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 REPLY OF COMMISSION STAFF TO RESPONSE OF STUTH AND AQUA TEST

I. INTRODUCTION

Commission Staff files this Reply in response to Stuth and Aqua Test's pleading filed with the Commission on February 17, 2006. In that pleading, Petitioners claim that all of the arguments raised before the Commission in this proceeding were likewise raised before and decided by Thurston County Superior Court Judge Hicks. They were not. Therefore, Judge Hicks could not have and did not rule on all of those issues. In addition, Petitioners argue that the fact that they do not now and may never own, operate, and manage on-site sewage systems does not render a declaratory order from the Commission in this matter merely advisory. Petitioners have failed to satisfy the provisions of RCW 34.05.240. For these and other reasons set forth in the Closing Brief of

Commission Staff, the Commission should either decline to enter a declaratory order or enter an order determining that the Commission lacks statutory authority to regulate on-site sewage systems.

II. ARGUMENT

A. Which Issues Were Before the Court?

Surprisingly, Petitioners argue that Judge Hicks had before him the identical legal arguments now pending before the Commission and, further, that he decided each and every issue against the Commission. Petitioners state as if it were fact:

> Judge Hicks was presented with the issues still clamored by Staff regarding the WUTC's jurisdiction, purported lack of a justiciable controversy to issue other than a mere advisory opinion, balance of adverse effects as to the company and the public, the Cole case, overextending regulation into businesses not named in Title 80, etc etc etc. Had Judge Hicks agreed with Staff as to any one of these issues raised, briefed and vigorously argued before him, he would have found for the WUTC and dismissed the Stuth and Aqua Test appeal. However and most obviously, he did not, the WUTC did not appeal, the remand became effective, and we are now in the midst of the statutorily mandated fact finding hearing—so end of discussion.
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> Stuth and Aqua Test's Reply Closing Brief, at 2.

Petitioners not only misstate the Court's ruling,[1] they misstate which

[1] *See* Closing Brief of Commission Staff, at 3-5.

issues were raised before and decided by Judge Hicks.[2] Notably, Petitioners do not cite to the superior court record to support their claim. Before Judge Hicks, counsel for the Commission argued that "an agency's written interpretation of the law does not implement or enforce the law and is 'advisory only,'" quoting *Washington Educ. Ass'n v. Washington State Pub. Disclosure Comm'n,* 150 Wn.2d 612, 616 (2003). Counsel made this argument with reference to a letter the Commission sent to Petitioners more than a year ago. Counsel did not make this argument with any reference to the requirements for the issuance of a declaratory order. Reply to Petitioners' Trial Brief at 12-14. Specifically, at no time did counsel argue that Petitioners failed to meet the requirements of RCW 34.05.240(1)(b). Nor did counsel argue the significance of the fact that Petitioners do not now and may never own, operate, and manage on-site sewage systems. Consequently, Judge Hicks could not have ruled and did not rule on whether Petitioners presented an actual controversy so that a declaratory order would not be merely an advisory opinion.

Petitioners further claim that Judge Hicks weighed and decided "the

[2] The superior court pleadings are in the Commission's Records Management System data base and are accessible on the Commission's web site. The Commission may take judicial notice of those pleadings as well as their content.

balance of adverse effects as to the company and the public." Stuth and Aqua Test's Reply Closing Brief, at 2. He did not. Nowhere in the superior court record will one find an analysis of RCW 34.05.240(1)(d). As stated in the Closing Brief of Commission Staff, under Petitioners' proposal, the Commission would assume the unprecedented regulation of on-site sewage systems, as public service companies. 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.[3] Petitioners have failed to address the burdens such regulation would place either on the Commission, on the numerous entities that might be affected, or on the public. Moreover, Petitioners have failed to explain how this new regulatory scheme would be funded. *Id*. at 10-11. Rather than concede that the record is devoid of any such evidence, Petitioners, instead, summarily dismiss these issues with the vague assertion that the superior court has previously decided them—in their favor. Petitioners' arguments are disingenuous and incorrect and should be rejected by the Commission.

B. Subject Matter Jurisdiction May Be Raised At Any Time

The issue of subject matter jurisdiction and when it may be raised was

[3] Indeed, the Commission could point to *no* statutory authority for the issuance of any rules applying to on-site sewage systems. Such authority simply does not exist.

briefed by Commission Staff in its Closing Brief. *Id*. at 2-3. Petitioners failed to respond to this threshold legal issue in their Reply Closing Brief. They did not address the cases cited by Commission Staff. Yet—without citation of authority—they continue to argue that the fact that the Commission did not appeal Judge Hicks' ruling has some bearing on whether it is proper or lawful to raise the jurisdictional issue at this time. Stuth and Aqua Test's Reply Closing Brief, at 2. Since the law is well settled that the issue of subject matter jurisdiction may be raised at any time, and may not be conferred by waiver, it is entirely appropriate for Commission Staff to, in Petitioners' words, "play the law card" and "hammer on legal issues."[4] Petitioners' arguments should be rejected.

C. There Is No Actual Controversy and, Therefore, Issuance of A Declaratory Order Would Be Merely An Advisory Opinion.

Petitioners acknowledge that they do not currently own, operate, and manage on-site sewage systems, but argue that they will engage in those activities if the Commission will issue a declaratory order asserting jurisdiction over on-site sewage systems. Petitioners argue that a company "not currently

[4] We note that Petitioners quote from a memorandum purporting to endorse, as a matter of policy, the possible regulation of on-site sewage systems in the future. Stuth and Aqua Test's Reply Closing Brief, at 11. Even if true, this policy statement is wholly irrelevant to the legal question whether the Commission currently has statutory authority to regulate sewage systems.

organized and not yet in the business of providing an existing service to the public" is precisely the sort of company that should seek a declaratory order from the Commission. Stuth and Aqua Test's Reply Closing Brief, at 3. Petitioners do allow as how those proposed services must be "expressed in concrete terms." *Id*. at 4, n.2.

There are three commission cases, two of which were cited by Petitioners, which demonstrate that Petitioners' proposed services are far from "concrete."[5] These cases support Commission Staff's position that there exists no actual controversy and any declaratory order would be merely an advisory opinion, prematurely and unnecessarily examining the Commission's jurisdiction.

In each of the following cases, the parties had either: (1) entered into purchase contracts with third persons, (2) created Special Purpose Entities, created Trusts, (3) awarded contracts for major construction work, (3) made 30-year lease arrangements, (4) applied to the U.S. Department of Energy for a Presidential Permit, (5) applied for a Certificate of Public Convenience and Necessity from the National Energy Board of Canada, (6) applied to the Federal Energy Regulatory Commission (FERC) for Authority to Sell

[5] The Commission's Orders in these cases are attached, for ease of reference. Petitioners did not cite *BPA*.

Transmission Rights at Negotiated Rates, (7) conducted a Regional Plan Study, (8) prepared an Environmental Impact Statement, or (9) sought municipal approvals for building permits, Coastal Zone Management Act compliance, rights-of-way and road openings. Here, by sharp contrast, Petitioners' proposed operations are so remote and attenuated that a declaratory order would be merely advisory.

1. In the Matter of the Petition of Sea Breeze Pacific Juan de Fuca Cable, LP, Olympic Converter Corporation, and Victoria Converter, NSULC, for a Declaratory Order Disclaiming Jurisdiction, Docket No. UE-051439

In *Sea Breeze*, the Commission entered an order declaring that the owners of a merchant transmission line would not be public service companies under Washington law and, therefore, would not be subject to regulation under Title 80 RCW. There, petitioners had taken several steps toward their goal of constructing and owning a transmission line (Juan de Fuca Cable Project) from Port Angeles, Washington, to near Victoria, British Columbia—regardless of whether or not the Commission would assert jurisdiction over them.

Sea Breeze was organized for "the special and sole purpose of financing and developing the Juan de Fuca Project." Existing Sea Breeze subsidiaries, Olympic Converter, and Victoria Converter were to own the facilities.

Petitioners had already secured financing for the Juan de Fuca Project, through Boundless Energy NW. At the time of the filing of the petition for declaratory order, the petitioners had applied to the U.S. Department of Energy for a Presidential Permit for the Juan de Fuca Project. The petitioners had also applied for a Certificate of Public Convenience and Necessity from the National Energy Board of Canada. Anticipating an open-access transmission obligation as a condition of the Presidential Permit, the petitioners had filed with FERC an Application for Authority to Sell Transmission Rights at Negotiated Rates in FERC Docket No. ER0 5-1228-000. FERC had granted the petitioners' application ten days before they filed their petition for declaratory order with the Commission. A Regional Plan Study already was underway.

In addition to the interconnection study, the Bonneville Power Administration (Bonneville) was preparing an Environmental Impact Statement to address requirements of the National Environmental Policy Act. The petitioners also were seeking municipal approvals for building permits, Coastal Zone Management Act compliance, rights-of-way and road openings. Petitioners even had a date by which all major permitting activities would be completed. There, the Commission found that "[t]he petition demonstrates an

actual controversy, showing that resolution of the issue is needed to avoid regulatory confusion and disrupting the financing of the project." *Sea Breeze* Order, at 6. Here, Stuth and Aqua Test have taken very few steps toward their goal of owning, operating, and managing on-site sewage systems. Here, there is no actual controversy.

2. In the Matter of the Petition of TECWA Power, Inc., for a Declaratory Order, Docket No. UE-991993

In *TECWA Power*, the Commission entered an order disclaiming jurisdiction over TransAlta Centralia Generation. There, petitioner already was the contract purchaser of the Centralia Generating Plant pursuant to a Centralia Plant Purchase and Sale Agreement dated May 6, 1999. The sellers included PacifiCorp, Puget Sound Energy, Avista, Snohomish County PUD, Grays Harbor PUD, the City of Seattle, the City of Tacoma and Portland General Electric. Because Petitioner intended to have TransAlta Centralia Generation own and sell the power, PacifiCorp, Avista, and Puget Sound Energy had already procured a determination from the Commission satisfying Section 32 of the PUHCA's eligibility conditions. In December 1999, the FERC approved TransAlta Centralia's market-based rates to be charged after the sale closed. In January 2000, the FERC approved the sale of the electric facilities to TECWA.

The Commission issued its declaratory order in March of 2000. Here, there is no actual controversy.

3. In the Matter of the Petition of Bonneville Power Administration, for a Declaratory Order Disclaiming Jurisdiction, Docket No. UE-040088

In *BPA*, the Commission entered an order declaring that the owner and trustee of certain electrical transmission facilities were not subject to the Commission's jurisdiction. At the time Bonneville filed its petition with the Commission, a Special Purpose Entity (SPE) had already been created (Northwest Infrastructure Financing Corp.), Bonneville had already awarded a contract for major construction work, and made arrangements for a 30-year lease agreement, with the SPE as lessor and Bonneville as lessee. The plans were so far down the path to completion that it had already been determined that the bonds issued would be non-recourse obligations, payable solely from Bonneville's payments to the SPE under the lease. To its petition, Bonneville attached: (1) a Construction Agency Agreement between Bonneville and Northwest Infrastructure Financing Corp. (SPE), (2) a Lease Agreement between the SPE, as Lessor and Bonneville, as Lessee, (3) an Indenture of Trust between the SPE and the Trustee, (4) the Petition of Bonneville to the Federal Energy Regulatory Commission, and (5) the Request of Bonneville to

the Securities and Exchange Commission. Here, there is no actual controversy.

III. CONCLUSION

For these and other reasons set forth in the Closing Brief of Commission Staff, the Commission should either decline to enter a declaratory order or enter an order determining that the Commission lacks statutory authority to regulate on-site sewage systems.

DATED this 27th day of February, 2006.

Respectfully submitted,

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