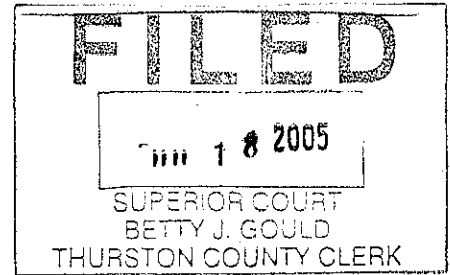


X *Trial Date is set:*
Date: Friday, September 2, 2005
Time: 1:30 P.M.
Judge/Calendar:
Judge Richard D. Hicks



No. 05-2-00782-3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

WILLIAM L. STUTH, Sr. individually; and
AQUA TEST, INC., a Washington corporation,

PETITIONERS,

v.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,
an agency of the State of Washington,

RESPONDENT.

PETITIONERS' TRIAL BRIEF

RHYS A. STERLING, WSBA #13846
Attorney for Petitioners

P.O. Box 218
Hobart, Washington 98025
425-391-6650

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- 1 3. WUTC's Answer to Petition for Judicial Review, pre-
2 vious cross-motion for summary judgment, its Trial
3 Brief, including attached Exhibits; and
- 4 4. The Court records compiled for this action to date.
5 And having heard argument and being otherwise fully app-
6 rised,
- 7 **NOW THEREFORE, WITH REFERENCE TO THE FOREGOING EVIDENCE
8 AND IN CONSIDERATION OF THE PARTICULAR MATTERS IDENTIFIED
9 HEREINBELOW, THE COURT FINDS AND CONCLUDES THAT:**
- 10 1. Stuth and Aqua Test, Inc. provide to the general public
11 served by large on-site sewage systems management servi-
12 ces, including operation and maintenance, subject to
13 guaranteed back up provided by a public entity pursuant
14 to State Department of Health (DOH) rules;
- 15 2. The DOH has identified a significant problem with its
16 back up management requirements because fewer municipal
17 entities are willing and able to provide such guarantee;
- 18 3. The DOH has endorsed the proposal by Stuth and Aqua Test
19 that a public service company subject to regulation by
20 the WUTC is a public entity that requires no further
21 back up guarantee;
- 22 4. Whether a private company providing LOSS management ser-
23 vices to the general public is a public service company
24 subject to regulation by the WUTC presents an uncertain-
ty that has significant public consequences and has not
been previously decided by the WUTC;
5. Stuth and Aqua Test properly submitted a petition for
declaratory order to the WUTC requesting a determination
as a question of fact whether a private company provid-
ing LOSS management services to the general public is a
public service company subject to regulation by the
WUTC.
6. Whether or not the WUTC has jurisdiction in this matter
to enter a declaratory order is a question of law to be
answered in light of the mandate in RCW 80.04.015 and
the public service laws of this State, including case
law;

- 1 7. The WUTC declined to enter a declaratory order as requested by Stuth and Aqua Test as a matter of law based
2 on its belief as to a limitation on the scope of its
3 jurisdiction rather than as a question of fact under RCW
4 80.04.015;
- 5 8. The WUTC cut short its factual determination as mandated
6 by RCW 80.04.015 based on a misreading and misapplication
7 of the Supreme Court's decision in Cole v. Washington
8 Utilities and Transportation Commission, 79 Wn.2d
9 302, 485 P.2d 71 (1971).
- 10 9. The enumeration of particular public service companies
11 in Title 80 is a non-exclusive exemplary listing and is
12 not intended as a limitation on the jurisdiction of the
13 WUTC;
- 14 10. Under the public service laws of this State, whether any
15 person or corporation is a public service company subject
16 to regulation by the WUTC is one of fact based on
17 what it does, not what it is called;
- 18 11. The WUTC's denial to enter a declaratory order as petitioned
19 by Stuth and Aqua Test is a breach of its statutory
20 duty, is arbitrary and capricious, and is an abuse
21 of discretion; and
- 22 12. It is appropriate pursuant to RCW 34.05.570(4)(b) and
23 .570(4)(c) for this matter to be remanded to the WUTC
24 for full and fair consideration of the Stuth and Aqua
Test Petition for Declaratory Order as a question of
fact in accordance with RCW 80.04.015.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED

that:

- 19 A. Stuth and Aqua Test's Petition for Judicial Review is
20 hereby GRANTED;
- 21 B. The April 8, 2005 notice that WUTC declines to enter a
22 declaratory order in Docket No. A-050528 is hereby VACATED; and

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C. This matter is hereby remanded to the WUTC for its full, fair and prompt consideration of the underlying Stuth and Aqua Test Petition for Declaratory Order as a question of fact pursuant to RCW 80.04.015.

DONE IN OPEN COURT this _____ day of September, 2005.

JUDGE RICHARD D. HICKS

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X **Trial Date is set:**
Date: Friday, September 2, 2005
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

WILLIAM L. STUTH, Sr. individually;)	No. <u>05-2-00782-3</u>
and AQUA TEST, INC., a Washington)	
corporation,)	
PETITIONERS,)	PETITIONERS' TRIAL
)	BRIEF
v.)	
)	
WASHINGTON UTILITIES AND TRANSPOR-)	
TATION COMMISSION, an agency of the)	
State of Washington,)	
RESPONDENT.)	

I. PARTIES AND ADMINISTRATIVE RECORD ON REVIEW

Petitioners in this administrative review are William Stuth and Aqua Test, Inc., a Washington corporation. Respondent in this matter is the Washington Utilities and Transportation Commission. The Court is asked to review the WUTC's decision declining to enter a Declaratory Order in response to a formal Petition submitted by Stuth and Aqua Test pursuant to WAC 480-07-930. The record consisting of the Petition for Declaratory Order and the WUTC's refusal is attached hereto as *Exhibit "A"* and *Exhibit "B"*, respectively.

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II. BACKGROUND STATEMENT

Stuth and Aqua Test provide management and operation services related to large on-site sewage systems serving the public.¹ To date, however, their services can be offered only where there is guaranteed backup provided by a municipality or sewer district in accordance with State Department of Health rules.² The DOH has identified a growing problem as fewer of such bodies are willing and able to provide the required backup.

Our requirement for a municipal entity is controversial and in many cases hasn't provided the assurance we hoped for. Developers complain there is a lack of municipal entities or special districts willing and able to directly manage such systems or to serve as a third party trust. . . . We have received complaints from homeowner associations required to pay ongoing fees to maintain the trust relationship without receiving any service in re-

¹ A large on-site sewage system (LOSS) is defined as "an integrated arrangement of components for a residence, building, industrial establishment or other places not connected to a public sewer system which conveys, stores, treats, and/or provides subsurface soil treatment and disposal on the property where it originates, or on adjacent or nearby property; and includes piping, treatment devices, other accessories, and soil underlying the disposal component of the initial and reserve areas; and has design flows, at any common point, greater than three thousand five hundred gallons per day" but less than 14,500 gallons per day (gpd). WAC 246-272B-01001; WAC 246-272B-03001(5)(a). A LOSS generating the maximum 14,500 gpd at any common point represents a residential subdivision or portion thereof consisting of about 60 single-family homes. WAC 246-272B-11501(2)(C)(i).

² WAC 246-272B-08001(2)(a)(vi) (and former WAC 246-272-08001(2)(a)(vi)).

1 turn. Some special sewer districts have struggled
2 to provide adequate management services and in at
3 least one case the municipal entity failed to meet
its obligations upon failure of the private manage-
ment entity.

4 Exhibit "A" at Exhibit 1, p. 1 (March 9, 2005 Letter to WUTC
5 from Richard Benson, P.E., DOH). Recognizing that solving
6 this problem is a "top priority", the DOH is actively seeking
7 "a reasonable and appropriate alternative to a municipal cor-
8 poration to provide long-term and secure management, opera-
9 tion, and maintenance of large on-site sewage systems in the
10 State of Washington."³ As a result of its researching op-
11 tions, the DOH concluded that a WUTC-regulated public service
12 company would be an acceptable public entity that could dir-
13 ectly manage, operate and maintain large on-site sewage sys-
14 tems without further municipal backup.

15 As a utility serving the general public who de-
16 pend on a LOSS, a UTC regulated public service
17 company could fill this growing need and serve an
essential public function by protecting public
health and safety [and the environment] across the
State.

18 Exhibit "A" at Exhibit 1, p. 2.⁴
19

20
21 ³ Exhibit "A" at Exhibit 1, p. 2.

22 ⁴ And based on its familiarity and experience with Stuth
23 and Aqua Test, the DOH endorsed the Petition for Declaratory
24 Order and the determination by WUTC that a private company
providing management, operation and maintenance services to
the general public is a public service company subject to
WUTC regulation. Exhibit "A" at Exhibit 1, p. 2.

1 In order to fill this need identified by DOH, Stuth and
2 Aqua Test must first have answered the question as to whether
3 a private company providing LOSS services to the general pub-
4 lic constitutes a public service company subject to WUTC reg-
5 ulation. There is no record that the WUTC has ever before
6 answered this specific query.

7 III. PROCEDURAL BACKGROUND

8 In order to have the WUTC make a formal determination of
9 fact pursuant to RCW 80.04.015⁵ that a private company offer-
10 ing LOSS operational services to the general public is a pub-
11 lic service company subject to WUTC regulation, Stuth and
12 Aqua Test formally petitioned the WUTC to enter a declaratory
13 order. Exhibit "A".

14 Any interested person may petition the commission
15 for a declaratory order with respect to the appli-
16 cability to specified circumstances of a rule, ord-
17 er, or statute enforceable by the commission, as
18 provided by RCW 34.05.240.

17 WAC 480-07-930.

18 The WUTC held no hearing on the Petition and declined to
19 enter a declaratory order solely as a matter of law.

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22 ⁵ "Whether or not any person or corporation is conduct-
23 ing business subject to regulation under [Title 80 RCW], or
24 has performed or is performing any act requiring registration
or approval of the commission without securing such registra-
tion or approval, shall be a question of fact to be determin-
ed by the commission." RCW 80.04.015.

1 We believe that without legislation defining the
2 service as a regulated public service business, and
3 without a specific statute defining the Commis-
4 sion's regulatory role and granting it the auth-
5 ority to act, the agency has no authority to regu-
6 late the operation or management of large on-site
7 sewage systems.

8 Exhibit "B".⁶

9 **IV. ISSUE PRESENTED AT TRIAL**

10 The central issue presented to this Court for resolution
11 at trial is set forth as follows:

12 Whether the WUTC properly declined to enter a de-
13 claratory order because it believes as a matter of
14 law that it has no jurisdiction over companies pro-
15 viding operation and management services to the
16 public related to large on-site sewage systems
17 notwithstanding its duty to make such decisions as
18 a question of fact under RCW 80.04.015?

19 **V. EVIDENCE RELIED UPON**

20 The evidence relied upon by Stuth and Aqua Test at trial
21 is that previously transmitted to the Court by the WUTC as
22 the certified administrative record, and:

- 23 1. The *Verified* Petition for Judicial Review filed and
24 served in this case, and the Exhibits attached
thereto; and
2. The Court files and records compiled in this case.

25 ⁶ The final action subject to this judicial review was
26 taken by WUTC on April 8, 2005 pursuant to RCW 34.05.240(5)
27 (d) and WAC 480-07-930(5)(b); namely, its formally declining
28 to enter a declaratory order as petitioned for by Stuth and
29 Aqua Test, Docket No. A-050528.

1 VI. STANDARD AND SCOPE OF REVIEW

2 The WUTC declined to enter a declaratory order as a mat-
3 ter of law without the benefit of an adjudicative proceeding.
4 Judicial review of this agency action under the APA is avail-
5 able pursuant to RCW 34.05.570(4)(b) and -.570(4)(c). More-
6 over,

7 Statutory construction is a question of law and
8 is reviewed de novo. Stuckey v. Dep't of Labor &
9 Indus., 129 Wn.2d 289, 295, 916 P.2d 399 (1996).
10 The primary goal of statutory construction is to
11 carry out legislative intent. Rozner v. City of
12 Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991).
13 If a statute is plain and unambiguous, its meaning
14 must be primarily derived from the language itself.
15 Dep't of Transp. v. State Employees' Ins. Bd., 97
16 Wn.2d 454, 458, 645 P.2d 1076 (1982).

17 Cockle v. Department of Labor and Industries, 142 Wn.2d 801,
18 807, 16 P.3d 583 (2001). "It is well settled that statutes
19 must not be construed in a manner that renders any portion
20 thereof meaningless or superfluous." Cockle, 142 Wn.2d at
21 809. And as to what weight if any to afford an agency's in-
22 terpretation of law:

23 While we may "defer to an agency's interpretation
24 when that will help the court achieve a proper und-
erstanding of the statute," . . . such interpreta-
tion is not binding on us. . . . Indeed, we have
deemed such deference "inappropriate" when the
agency's interpretation conflicts with a statutory
mandate.

Cockle, 142 Wn.2d at 812 (emphasis added). And most empha-
tically, the courts do not defer to an agency's own determin-

1 ation as to its scope of authority. Campbell v. Department
2 of Social and Health Services, 150 Wn.2d 881, 894 n.4, 83
3 P.3d 999 (2004).

4 An agency may not finally decide the limits of
5 its statutory power. That is a judicial function.
6 Social Security Board v. Nierotko, 327 U.S. 358, 369, 66
7 S.Ct. 637, 643, 90 L.Ed. 718 (1946).

8 Stuth and Aqua Test contend that the WUTC's summary de-
9 cision to deny their Petition for Declaratory Order as a mat-
10 ter of law in total disregard of its duty to make a determin-
11 ation of jurisdiction as a question of fact based upon evid-
12 ence submitted and to be developed in the record is:

- 13 1. A failure to perform a duty that is required by law
14 [i.e., RCW 80.04.015] to be performed, RCW 34.05.
15 570(4) (b);
- 16 2. Unconstitutional as a violation of a fundamental
17 right subject to substantive and/or procedural due
18 process, RCW 34.05.570(4) (c) (i);
- 19 3. Outside the statutory authority of the agency or
20 the authority conferred by a provision of law, RCW
21 34.05.570(4) (c) (ii);
- 22 4. Arbitrary or capricious, RCW 34.05.570(4) (c) (iii);
23 or
- 24 5. An abuse of discretion, RCW 34.05.570(4) (c).⁷

25 ⁷ The duty arises that a State official must exercise
26 discretion in a reasonable and unabusive manner consistent
27 with statutory requirements. Babcock v. State, 116 Wn.2d
28 596, 618, 809 P.2d 143 (1991). An official government deci-
29 sion found to be an unreasonable departure from statutory
30 requirements, is thus an abuse of discretion. Id. at 618.

PETITIONERS' TRIAL BRIEF

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RHYS A. STERLING, P.E., J.D.
Attorney at Law
P.O. Box 218
Hobart, Washington 98025-0218
Telephone (425)391-6650
Facsimile (425)391-6689
E-mail: RhysHobart@aol.com

1 VII. SUMMARY

2 The WUTC took a short cut through the mandate of RCW 80.
3 04.015 by employing a simple two-step process. First, as
4 purportedly its only factual determination the WUTC "accepted
5 for purposes of consideration of the declaratory order peti-
6 tion Petitioners' assertion that they were managers of large
7 on-site sewage systems as defined by Department of Health
8 rule."⁸ Second, the WUTC thereupon applied its interpreta-
9 tion of the Cole⁹ decision and "determined that it could not
10 regulate Petitioners as a matter of law since no section of
11 the public service laws permitted the Commission to regulate
12 managers or operators of large on-site sewage systems."¹⁰
13 This is the sum and substance of the WUTC decision-making
14 process in response to the Stuth and Aqua Test's Petition for
15 Declaratory Order.¹¹

16
17 ⁸ Initially denied by WUTC in its Answer, WUTC subse-
18 quently made this assertion in previous motion papers filed
19 with the Court in this matter. See WUTC Cross Motion For
20 Summary Judgment p. 6.

21 ⁹ Cole v. Washington Utilities and Transportation Com-
22 mission, 79 Wn.2d 302, 485 P.2d 71 (1971).

23 ¹⁰ WUTC Cross Motion p. 6.

24 ¹¹ WUTC factually inquired no further than to check Ti-
tle 80 RCW to see whether the specific type of business pro-
posed by Stuth and Aqua Test fit within any of those express-
ly enumerated activities otherwise identified as public ser-
vice companies in the law. When the WUTC could not match the
(continued...)

1 companies." RCW 80.01.040(3) (emphasis added).¹³ The term
2 "public service company includes every gas company, electric-
3 al company, telecommunications company, and water company."
4 RCW 80.04.010 (emphasis added).

5 The word "includes" is a term of enlargement, not of li-
6 mitation, and denotes a nonexclusive exemplary listing.

7 [T]he statute's use of the term "includes," de-
8 notes a nonexclusive exemplary listing. See 2A
9 Norman J. Singer, Statutes and Statutory Construc-
tion § 47.07, at 231 (6th ed. 2000 ("includes" is
usually a term of enlargement, not limitation).

10 State v. Hall, 112 Wn. App. 164, 169, 48 P.3d 350 (2002).¹⁴

11 The word 'includes' is usually a term of enlarge-
12 ment, and not of limitation. . . . It therefore
13 conveys the conclusion that there are other items
includable, though not specifically enumerated by
the statutes.

14 Argosy Limited v. Hennigan, 404 F.2d 14, 20 (5th Cir.

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18 ¹³ A utility is defined to mean "every public service
19 company that has not been classified as competitive by the
20 commission." WAC 480-80-030. Nowhere in WUTC regulation is
a utility that provides operation and management services to
the public related to large on-site sewage systems classified
as "competitive".

21 ¹⁴ See also Brown v. Scott Paper Worldwide Company, 143
22 Wn.2d 349, 359, 20 P.3d 921 (2001); Publishers Building Comp-
23 any v. Miller, 25 Wn.2d 927, 939, 172 P.2d 489 (1946); Wheeler
24 v. Department of Licensing, 86 Wn. App. 83, 88, 936 P.2d
17 (1997). In contrast, the Legislature uses the word "means"
where it intends to create a limitation. Queets Band of Indi-
ans v. State, 102 Wn.2d 1, 4, 682 P.2d 909 (1984).

PETITIONERS' TRIAL BRIEF

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RHYS A. STERLING, P.E., J.D.
Attorney at Law
P.O. Box 218
Hobart, Washington 98025-0218
Telephone (425)391-6650
Facsimile (425)391-6689
E-mail: RhysHobart@aol.com

1 1968).¹⁵ A broadened scope of companies subject to WUTC's
2 jurisdiction fits within the general expansive framework of
3 the statute, as the term "service is used in [Title 80 RCW]
4 in its *broadest and most inclusive* sense." RCW 80.04.010 (em-
5 phasis added).¹⁶ And as to the specific manner that a deter-
6 mination is made whether or not any particular company comes
7 under the WUTC's jurisdiction, no more straightforward and
8 unambiguous mandate could be stated by the Legislature than
9 as expressly *provided by the public service laws* as follows:

10 Whether or not any person or corporation is con-
11 ducting business subject to regulation under [Title
12 80 RCW], or has performed or is performing any act
13 requiring registration or approval of the commis-
14 sion without securing such registration or appro-
15 val, *shall be a question of fact to be determined*
16 *by the commission.*

17 ¹⁵ "When the term 'include' is used in a statute, it is
18 generally improper to conclude that entities not specifically
19 enumerated are excluded. . . . The legislative intent that
20 'include' be read as a term of enlargement rather than limi-
21 tation is further underscored by coupling its use with the
22 phrase 'but not limited to.'" Gholson v. United States, 532
23 A.2d 118, 119 (D.C.App. 1987). See also Pennsylvania Human
24 Relations Commission v. Alto-Reste Park Cemetery Association,
306 A.2d 881, 885 (Pa. 1973).

22 ¹⁶ "In fact, it is generally improper to conclude that
23 entities not specifically enumerated are excluded when the
24 legislature uses the word 'including'." Paxson v. Board of
Education of School District No. 87, Cook County, Illinois,
658 N.E.2d 1309, 1314-15 (Ill.App. 1995).

1 RCW 80.04.015 (emphasis added).¹⁷ Accordingly, the listing
2 of certain identified companies in RCW 80.01.040(3) and in
3 RCW 80.04.010 does not automatically exclude all other types
4 of companies and services simply because they are not expres-
5 sly named therein.

6 The general test used by our courts to determine if a
7 company is subject to regulation by the WUTC, and ingrained
8 as part of our "public service laws", is well-established and
9 long-standing:

10 A corporation becomes a public service corpora-
11 tion, subject to regulation by the department of
12 public service, only when, and to the extent that,
13 its business is dedicated or devoted to a public
14 use. The test to be applied is whether or not the
15 *corporation holds itself out, expressly or implied-
ly, to supply its service or product for use either
by the public as a class or by that portion of it
that can be served by the utility; or whether, on
the contrary, it merely offers to serve only parti-
cular individuals of its own selection.*

16 Inland Empire Rural Electrification Inc. v. Department of
17 Public Service, 199 Wash. 527, 537, 92 P. 2d 258 (1939)
18 (emphasis added).

19 The question of the character of a corporation is
20 one of fact to be determined by the evidence dis-
21 closed by the record. . . . What it does is the im-
22 portant thing . . .

23 ¹⁷ "As used in statutes, contracts, or the like, [the
24 word shall] is generally imperative or mandatory." Black's
Law Dictionary p. 1233 (5th ed. 1979).

1 Inland Empire, 199 Wash. at 538.¹⁸

2 Thus, whether any company providing ownership, manage-
3 ment, operation, and maintenance services on an independent,
4 for profit, contractual, and permanent basis to any and all
5 members of the general public in the State of Washington ser-
6 viced by large on-site sewage systems, constitutes a "public
7 service company" subject to WUTC regulation under Title 80
8 RCW is a question of fact to be determined by the Commission
9 in a Declaratory Order proceeding.

10 Any interested person may petition the commission
11 for a declaratory order with respect to the applic-
12 ability to specified circumstances of a rule, ord-
13 er, or statute enforceable by the commission, as
14 provided by RCW 34.05.240.

15 WAC 480-07-930.¹⁹

16 ¹⁸ The Supreme Court in West Valley Land Company, Inc.
17 v. Nob Hill Water Association, 107 Wn.2d 359, 366, 729 P.2d
18 42 (1986), noted that distinguishing factors include whether
19 the company is an independent corporation engaged in business
20 for profit to itself at the expense of a consuming public
21 which has no voice in the management of its affairs and no
22 interest in the financial returns. See also State ex rel.
23 Addy v. Department of Public Works, 158 Wash. 462, 465, 291
24 Pac. 346 (1930). See also United and Informed Citizen Advo-
cates Network v. Washington Utilities and Transportation Com-
mission, 106 Wn. App. 605, 611-12, 24 P.3d 471 (2001), review
denied, 145 Wn.2d 1021 (2002) (the WUTC has clear authority
to determine whether any person or corporation is subject to
regulation under RCW 80.04.015 as a question of fact).

25 ¹⁹ Because whether a company providing the services to
26 the public identified by Stuth and Aqua Test legally consti-
27 tutes a public service company is a question of fact, there
28 exists uncertainty that must be resolved only by specific de-
(continued...)

1 Although Stuth and Aqua Test fulfilled their statutory
2 duties for properly requesting a declaratory order, the WUTC
3 circumvented its statutory duty by cutting short its manda-
4 tory factual inquiry.

5 Recall the WUTC's rationale for cutting short its factu-
6 al determination and declining to enter a declaratory order
7 as a matter of law:

8 The Commission declined to enter a declaratory
9 order because the Commission believed Petitioners'
activities *could not possibly* fall under the Com-
mission's jurisdiction.

10 WUTC Cross Motion p. 4 (emphasis added). The word "possibly"
11 is customarily defined to mean "by any possibility; conceiv-
12 ably."²⁰ What the WUTC determined as a matter of law is that
13 under absolutely no possible or conceivable set of facts
14

15 _____
16 ¹⁹(...continued)
17 termination of the WUTC. This question has not been answered
18 previously and, based on the need and support expressed by
19 the State DOH, the WUTC's determination that such company is
20 to be regulated as a public service company is essential in
21 order to be recognized under law as a public entity for purp-
22 poses of LOSS management. WUTC's declining to enter a declar-
23 atory order as requested substantially adversely affects,
prejudices and violates the rights of Stuth and Aqua Test by
denying them status as a public service company regulated by
the WUTC that qualifies as a public entity under the DOH
large on-site sewage system regulations. Such summary dis-
missal of its statutory duty also has substantial adverse im-
pact on the public by denying them a necessary public service
to protect public health and the environment.

24 ²⁰ Webster's College Dictionary p. 1054 (Random House
1995).

1 could the management of large on-site sewage systems by a
2 private company, wherever located and for the public served
3 thereby and dependent thereon, ever fall under its jurisdic-
4 tion and subject to regulation as a public service company.
5 The WUTC has built a shield around its jurisdictional reach
6 to include only those expressly enumerated "activities provi-
7 ded for in the public service laws" and no more, regardless
8 of the facts.²¹ This is a clear error of law and a breach of
9 the WUTC's statutory duty to determine its jurisdictional
10 reach as a question of fact pursuant to RCW 80.04.015.

11 WUTC points to Cole v. Washington Utilities and Trans-
12 portation Commission, 79 Wn.2d 302, 485 P.2d 71 (1971) as the
13 dispositive decision which purportedly sets definite limits
14 on the bounds of its jurisdiction²² and supports its basic
15 premise that "if the law does not say that you can, then you
16 can't". The WUTC misreads Cole and misapplies its limitation
17 on administrative powers.²³ In Cole, the phrase "regulate in
18 the public interest, as provided by the public service laws"
19 was applied in the context of whether the Oil Heat Institute
20

21 ²¹ WUTC Cross Motion p. 4.

22 ²² WUTC Cross Motion pp. 4-5.

23 ²³ Generally, "an administrative agency must be strictly
24 limited in its operations to those powers granted by the leg-
islature." Cole, 79 Wn.2d at 306.

1 had standing to intervene in complaint proceedings before the
2 WUTC. 79 Wn.2d at 304. In affirming the denial to intervene
3 our Supreme Court observed that the Institute "fail[ed] to
4 point out any section of title 80 which suggests that nonreg-
5 ulated fuel oil dealers are within the jurisdictional concern
6 of the commission." 79 Wn.2d at 306. Accordingly,

7 We conclude that the commission correctly determ-
8 ined that it had no authority to consider the eff-
9 ect of a regulated utility upon a nonregulated bus-
10 iness.

11 Cole, 79 Wn.2d at 306.²⁴

12 In stark contrast to both Cole and WITA, here Stuth and
13 Aqua Test expressly point to RCW 80.04.015, WAC 480-07-930,
14 and caselaw as comprising those specific "public service
15 laws" that grant WUTC the jurisdiction to enter a declaratory
16 order and make a determination as a question of fact whether
17 a private company providing LOSS operation and management
18 services to the public constitutes a public service company
19 subject to regulation by the WUTC. Stuth and Aqua Test also

20 ²⁴ And in Washington Independent Telephone Association
21 v. Telecommunications Ratepayers Association for Cost-Based
22 and Equitable Rates, 75 Wn. App. 356, 880 P.2d 50 (1994), the
23 Court of Appeals cited to the Cole decision in support of its
24 observation that "WITA has not cited any section of Title 80
of the Revised Code of Washington that permits the Commission
to set up a fund, such as the CCF [Community Calling Fund],
to which all LECs [local exchange company] are required to
contribute, but from which not all LECs can draw." 75 Wn.
App. at 368. The Court concluded that the WUTC had no auth-
ority to promulgate regulations setting up such a fund. Id.

1 point out that under these public service laws the essential
2 determination that must be made is:

3 What it does is the important thing, not what it,
4 or the state, says that it is.

5 West Valley Land Company, 107 Wn.2d at 366. Finally, Stuth
6 and Aqua Test point out that the enumeration of public serv-
7 ice companies in Title 80 is exemplary only and does not con-
8 stitute an exclusive listing. If in fact Title 80 embodied
9 an all-inclusive list establishing the bounds to WUTC's jur-
10 isdictional reach, there would be no reason for the Legisla-
11 ture to include the mandate that "whether or not any person
12 or corporation is conducting business subject to regulation
13 [under Title 80] . . . shall be a question of fact to be de-
14 termined by the commission." RCW 80.04.015. Moreover, such a
15 construction would render the Legislature's words "includes"
16 and "including, but not limited to" in RCW 80.04.010 and RCW
17 80.01.040(3) surplusage and a complete nullity; something
18 that is not ascribed to legislative enactments.

19 Statutes are to be construed, wherever possible,
20 so that no clause, sentence or word shall be
21 superfluous, void, or insignificant.

22 United Parcel Service, Inc. v. Department of Revenue, 102
23 Wn.2d 355, 361-62, 687 P.2d 186 (1984).

24 Clearly, Stuth and Aqua Test have here expressly and
specifically pointed to those parts of our public service

1 laws which affirmatively demonstrate that the WUTC has juris-
2 diction to (1) enter a declaratory order as to which they
3 have petitioned, and (2) determine that a private company
4 providing LOSS operation and management services to the pub-
5 lic wherever located in this State is in fact subject to reg-
6 ulation by the WUTC as a public service company.

7 Finally, that fundamental rights protected by constitu-
8 tional due process have been infringed is beyond peradvent-
9 ure. There is a fundamental "expectation of freedom from
10 arbitrary action, which dictates being treated consistent
11 with the [governing] statutes".²⁵ WUTC clearly failed to
12 provide the process that was due Stuth and Aqua Test when it
13 took an unwarranted short cut through RCW 80.04.015.²⁶ RCW
14 34.05.570(4)(c)(i); RCW 34.05.570(4)(c)(iii).

17 ²⁵ Cf. Williams v. Seattle School District No. 1, 97
18 Wn.2d 215, 222, 643 P.2d 426 (1982).

19 ²⁶ "In determining whether the agency acted in an arbi-
20 trary and capricious manner, we must ensure that the agency
21 decision was based on a consideration of the relevant factors
22 and examine whether there has been a clear error of judg-
23 ment." Colorado Environmental Coalition v. Dombeck, 185 F.3d
24 1162, 1167 (10th Cir. 1999). A short cut taken through the
decision-making process may evidence a pre-judgment of the
question presented and diminishes any deference that might
otherwise be due the WUTC under the arbitrary and capricious
standard. Davis v. Mineta, 302 F.3d 1104, 1112 (10th Cir.
2002); International Snowmobile Manufacturers Association v.
Norton, 340 F. Supp. 2d 1249, 1259-61 (D.Wyo. 2004).

1 Just as one last footnote for the Court's and WUTC's in-
2 formation and consideration, to rebut once and for all the
3 notion that "Petitioners' activities *could not possibly* fall
4 under the Commission's jurisdiction," one need only look to
5 the State of Tennessee and its determination pursuant to very
6 similar public utility laws as long ago as 1994 that a priv-
7 ate corporation providing operation and maintenance of on-
8 site sewage systems for the public would be regulated by the
9 Tennessee Regulatory Authority as a public utility.²⁷ This
10 is the same utility service that Stuth and Aqua Test propose
11 to provide to the public here in the State of Washington.

12
13

14 ²⁷ The Court is asked to take judicial notice of the
15 following. ER 201. "Public utility means every individual,
16 copartnership, association, corporation, or joint stock
17 company . . . that own, operate, manage or control, within
18 the state, any interurban electric railway, traction company,
19 all other common carriers, express, gas, electric light,
20 heat, power, water, telephone, telegraph, telecommunications
21 services, **or any other like system, plant or equipment**, aff-
22 ected by and dedicated to the public use" Tennessee
23 Code § 65-4-101(6) (emphasis added). Tennessee's test for
24 inclusion is "or any other like system, . . ."; whereas Wash-
ington enlarges the scope of covered activities by using "in-
cluding, but not limited to" -- a distinction without a diff-
erence. The Tennessee Regulatory Authority granted On-Site
Systems, Inc. a Certificate of Convenience and Necessity on
April 6, 1994 (Docket No. 93-09040) and has regulated that
company as a public utility ever since (now Tennessee Waste-
water Systems, Inc.) including approval of operating plans
and tariffs. The TRA is currently proposing administrative
rules that cover in detail its regulation of wastewater com-
panies as public utilities. TRA Rule Chapter 1220-4-12.

PETITIONERS' TRIAL BRIEF

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RHYS A. STERLING, P.E., J.D.

Attorney at Law

P.O. Box 218

Hobart, Washington 98025-0218

Telephone (425)391-6650

Facsimile (425)391-6689

E-mail: RhysHobart@aol.com

1 IX. CONCLUSIONS

2 The Petition for Declaratory Order submitted to the WUTC
3 by Stuth and Aqua Test is the available and appropriate legal
4 means to determine as a question of fact whether a company
5 providing ownership, management, operation, and maintenance
6 services on an independent, for profit, contractual, and per-
7 manent basis to any and all members of the general public in
8 the State of Washington serviced by large on-site sewage sys-
9 tems, constitutes a "public service company" subject to WUTC
10 regulation under Title 80 RCW. The Petitioners, the State
11 DOH, and the public all deserve a considered and favorable
12 answer.

13 By summarily declining to enter a declaratory order as
14 a matter of law the WUTC violated its clear and unambiguous
15 statutory mandate and duty to base its determination whether
16 any particular company is a public service company subject to
17 regulation by WUTC as a question of fact upon all the eviden-
18 ce produced for its consideration. The summary decision by
19 the WUTC is a violation of its statutory duty, is arbitrary
20 and capricious, is an error of law, and/or is an abuse of
21 discretion.²⁸ RCW 34.05.570(4).

22 _____
23 ²⁸ Even where discretion is involved, such does not
24 necessarily tip the balance to a purely ministerial action
shielded from judicial review where there is alleged (as is
(continued...))

1 For the foregoing reasons, Stuth and Aqua Test respect-
2 fully ask this Court to grant their request for judicial re-
3 lief allowed under the APA and order this matter remanded to
4 the WUTC with directions to properly and promptly consider
5 Stuth and Aqua Test's Petition for Declaratory Order and to
6 make its determination fully and fairly upon the complete
7 record as a question of fact.

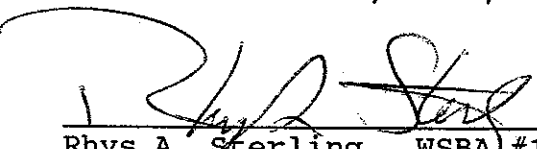
8 **X. PROPOSED ORDER**

9 A proposed Order granting the relief requested by Stuth
10 and Aqua Test is attached hereto (see Pages iv - vii, supra).

11 DATED this 18th day of July, 2005.

12 Respectfully submitted,

13 RHYS A. STERLING, P.E., J.D.

14 
15 _____
16 Rhys A. Sterling, WSBA #13846
17 Attorney for Petitioners Stuth
and Aqua Test, Inc.

18 ²⁸(...continued)

19 in our case) a clear or serious abuse of discretion. If the
20 APA is found wanting, the writ of certiorari is nonetheless
21 available as an alternative means to secure judicial review.
22 14 Am.Jur.2d Certiorari § 28, p. 651 (2000); Arkansas Demo-
23 crat-Gazette v. Zimmerman, 20 S.W.3d 301, 304 (Ark. 2000).
24 "An abuse of discretion occurs when a . . . decision is man-
ifestly unreasonable, or exercised on untenable grounds, or
for untenable reasons." Phillips v. City of Seattle, 51 Wn.
App. 415, 423, 754 P.2d 116 (1988), aff'd, 111 Wn.2d 903, 766
P.2d 1099 (1989). A decision made by government officials in
contravention to a clear statutory duty is an abuse of disc-
retion. Cf. Babcock, 116 Wn.2d at 618.

PETITIONERS' TRIAL BRIEF

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RHYS A. STERLING, P.E., J.D.

Attorney at Law

P.O. Box 218

Hobart, Washington 98025-0218

Telephone (425)391-6650

Facsimile (425)391-6689

E-mail: RhysHobart@aol.com

CERTIFICATION OF SERVICE

I certify under penalty of perjury
under the laws of the State of Washington
that on the 18th day of July
19205, I ~~mailed~~ ^{personally served} a copy of this document
to all parties.

DATED at Portland, Washington




EXHIBIT "A"

RHYS A. STERLING, P.E., J.D.
Attorney at Law

P.O. Box 218
Hobart, Washington 98025-0218
E-mail: RhysHobart@aol.com

1495 N.W. Gilman Blvd.
Suite 4-G
Issaquah, Washington 98027
(425) 391-6650
Facsimile (425) 391-6689

March 15, 2005

Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, Washington 98504-7250

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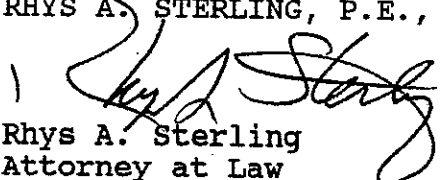
Re: William Stuth and Aqua Test, Inc.
Petition for Declaratory Order

Honorable Commissioners:

On behalf of William Stuth and Aqua Test, Inc., and pursuant to RCW 34.05.240 and WAC 480-07-930, formally submitted hereby to the Washington Utilities and Transportation Commission is the enclosed PETITION OF WILLIAM STUTH AND AQUA TEST, INC., FOR DECLARATORY ORDER TO DESIGNATE PUBLIC SERVICE COMPANY for your consideration and favorable action.

Please contact me at any time if you have any questions regarding this Petition for Declaratory Order.

Very truly yours,

RHYS A. STERLING, P.E., J.D.

Rhys A. Sterling
Attorney at Law

Enclosure

cc: William Stuth
Aqua Test, Inc.

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BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

In The Matter of the Petition of)	Docket No. _____
WILLIAM L. STUTH, individually; and)	
AQUA TEST, INC., a Washington corpor-)	PETITION OF WILLIAM STUTH
ation,)	AND AQUA TEST, INC., FOR
for Declaratory Order designating)	DECLARATORY ORDER TO DESIG-
a Public Service Company)	NATE PUBLIC SERVICE COMPANY

I. IDENTITY OF PETITIONERS

1.1 Petitioners in this request for Declaratory Order to designate a public service company are William L. Stuth, individually, and Aqua Test, Inc., a Washington corporation.

1.2 Petitioner William L. Stuth resides at 31424 W. Lake Morton Drive SE, Kent, WA 98042. Mr. Stuth is the principal owner and President of Petitioner Aqua Test, Inc.

1.3 Petitioner Aqua Test, Inc. is a Washington corporation having its principal place of business at 28620 Maple Valley Highway SE, Maple Valley, WA 98038. Aqua Test, Inc. either directly or indirectly intends to provide the utility services to the public as a public service company regulated by WUTC.

PETITION FOR DECLARATORY
ORDER

-- PAGE 1 OF 10

ORIGINAL

RHYS A. STERLING, P.E., J.D.
Attorney at Law
P.O. Box 218
Hobart, Washington 98025-0218
Telephone (425)391-6650
Facsimile (425)391-6689
E-mail: RhysHobart@aol.com

1 1.4 Petitioners' attorney in this matter is Rhys A. Sterling,
2 Attorney at Law, P.O. Box 218, Hobart, Washington 98025. Mr. Ster-
3 ling's business telephone number is 425-391-6650; the fax number is
4 425-391-6689; and e-mail address is RhysHobart@aol.com.

5 II. BACKGROUND FACTS CONSTITUTING BASIS OF PETITION

6 2.1 Stuth and Aqua Test for 19 years have provided large on-
7 site sewage system operation and management services to the public
8 pursuant to the provisions of WAC 246-272B-08001(2)(a)(vi) (and
9 former WAC 246-272-08001(2)(a)(vi)).

10 2.2 A large on-site sewage system (LOSS) is defined as "an
11 integrated arrangement of components for a residence, building, in-
12 dustrial establishment or other places not connected to a public
13 sewer system which conveys, stores, treats, and/or provides subsur-
14 face soil treatment and disposal on the property where it originat-
15 es, or on adjacent or nearby property; and includes piping, treat-
16 ment devices, other accessories, and soil underlying the disposal
17 component of the initial and reserve areas; and has design flows,
18 at any common point, greater than three thousand five hundred gal-
19 lons per day" but less than 14,500 gallons per day (gpd). WAC 246-
20 272B-01001; WAC 246-272B-03001(5)(a).

21 2.3 A LOSS generating the maximum 14,500 gpd at any common
22 point represents a residential subdivision or portion thereof con-
23 sisting of about 60 single-family homes. WAC 246-272B-11501(2)(C)
24 (i).

1 2.4 It is commonplace for residential developments to have a
2 LOSS composed of several subsystems each designed so as not to ex-
3 ceed the maximum flow at any common point, but which in fact exceed
4 a total of 14,500 gpd of wastewater actually treated and disposed.

5 2.5 Pursuant to State Department of Health (DOH) regulation,
6 a LOSS can be operated and maintained by a private company but only
7 where "a public entity serves as the primary management entity, or
8 as the third party trust for a private management entity." WAC 246
9 -272B-08001(2)(vi)(A)(1).

10 2.6 There has for some time been increasing the gap between
11 the number of municipal and special district entities willing and
12 able to provide back-up management services and an ever growing
13 number of existing and planned residential developments served by
14 a LOSS in unincorporated areas.

15 2.7 Stuth and Aqua Test know of several residential develop-
16 ments where hundreds of homeowners are on a LOSS as to which the
17 current special districts providing back-up management services
18 have expressed intentions to discontinue such required service and
19 no other existing municipal or special district is willing or able
20 to provide the service required by law.

21 2.7 Recognizing the imminent public and environmental health,
22 safety, and welfare issues (as well as the substantial public and
23 private resources at stake that could suffer from lack of required
24 operation and maintenance) stemming from the absence of sufficient

PETITION FOR DECLARATORY
ORDER

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RHYS A. STERLING, P.E., J.D.
Attorney at Law
P.O. Box 218
Hobart, Washington 98025-0218
Telephone (425)391-6650
Facsimile (425)391-6689
E-mail: RhysHobart@aol.com

1 and willing municipal and special district organizations providing
2 back-up management services, the State Department of Health supp-
3 orts the designation as "public entity" for all purposes of Chapter
4 246-272B WAC a "public service company" regulated by the Washington
5 Utilities and Transportation Commission pursuant to Title 80 RCW.
6 Attached hereto as *Exhibit 1* is a copy of a letter from Richard M.
7 Benson, P.E., LOSS Program Lead for DOH.

8 2.8 Stuth and Aqua Test desire and intend to offer and pro-
9 vide utility services to the public in the State of Washington as
10 a public entity in the form of a WUTC regulated public service com-
11 pany for all purposes of management including but not limited to
12 the ownership, operation, maintenance, repair, and replacement of
13 large on-site sewage systems pursuant to the requirements of Chap-
14 ter 246-272B WAC. Under this form of primary management, there is
15 no additional municipal or special district back-up.

16 2.9 The utility services intended to be provided by Stuth and
17 Aqua Test, or separate privately and closely held company, will be
18 performed as a "for profit" business held out for contractual use
19 by the general public or portions thereof utilizing a LOSS wherever
20 located in the State of Washington.

21 2.10 The public served by Stuth and Aqua Test, or a related
22 but separate private and closely held company, will have no owner-
23 ship interests or rights of control in such company, the utility
24 services from which will be provided on a permanent basis.

PETITION FOR DECLARATORY
ORDER

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RHYS A. STERLING, P.E., J.D.
Attorney at Law
P.O. Box 218
Hobart, Washington 98025-0218
Telephone (425)391-6650
Facsimile (425)391-6689
E-mail: RhysHobart@aol.com

1 2.11 The service area for each LOSS would be generally de-
2 fined to coincide with the boundaries of any related plat or dev-
3 elopment plan approved by an appropriate government agency. The
4 LOSS may consist of components located outside of the plat or ap-
5 proved development boundaries, but would nonetheless be included
6 within the service area covered by a LOSS management plan.

7 2.12 Possible ownership interests in the LOSS include indiv-
8 idual sewage systems that are connected to a LOSS together with the
9 LOSS components, real property and easement rights for access, tes-
10 ting, repair and necessary replacement of system components.

11 2.13 LOSS management must include the ability to charge and
12 collect reasonable fees and assessments for routine operation and
13 maintenance, as well as capital funds for repair and replacement of
14 LOSS components on a customary and emergency basis. As a regulated
15 public service company, such tariffs will be subject to the review
16 and approval of the WUTC.

17 2.14 Management services will include monitoring and testing
18 services provided at company-owned and operated facilities for fees
19 included within the approved tariff.

20 2.15 Management services will include LOSS component review
21 and approval with the overall intention to provide uniform compon-
22 ent parts that should yield more efficient and cost-effective ser-
23 vice to the public. The manner in which such uniformity is intend-
24 ed to be achieved will be included in the approved tariff.

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RHYS A. STERLING, P.E., J.D.
Attorney at Law
P.O. Box 218
Hobart, Washington 98025-0218
Telephone (425)391-6650
Facsimile (425)391-6689
E-mail: RhvsHobart@aol.com

1 III. CITATIONS TO RELEVANT STATUTES AND LAW

2 3.1 Statutory jurisdiction of the WUTC is to "regulate in the
3 public interest, as provided by the public service laws, the rates,
4 services, facilities, and practices of all persons engaging within
5 this state in the *business of supplying any utility service or com-*
6 *modity to the public for compensation, and related activities; in-*
7 *cluding, but not limited to, electrical companies, gas companies,*
8 *. . . and water companies." RCW 80.01.040(3) (emphasis added).¹*

9 3.2 A utility is defined to mean "every public service comp-
10 any that has not been classified as competitive by the commission."
11 WAC 480-80-030.

12 3.3 The term "public service company includes every gas com-
13 pany, electrical company, telecommunications company, and water
14 company." RCW 80.04.010.

15 3.3 "Whether or not any person or corporation is conducting
16 business subject to regulation under [Title 80 RCW], or has per-
17 formed or is performing any act requiring registration or approval
18 of the commission without securing such registration or approval,
19 *shall be a question of fact to be determined by the commission."*
20 RCW 80.04.015 (emphasis added).

21
22 ¹ The terms "includes" and "including, but not limited to" are phrases of
23 enlargement, not of restriction or limitation, and denote a non-exclusive exemp-
24 lary listing. 2A Norman Singer, Statutes and Statutory Construction, § 47.07, at
231 (6th ed. 2000); Brown v. Scott Paper Worldwide Company, 143 Wn.2d 349, 359,
20 P.3d 921 (2001).

1 3.4 The term "service is used in [Title 80 RCW] in its broad-
2 est and most inclusive sense." RCW 80.04.010 (emphasis added).

3 3.5 The general test used to determine if a corporation is to
4 be regulated by the WUTC is stated in Inland Empire Rural Electri-
5 fication Inc. v. Department of Public Service, 199 Wash. 527, 92 P.
6 2d 258 (1939) as follows:

7 A corporation becomes a public service corporation,
8 subject to regulation by the department of public serv-
9 ice, only when, and to the extent that, its business is
10 dedicated or devoted to a public use. The test to be
11 applied is whether or not the corporation holds itself
12 out, expressly or impliedly, to supply its service or
13 product for use either by the public as a class or by
14 that portion of it that can be served by the utility; or
15 whether, on the contrary, it merely offers to serve only
16 particular individuals of its own selection.

17 Inland Empire, 199 Wash. at 537 (emphasis added).

18 3.6 "The question of the character of a corporation is one of
19 fact to be determined by the evidence disclosed by the record. . .
20 . What it does is the important thing" Inland Empire, 199
21 Wash. at 538. See, e.g., West Valley Land Company, Inc. v. Nob Hill
22 Water Association, 107 Wn.2d 359, 366, 729 P.2d 42 (1986) (where
23 our Supreme Court noted that distinguishing factors include whether
24 the company is an independent corporation engaged in business for
profit to itself at the expense of a consuming public which has no
voice in the management of its affairs and no interest in the fin-
ancial returns). See also State ex rel. Addy v. Department of Pub-
lic Works, 158 Wash. 462, 465, 291 Pac. 346 (1930).

1 3.7 Whether a company comprised of Stuth and Aqua Test, Inc.,
2 or a separate company formed thereby, providing ownership, manage-
3 ment, operation, and maintenance services on an independent, for
4 profit, contractual, and permanent basis to any and all members of
5 the general public in the State of Washington serviced by large on-
6 site sewage systems, constitutes a "public service company" subject
7 to WUTC regulation under Title 80 RCW is a question of fact to be
8 determined by the Commission in a Declaratory Order proceeding.

9 Any interested person may petition the commission for
10 a declaratory order with respect to the applicability to
11 specified circumstances of a rule, order, or statute en-
forceable by the commission, as provided by RCW 34.05.
240.

12 WAC 480-07-930.

13 3.8 Because whether a company providing the services to the
14 public identified by Stuth and Aqua Test legally constitutes a pub-
15 lic service company is a question of fact, there exists uncertainty
16 that must be resolved only by specific determination of the Commis-
17 sion. This question has not been answered previously and, based on
18 the need and support expressed by the State DOH, the Commission's
19 determination that such company is to be regulated as a public ser-
20 vice company is essential in order to be recognized under law as a
21 public entity for purposes of LOSS management. The uncertainty that
22 exists directly and adversely affects the Petitioners and their ab-
23 ility to serve the public, and the public interest will be served
24 by the Commission making such determination. RCW 34.05.240(1).

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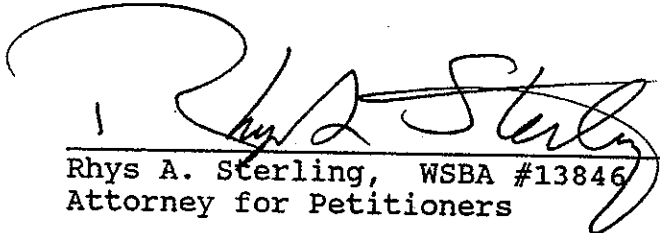
IV. REQUESTED RELIEF

4.1 Petitioners respectfully ask the WUTC to promptly issue an Order declaring that a privately owned for-profit company providing services to the public including and not limited to the management, ownership, operation, and maintenance of large on-site sewage systems and any components thereof all as defined by WAC 246-272B-01001, as now or hereafter amended, and that intends thereby to be deemed a public entity for all purposes under Chapter 246-272B WAC, is a public service company subject to regulation and tariff approval by the WUTC. WAC 480-07-930(5)(a).

4.2 The Declaratory Order should include 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.

DATED this 7th day of February, 2005.

Respectfully submitted,
RHYS A. STERLING, P.E., J.D.



Rhys A. Sterling, WSBA #13846
Attorney for Petitioners

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CERTIFICATION DECLARATION

I certify and declare under penalty of perjury under the laws of the State of Washington that I have read the foregoing Petition for Declaratory Order, that I am a principal owner and President of Aqua Test, Inc., and that the stated facts supporting this Petition are true and accurate to the best of my personal knowledge, information, and belief.

2/7/05
DATE

William L. Stuth
WILLIAM L. STUTH (WRITTEN)

Maple Valley Wash
PLACE OF SIGNATURE

William L. Stuth
WILLIAM L. STUTH (PRINTED)

EXHIBIT 1



STATE OF WASHINGTON

DEPARTMENT OF HEALTH

OFFICE OF ENVIRONMENTAL HEALTH AND SAFETY

1500 West Fourth Avenue • Suite 403 • Spokane, Washington 99204-1656

March 9, 2005

Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
PO Box 47250
Olympia, Washington 98504-7250

**RE: DOH Support for Stuth / Aqua Test, Inc.
Petition to UTC for Authorization as Public Service Company**

Honorable Commissioners:

I am writing to express my support for an application to the UTC for authorization as a Public Service Corporation on behalf of Mr. William Stuth and Aqua Test, Inc.

I am the Program Lead for the Washington State Department of Health (DOH) Large Onsite Sewage System (LOSS) program. Washington Administrative Code defines "LOSS" as a sewage system with subsurface treatment and disposal (usually on the same site where sewage is generated) with design flows between 3500 and 14,500 GPD. Our program reviews/approves LOSS engineering projects and administers an operating permit program to assure systems are properly sited, designed, constructed and managed.

Assuring that all LOSS are properly managed is critical to protecting public health and the environment and is one of the central goals of our program. We find that assuring proper management is particularly problematic for projects serving residential subdivisions where lots are individually owned. Accordingly our LOSS rules (WAC 246-272B) require for these types of projects that a "public entity" (generally interpreted to mean a municipal corporation) must provide direct management of the LOSS or at least serve in a "standby" capacity (act as a third party guarantor for a private management entity such as a homeowner association).

Our requirement for a municipal entity is controversial and in many cases hasn't provided the assurance we hoped for. Developers complain there is a lack of municipal entities or special districts willing and able to directly manage such systems or to serve as a third party trust. Reasons cited include lack of expertise or staff resources, impractical service distance, concern about collecting delinquent service accounts, perceived potential liability, etc. We have received complaints from homeowner associations required to pay ongoing fees to maintain the trust relationship without receiving any service in return. Some special sewer districts have struggled to provide adequate management services and in at least one case the municipal entity failed to meet its obligations upon failure of the private management entity.



UTC Commissioners

3/9/05

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We are currently revising our rules and working with a LOSS Rule Development Committee ("LRDC"). The LRDC voted as its top priority to develop alternatives to the "public entity" requirement. As a necessity under these circumstances, DOH is looking for a reasonable and appropriate alternative to a municipal corporation to provide long-term and secure management, operation, and maintenance of large onsite sewage systems in the State of Washington.

Researching options we feel that a UTC-regulated Public Service Company could provide a much needed alternative for the purposes of assuring direct management, operation, and maintenance of large onsite sewage systems in the State of Washington. As a utility serving the general public who depend on a LOSS, a UTC regulated public service company could fill this growing need and serve an essential public function by protecting public health and safety across the State.

Finally, we have a great deal of experience dealing with Mr. William Stuth and Aqua Test, Inc. Aqua Test currently provides maintenance services for hundreds of onsite sewage systems statewide including a number of LOSS on our database. We've found Aqua Test to be ethical, knowledgeable and competent and they have a proven track record of properly managing systems and providing safe and reliable service to customers.

For the foregoing reasons this office and department supports the Petition for Declaratory Order submitted to the UTC by William Stuth and Aqua Test, Inc. We feel a UTC-regulated Public Service Corporation can provide competent and professional LOSS management services to the public and a much needed and essential safeguard for protecting public health and safety, and the environment in the State of Washington.

Thank you for your consideration and favorable action on the subject Petition. Feel free to contact me anytime at (509) 456-6177 or via email if you have any questions.

Sincerely,



Richard M. Benson, P.E.
Large On-site Program
richard.benson@doh.wa.gov

cc: William Stuth / Aqua Test Inc.
Rhys A. Sterling, PE, JD

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EXHIBIT "B"

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APR 8 2005



STATE OF WASHINGTON

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

1300 S. Evergreen Park Dr. S.W., P.O. Box 47250 • Olympia, Washington 98504-7250
(360) 664-1160 • TTY (360) 586-8203

April 8, 2005

Mr. Rhys A. Sterling, P.E., J.D.
Attorney at Law
P.O. Box 218
Hobart, WA 98025-0218.

Re: William Stuth and Aqua Test, Inc.
Petition for Declaratory Order, Docket No. A-050528

Dear Mr. Sterling,

The Commission acknowledges receipt of your petition, filed on March 16, 2005, for a declaratory order asserting jurisdiction over Aqua Test, Inc., as a public service company.

Pursuant to RCW 34.05.240(5)(d) and WAC 480-07-930(5)(b), however, the Commission notifies you that it will not enter a declaratory order in response to your request.

You state that your client, William Stuth and Aqua Test, Inc., provide operation and management services to large on-site sewage systems (LOSS), pursuant to Department of Health (DOH) regulation WAC 246-272B-08001(2)(a)(vi) and its predecessor. You urge that the Commission declare that it has jurisdiction to regulate LOSS operators and managers, in order to qualify as "public entities" within the terms of DOH regulations, and offer support in the form of a letter from the pertinent DOH program manager.

You cite RCW 80.01.040(3) for the proposition that persons "supplying any utility service" are subject to regulation as public service companies. You also cite to cases, including *Inland Empire Rural Electrification Inc. v. Department of Public Service*, 199 Wash. 527, 92 P.2d 258 (1939), to support your view that a corporation holding itself out to provide its service to the public is a public service company. You argue that under RCW 80.04.015, whether or not a



Mr. Rhys A. Sterling

April 8, 2005

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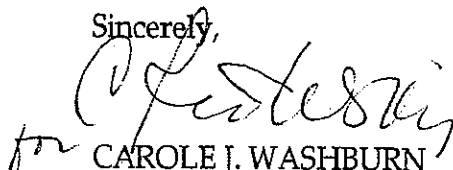
company is a public service company is a question of fact to be determined by the Commission, and you urge that the Commission should conduct a declaratory order proceeding to determine whether your clients' LOSS management service constitutes a public service company.

The Commission declines to begin a declaratory order proceeding because it believes, as a matter of law, that it has no jurisdiction over companies providing such services. The Commission's enabling statute, chapter 80.01 RCW, is broad in its language to enable the Commission to pursue whatever programs the legislature may authorize it to conduct with specific grants of authority in the remaining relevant chapters of titles 80 and 81. Without the authority to conduct a program, however, the Commission lacks the jurisdiction to regulate the services your clients conduct.

As the State Supreme Court held in *Cole v. Washington Utilities and Comm'n*, 79 Wn.2d 302, 306, 485 P. 2d 71 (1971), "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 . . .'" The Court further required a showing that some section of Title 80 RCW rendered the business in question "within the jurisdictional concern of the commission" before allowing the Commission to exercise jurisdiction over the business. The *Inland Empire* decision that you cite refers to the conduct of a regulated public service, the provision of electricity, which is defined in RCW 80.04.010 and for which regulatory jurisdiction is granted in Chapter 80.28 RCW. We believe that without legislation defining the service as a regulated public service business, and without a specific statute defining the Commission's regulatory role and granting it the authority to act, the agency has no authority to regulate the operation or management of large on-site sewage systems.

Thank you for your inquiry.

Sincerely,


for CAROLE J. WASHBURN
Executive Secretary

APPENDIX

Not Included
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