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March 15, 2005

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

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

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ATTORNEY GENERAL

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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UTILITY AND TRANSPORTATION
COMMISSION

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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.

ORIGINAL

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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

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.

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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III. CITATIONS TO RELEVANT STATUTES AND LAW

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

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

3.3 The term "public service company includes every gas company, electrical company, telecommunications company, and water company." RCW 80.04.010.

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

¹ The terms "includes" and "including, but not limited to" are phrases of enlargement, not of restriction or limitation, and denote a non-exclusive exemplary 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).

1 IV. REQUESTED RELIEF

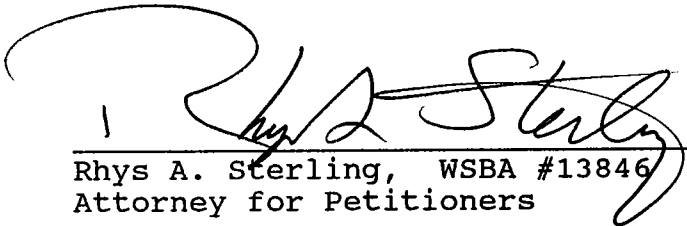
2 4.1 Petitioners respectfully ask the WUTC to promptly issue
3 an Order declaring that a privately owned for-profit company pro-
4 viding services to the public including and not limited to the man-
5 agement, ownership, operation, and maintenance of large on-site se-
6 wage systems and any components thereof all as defined by WAC 246-
7 272B-01001, as now or hereafter amended, and that intends thereby
8 to be deemed a public entity for all purposes under Chapter 246-
9 272B WAC, is a public service company subject to regulation and
10 tariff approval by the WUTC. WAC 480-07-930(5)(a).

11 4.2 The Declaratory Order should include a directive that any
12 private company desiring to provide such LOSS management services
13 to the public shall apply to the WUTC for tariff and operating plan
14 approval.

15
16 DATED this 7th day of February, 2005.

17 Respectfully submitted,

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

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21 Rhys A. Sterling, WSBA #13846
22 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

Page 2 of 2

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