* www.aquatestinc.com/company.shtml

> "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive." [Citations omitted.]
>
> All four of the justiciability factors 'must coalesce' to ensure that the court does not 'step into the prohibited area of advisory opinions.' [Citation omitted.]

As in *WEA*, Petitioners here are requesting an advisory opinion from the Commission. Since there is no actual controversy, the Commission should decline to issue a declaratory order addressing a prospective, theoretical business enterprise.

C. Petitioners Have Failed To Show That The Adverse Effect of Uncertainty On The Petitioners Outweighs Any Adverse Effects On The Commission Or On The General Public

Petitioners desire to become subject to economic regulation by the Commission, yet nowhere do they show that the adverse effect of any alleged uncertainty on them outweighs any adverse effects on the Commission or on the general public. Under Petitioners' proposal, the Commission would regulate on-site sewage systems, as public service companies. Moreover, the Commission would undertake this new task without *any* further guidance from the Legislature as to how the rates, services, facilities, or practices of on-site sewage systems should be regulated. This would be unprecedented regulation

in this State. Petitioners have not addressed the burdens such regulation would place either on the Commission, on the numerous entities that might be affected, or on the public. Nor have the Petitioners explained how such a new regulatory scheme would be funded. For this reason alone, the Commission should reject Petitioners' petition, as not complying with RCW 34.05.240(1)(d).

D. Petitioners Do Not Fall Within The Definition of "Public Service Company"

Under RCW 80.04.010, a "public service company" is defined as including "every gas company, electric company, telecommunications company, and water company." It is undisputed that Petitioners are none of the above. Based on the plain language of the statute, the Commission should deny Petitioners' request that the Commission issue a declaratory order determining that a hypothetical, private company providing large on-site sewage services to the general public constitutes a public service company subject to Commission jurisdiction.

E. RCW 80.01.040(3) and Its Interpretation: *Cole* Controls

The Commission has broad regulatory authority to regulate public service companies. However, the Commission's authority is not unconstrained. Rather, it is constrained by the language of RCW 80.01.040(3), which provides in part:

> The utilities and transportation commission shall:
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> * * *
>
> (3) 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, telecommunications companies, and water companies.

The scope of the Commission's regulatory authority under RCW 80.01.040(3) was tested in the State Supreme Court case of *Cole v. Washington Utils. & Transp. Comm'n*, 79 Wn.2d 302, 485 P.2d 71 (1971). There, the Court interpreted RCW 80.01.040(3) as limiting the Commission's jurisdiction to those activities provided for in the public service laws:

> Although 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 dealers are within the jurisdictional concern of the commission. An administrative agency must be strictly limited in its operations to those powers granted by the legislature. (Citation omitted.)

Accord, Washington Indep. Tel. Ass'n v. Telecommunications Ratepayers Ass'n for Cost-Based and Equitable Rates, 75 Wn. App. 356, 368, 880 P.2d 50 (1994) (Community Calling Fund may be in the public interest, but it is not authorized by the public service laws.)

Without citation of authority, Petitioners argue that it is "well established" that "you're in if you provide a service of consequence as to which the public is entitled to demand and have continued for a reasonable charge, unless you're specifically exempted out." Stuth and Aqua Test's Statement Regarding Jurisdiction and Closing Statement, at 4. Petitioners continue to overstate their case when they pronounce that:

> [u]nder the body of public service laws in the State of Washington, as defined in both statute and in caselaw, a person or corporation owning, operating and managing on a continuous basis large on-site sewage systems for hire, on demand and for profit wherever located in this State qualifies both factually and legally as a public service company that is subject to regulation by the WUTC.
>
> *Id*. at 21.

Petitioners rely on *Spokane United Railways v. Department of Pub. Serv.*, 191 Wash. 595, 71 P.2d 661 (1937) for the proposition that the Commission's jurisdiction over on-site sewage systems need not be explicit in the public service laws. That case—which Petitioners regard as "the seminal case"—is distinguishable.[5] There, buses fit within the definition of the term "common carrier" (a statutory category which has an entire chapter describing how such entities shall be regulated, *see* RCW 80.28) and bore striking similarities to the other items enumerated in the statute. The Court found that the buses "are performing exactly the same service as the street railway

[5] Stuth and Aqua Test's Statement Regarding Jurisdiction and Closing Statement, at 6.

previously performed." *Id*. at 599. These facts enabled the Court to state that it was "perfectly plain" that the Legislature intended to include within its reach buses.[6] *Id*. at 598. That is hardly the case here. In short, the *Spokane* decision depended on more than simply a finding that a company was engaged in a previously unregulated "public service."

F. The Legislature Has Assigned The Task of Regulating On-Site Sewage Systems to The Department of Health

Petitioners argue that the Commission should assert jurisdiction over on-site sewage systems because the Department of Health (DOH) supports such regulation.[7] However, the Legislature has assigned the task of regulating on-site sewage systems to the Department of Health, not the Commission. RCW 43.20.050 provides in part:

> (2) In order to protect public health, the state board of health shall:
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> ***
>
> (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

[6] We would note that both *Spokane* and *Inland*, relied on by Petitioners, pre-date both *Cole* and *TRACER*.

[7] The Department of Health and others submitted letters in support of Petitioners' proposal. Such letters of support may prove persuasive to the Legislature. However, in his letter, Mr. Fay, Jr. "stress[ed] that these are my opinions and do not necessarily represent the opinion of Public Health Seattle & King County or the King County Board of Health." Fay Letter dated November 15, 2005, Exhibit D to Stuth and Aqua Test's Initial Brief for Summary Determination.

> operation of sewage, garbage, refuse and other solid waste collection, treatment, and disposal facilities.

By DOH rule, WAC 246-272B-08001(2)(vi)(A)(1), a public entity must provide direct management (as distinct from owning, operating or maintaining) of the on-site sewage system or "at least serve in a stand-by capacity (act as a third party guarantor for a private management entity such as a homeowner association. DOH Benson Letter dated March 9, 2005, Exhibit D to Stuth and Aqua Test's Initial Brief for Summary Determination. The term "public entity" is generally interpreted to mean a municipal corporation.[8]

In addition, under RCW 70.05.077, the DOH must provide training to local health officers regarding on-site sewage systems. The training must include a discussion of "[t]he regulatory framework for the application of on-site sewage treatment and disposal technologies, with an emphasis on the differences between rules, standards, and guidance. . . ." *Id*. at (1)(b).

In 1997, the Legislature directed the DOH to convene a work group for the purpose of addressing issues relating to on-site sewage systems:

> **Intent -- 1998 c 34:** "(1) The 1997 legislature directed the department of health to convene a work group for the purpose of making recommendations to the legislature for the development of a certification program for occupations related to on-site septic systems, including those who pump, install, design, perform maintenance, inspect, or regulate on-site septic systems. The work

[8] It is hard to fathom how a private corporation could be a "public entity" within the meaning of the DOH rules.

group was convened and studied issues relating to certification of people employed in these occupations, bonding levels, and other standards related to these occupations. In addition, the work group examined the application of a risk analysis pertaining to the installation and maintenance of different types of septic systems in different parts of the state. A written report containing the work group's findings and recommendations was submitted to the legislature as directed.

(2) The legislature recognizes that the recommendations of the work group must be phased-in over a time period in order to develop the necessary scope of work requirements, knowledge requirements, public protection requirements, and other criteria for the upgrading of these occupations. It is the intent of the legislature to start implementing the work group's recommendations by focusing first on the occupations that are considered to be the highest priority, and to address the other occupational recommendations in subsequent sessions." [1998 c 34 § 1.]

RCW 70.05.077. (Analysis of HB 3056, Final Bill Report of SHB 3036, and Bill Digest are attached for ease of reference.)

While Petitioners desire to be part of a different regulatory scheme, the fact is they remain regulated by the DOH and others.[9] Petitioners should bring their proposal to the attention of the Legislature, not this Commission.

[9] On the Washington Onsite Sewage Association's (WOSSA) web site, one will find the following regulatory links:
Regulatory Links
WA County Environmental Health Department Links
http://www.doh.wa.gov/LHJMap/LHJMap.htm
WA DOH Rules & Development Committee
www.doh.wa.gov/ehp/ts/WW/RDC.htm
WA Dept of Environmental Health (DOH)
www.doh.wa.gov/ehp/ts/waste.htm
Washington Department of Licensing : Onsite Waste Water Designers

III. CONCLUSION

For the above reasons, the Commission should either decline to issue a declaratory order in this case, or enter an order determining that the Commission lacks statutory authority to regulate on-site sewage systems.

Dated: February 13, 2006.

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Information
http://www.dol.wa.gov/engineers/onsitefront.htm