

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of)	DOCKET A-050528
)	
WILLIAM L. STUTH and AQUA)	ORDER 06
TEST, INC.,)	
)	PREHEARING CONFERENCE
For a Declaratory Order)	ORDER;
)	
)	NOTICE OF HEARING
)	(Set for June 29, 2006, 9:30 a.m.)
)	
.....)	

BACKGROUND

1 Docket A-050528 involves a petition for a declaratory order filed by William L. Stuth and Aqua Test, Inc. The Commission declined to enter a declaratory order; petitioners sought judicial review, and the court remanded for a fact-finding hearing.

2 Petitioners and Commission Staff submitted the matter for decision to the ALJ on written statements and cross motions for summary determination under WAC 480-07-380. The ALJ reviewed the parties’ submissions, and in Order 05, denied the motions. In that order, the ALJ identified questions whose answers are needed to enable the Commission to make a decision, and noticed a prehearing conference for April 17, 2006, to resolve procedural issues and set a time and place for the hearing to be held.

3 The Washington the Washington Utilities and Transportation Commission (Commission) convened a prehearing conference before Administrative Law Judge C. Robert Wallis on April 17, 2006. Petitioners Stuth and Aqua Test, Inc., appeared by Rhys A. Sterling, attorney, Hobart, Washington; Commission Staff

appeared by Jonathan Thompson, Assistant Attorney General, Olympia, Washington.

1. Clarification of the Petition

4 The parties agreed on the following points:

5 **Subject of declaratory order.** Petitioners seek a declaratory order from the Commission that large onsite sewage systems (LOSSs), and independent entities who own, operate, manage, or service any facilities falling within the DOH definition of large onsite sewage systems, are public service companies subject to regulation by the Commission.

6 **Meaning of “subject to regulation.”** The parties agree that the phrase “subject to regulation” in RCW 80.04.015, and for the purposes of the petition for a declaratory order means that the statute requires the Commission to regulate such businesses. In other words, the phrase means that the Commission has no discretion to decide whether to regulate or to not regulate. Consequently, to consider the petition for declaratory ruling, the Commission need not explore the public policies behind regulation, nor determine whether regulation of such businesses would be “a good idea” – only whether it is required under the existing public service laws.

7 **Nature of the hearing.** The petitioners seek a declaratory order under RCW 34.05.240. That statute permits a “proceeding,” and gives the agency discretion in determining the process. The court remanded to the Commission for a fact-finding hearing. The process adopted in this docket complies with the court’s order and constitutes a proceeding under RCW 34.05.270.

8 RCW 34.05.240(4) states that the adjudicative provisions of the APA (RCW 34.05.410 through 34.05.494) do not apply to declaratory order proceedings, except as the Commission may provide by rule or order. In this docket, only RCW 34.05.461 (agency review of initial order) has been invoked to date.

9 The court remanded this matter to the Commission for a fact-finding hearing, on the issue described. The parties agreed that it would be appropriate to continue conducting the hearing process as informally as possible. They also agreed that it would be appropriate to require witnesses to testify under oath (RCW 34.05.452(3)) and to invoke the *ex parte* requirements (RCW 34.05.455 and WAC 480-07-310). Accordingly, those provisions are hereby invoked in this docket. The parties also agreed that the discovery rules would not be invoked, but the parties would continue to engage in cooperative informal discovery without the need to pursue subpoenas or public records requests. If the situation changes, the parties will address these matters to the ALJ for resolution.

10 The scope of the hearing will be to clarify specific matters identified by the bench and the parties, that bear on the issue of whether the petitioners' proposed activities are subject to regulation by the Commission. It will also identify the reasons supporting expressions of support for public service company status from private and government witnesses.

2. Nature of the Hearing

11 a) **Witnesses.** The parties submitted names of proposed witnesses and suggested the scope of matters they will address. It was agreed that the following witnesses would be presented:

1) Petitioners will present William Stuth, owner, Aqua Test, Inc.

2) Petitioners will present Matt Lee, manager, Aqua Test, Inc.

3) Petitioners will present Richard M. Benson, P. E., Department of Health (DOH). Mr. Benson will address current DOH rules, the nature of and reasons for the "public entity" provision in the DOH rule, the reasons for his belief, expressed in his letter in the file of this docket, that public service companies would satisfy DOH needs.

4) Commission Staff will present Eugene Eckhardt, Assistant Director, Transportation and Waste, UTC.

5) The bench will request that Department of Health present a witness with authority to state the position of the DOH with regard to the pending petition for a declaratory order.

6) The parties agreed that questions may be addressed to Mr. Pinkney. He is the operator of a Tennessee company subject to regulation in that state and author of a statement supporting the application. He will appear, if requested by Commission Staff or the bench. If called, he may appear by telephone. ???

12 **Specific matters for witnesses to address.** The parties may identify questions that they request be addressed in the written statements of the witnesses.

13 **Written statements of witnesses.** Counsel will circulate a written statement from each witness that expresses the facts and substance of his presentation. The statements need not be in question and answer format. If the witness intends to rely on exhibits, the exhibits should be included. Opposing counsel may respond with questions about the statement; the witness should respond with an amended or supplemental written statement that responds to the questions. The schedule for written statements, questions, and responses is set out below. Statements may include or may consist of a “powerpoint” presentation, as long as it requires no oral supplementation to represent completely the information that the witness is presenting. The slides comprising a power point presentation must be submitted as part of the written statement.

14 **b) Written statements from persons who are not witnesses.** Stuth will provide an affidavit from each person submitting a statement but not identified as a witness to respond to questions, that the content of the statement is true and correct to the best of the statement-maker’s knowledge. Stuth will review the written statements (typically letters) submitted to date in support of the application and ask that those statements be revised consistent with the scope of the

proceeding. Commission Staff may pose questions for the statement makers in advance of the statement filing deadline and on the same schedule as questions relating to the witnesses' statements.

3. Discovery

15 The Commission's discovery rules have not been invoked. Parties agreed, however, to accommodate inquiries relevant to the docket. In particular, in lieu of formal discovery or subpoena of Mr. Rose and Mr. Danner, Stuth may pose relevant questions to Mr. Eckhardt relating to involvement of those persons in the Staff presentation.¹ Questions related to Mr. Danner, Mr. Rose, and Mr. Pinkney will be timely if posed by April 28, 2006; answers must be presented by May 12, 2006. A party who wishes to call one of these persons as a witness must make the request to the other party, copy to the bench, with supporting reasons, no later than the time for filing initial statements (May 24, 2006).

4. Schedule²

16 Questions for Mr. Eckhardt relating to Mr. Danner and Mr. Rose must be presented to Mr. Thompson, and questions for Mr. Pinkney to Mr. Sterling, no later than April 28. Responses must be provided no later than May 12.

17 Witnesses' statements (including exhibits) are to be filed and served on or before Wednesday, May 24, 2006.

18 Questions about the statements are to be filed and served on or before Monday, June 5, 2006.

19 Responses, incorporating or supplementing the initial statements, are to be filed and served on or before Friday, June 23, 2006.

¹ Similarly, as noted above, Staff may pose questions for Mr. Pinkney to respond to.

² The schedule may be extended slightly by later notice.

20 The hearing will be convened on June 29, 2006. Two days will be reserved for the hearing. Parties who have any preliminary matters, including motions to strike, objections to statements or exhibits, or other procedural matters, must make those known to the bench and the other party's counsel by 1 p.m. on June 27, 2006. If appropriate to deal with such procedural matters, a prehearing conference may be called before the hearing is convened on June 29.

21 A purpose of the foregoing procedures is to avoid surprise at the hearing. If new information arises at the hearing that could not reasonably be anticipated, the ALJ will consider suggestions for addressing that problem. The parties understand they should take reasonable steps to avoid this problem, by supplying complete information in advance, under the process described in this notice.

22 Parties will present simultaneous briefs by 2 p.m. on July 7, 2006. Answering briefs are not contemplated.

NOTICE OF HEARING

23 **NOTICE IS HEREBY GIVEN That a hearing in this matter will be held beginning at 9:30 a.m., on Thursday, June 29, 2006, in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington.**

24 **NOTICE TO PARTIES: Any objection to the provisions of this Order must be filed within ten (10) days after the service date of this Order, pursuant to WAC 480-07-430 and WAC 480-07-810. Absent such objection, this Order will control further proceedings in this matter, subject to Commission review.**

Dated at Olympia, Washington, and effective April 24, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

C. ROBERT WALLIS
Administrative Law Judge