September 3, 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. Further, we believe this surcharge application violates RCW 80.28.090; "*No gas company, electrical company, wastewater company, or water company may make or grant any undue or unreasonable preference or advantage to any person, corporation, or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever*."

What this paper will demonstrate is:

1. The law clearly defines the liability for all costs associated with the contamination as belonging to the "current owner or operator and/or an entity that "owned or operated the facility" at the time the hazardous substance was released. RCW 70.105D.040 (1)
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 knowingly acquired liability for the contamination through the 100% stock purchase of Olympic Water and Sewer from Pope Resources under the 2001 Buy/Sell Agreement, which also purported to release Pope Resources from all liability.
4. It is against public interest to release an entity from liability for contamination per RCW70.105D.040(2); "*Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances*."
5. 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.
6. WUTC Staffs' recommendation that these cost are recoverable from the customers is in error and ignores the law.

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.

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 and/or Pope Resources. In addition, these cost were incurred pursuant to the renegotiation of the 2001 Buy/Sell 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 Buy/Sell 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 back 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. Doing so would be approving preferential treatment by a water company.

In addition, if this application for a surcharge related to 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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