August 28, 2014

Steven King, Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. S.W.
Olympia, WA 98504

RE: Case Number 110436

Dear Mr. King:

The Commission is being asked today to establish two legal precedents: one that expands established law concerning the liability for a contaminated site; and one that permits a corporation to charge corporate debts to its customer base.

The Port Ludlow community is faced with a surcharge request by the Olympic Water and Sewer Inc. The surcharge consists of the cost to (i) site the well & drill to the 50 foot level where contamination was encountered, (ii) investigation of the field of contamination, and (iii) legal costs incurred in negotiations with Pope Resources (the previous owner of Olympic Water and Sewer). It is our belief that costs associated with items (ii) and (iii) are by law the responsibility of the parent company of Olympic Water and Sewer, Port Ludlow Associates.

What this paper will demonstrate is:

1. The law clearly defines the liability for all costs associated with remediation of contamination as belonging to the owner/contaminator and/or an entity that buys property with the knowledge that it is contaminated.
2. Pope Resources was the responsible entity for the contamination of the Walker Way property from underground fuel tanks and confirmed that responsibility in 1991 when the tanks were removed.
3. Port Ludlow Associates acquired liability for the remediation of the contamination through the 100% stock purchase of Olympic Water and Sewer from Pope Resources under the 2001 Buy/Sell agreement.
4. The legal cost of negotiations with Pope Resources and the shared investigation cost represent a renegotiation of the 2001 Buy/Sell agreement between Pope Resources and Port Ludlow Associates.
5. WUTC Staffs' recommendation that these cost are recoverable from the customers is in error and ignores the law.

The Law

RCW 70.105D.040 specifies who is liable for the remediation cost of contamination.

> *(1) Except as provided in subsection (3) of this section, the following persons are liable with respect to a facility:*
>
> *(a) The owner or operator of the facility;*
>
> *(b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances*
>
> *(3) The following persons are not liable under this section:*

(b) Any person who is an owner, past owner, or purchaser of a facility and who can establish by a preponderance of the evidence that at the time the facility was acquired by the person, the person had no knowledge or reason to know that any hazardous substance, the release or threatened release of which has resulted in or contributed to the need for the remedial action, was released or disposed of on, in, or at the facility.

Ownership

In 1990 -1991, Pope Resources commissioned the removal of three underground fuel storage tanks. There were two 2000 gallon tanks and one 1000 gallon tank. One of the 2000 gallon tanks and the 1000 gallon tank were found to have leaked. The contamination of the 2000 gallon was removed but not all of that from the 1000 gallon tank was removed. At the end of 1991 there was one known contaminated site remaining on the Walker Way property.

In 1998 in anticipation of selling the resort Pope Resources changed the utility's name to Olympic Water and Sewer Inc. and it deeded the Walker Way property to the utility company.

Port Ludlow Associates acquired all of the assets and liabilities of Olympic Water & Sewer Inc. in a stock purchase agreement from Pope Resources in 2001.

Knowledge of Contamination:

There are two methods to demonstrate that knowledge of the contamination was known by Port Ludlow Associates at the time of purchase. Records filed with the State indicate Mr. Smith the current President of Olympic Water and Sewer and Vice President of Port Ludlow Associates was in charge of the tank removal for Pope Resources in 1991. The second method is to look to the 2001 Stock Purchase Agreement. Section 3 of the Stock Purchase Agreement, *Representations and Warranties*, contains disclosures, warranties and indemnifications dealing with environmental issues and hazardous materials. Either Port Ludlow Associates knowingly assumed liability for the contamination or the contamination was not disclosed and Pope Resources continues to be liable. Under no circumstance are we the Port Ludlow Community responsible.

Discussion:

The costs that the customers of Olympic Water and Sewer are being asked to pay are for half of the investigation of the site contamination and legal costs associated with Port Ludlow Associates negotiations with Pope Resources. These costs are directly related to the contamination and not with the development and delivery of water to customers. Thus they must be borne by Port Ludlow Associates. In addition, these cost were incurred pursuant to the renegotiation of the 2001 Stock Purchase Agreement. These renegotiations reassign a portion of the liability to Pope Resources leaving the balance of the liability with Port Ludlow Associates. Port Ludlow Associates basically received a one million dollar reduction in the purchase price of the Olympic Water and Sewer should further remediation be required. Because these negotiations were between and for the benefit of Pope Resources and Port Ludlow Associates, there is no basis for compelling payment by the Port Ludlow Community.

What is important in this matter is that the costs were incurred as part of a renegotiation of the Stock Purchase Agreement. It is a renegotiation between the buyer, Port Ludlow Associates, and the seller, Pope Resources. Any costs associated with these negotiations are Port Ludlow Associates' costs not the Olympic Water and Sewer customers' costs.

Conclusion:

Olympic Water and Sewer knowingly took a substantial risk drilling into contaminated property. When the risk resulted in an unproductive well and extraordinarily high costs, it attempted to recover those costs through a rate increase, through insurance coverage, through the renegotiation of liability between Pope Resources and Port Ludlow Associates and now through this surcharge application. All of these attempts ignore the primary liability of Port Ludlow Associates. Shifting part of that liability to Pope Resources is a corporate decision with corporate consequences. The costs in short are corporate debt.

If this application is approved, Olympic Water and Sewer and other utilities will be shielded from the consequences of future risks simply by passing corporate costs to the customer base. When, as here, the costs are a corporate debt, there is no basis for protecting corporate interests by shifting costs to the community

In addition, if this application for a surcharge for drilling on contaminated property is approved, it would be the first time in Washington utilities history. The law establishes that it is in the public interest to place the consequences of contamination firmly on those who created it or assumed the liability. The Commission should not contravene public policy by approving this application.

Respectfully,

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