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

05-2-00782-3

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

PETITIONERS,

v.

WASHINGTON UTILITIES AND TRANSPOR-
TATION COMMISSION, an agency of the
State of Washington,

RESPONDENT.

No. _____

NOTICE OF COMMENCEMENT OF
PETITION PROCEEDING FOR
JUDICIAL REVIEW OF DECISION
DECLINING TO ENTER DECLARA-
TORY ORDER, AND IN THE ALT-
ERNATIVE AN APPLICATION TO
ISSUE A WRIT OF CERTIORARI

TO: WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, an
agency of the State of Washington, Office of the Commission Chair,
1300 S. Evergreen Park Drive S.W., Olympia, Washington 98504;

AND TO THE OFFICE OF ATTORNEY GENERAL, Highways-Licenses
Building, Olympia, Washington 98504.

PLEASE TAKE NOTICE THAT a proceeding has been commenced in
Thurston County Superior Court by the filing of a Petition for Re-
view pursuant to RCW 34.05.510 et seq., and in the alternative an
application for issuance of a writ of certiorari, by WILLIAM L.
STUTH and AQUA TEST, INC. ("Petitioners"), seeking judicial review
of the WUTC's decision dated April 8, 2005 declining to enter a
declaratory order on that certain petition therefor filed by Stuth
and Aqua Test, Docket No. A-050528.

It is Petitioners' intent to initially pursue judicial review
pursuant to the provisions of the Administrative Procedure Act.

NOTICE OF COMMENCEMENT OF PETI-
TION/WRIT PROCEEDING FOR JUDICIAL
REVIEW -- PAGE 1 OF 2

COPY

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 Please serve your Notice of Appearance and all other papers on
2 the undersigned attorney for Petitioners either by mail at either
3 address below, or in person at his Issaquah office.

4 ISSAQUAH OFFICE
5 1495 N.W. Gilman Blvd.
6 Suite 4-G
7 Issaquah, WA 98027

ALTERNATIVE MAILING ADDRESS
P.O. Box 218
Hobart, WA 98025-0218

8 DATED this 21st day of April, 2005.
9

10 RHYS A. STERLING, P.E., J.D.
11

12 
13

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

17 Telephone 425-391-6650
18 Facsimile 425-391-6689
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1 William L. Stuth resides at 31424 W. Lake Morton Drive SE, Kent, WA
2 98042. Stuth is the principal owner and President of Aqua Test,
3 Inc. Aqua Test is a Washington corporation having its principal
4 place of business at 28620 Maple Valley Highway SE, Maple Valley,
5 WA 98038. Aqua Test, Inc. either directly or indirectly intends to
6 provide the utility services to the public as a public service com-
7 pany regulated by WUTC.

8 **II. PETITIONERS' ATTORNEY**

9 Petitioner's attorney is Rhys A. Sterling, WSBA #13846. Mr.
10 Sterling's mailing address is Rhys A. Sterling, P.E., J.D., Attor-
11 ney at Law, P.O. Box 218, Hobart, Washington 98025-0218. His of-
12 fice is located at Suite 4-G, 1495 NW Gilman Blvd., Issaquah, Wash-
13 ington 98027. His office telephone number is 425-391-6650 and fax
14 number is 425-391-6689.

15 **III. IDENTITY OF STATE AGENCY**

16 The agency whose action is at issue is the Washington Utili-
17 ties and Transportation Commission. The WUTC's headquarters office
18 is located at 1300 S. Evergreen Park Drive S.W., Olympia, Washing-
19 ton 98504.

20 **IV. AGENCY ACTIONS AT ISSUE**

21 The final action subject to review was taken on April 8, 2005
22 by the WUTC pursuant to RCW 34.05.240(5)(d) and WAC 480-07-930(5)
23 (b); namely, its formally declining to enter a declaratory order as
24 petitioned for by Stuth and Aqua Test, Docket No. A-050528. A copy
25 of the final decision of the WUTC as to the underlying petition for
26 declaratory order is attached hereto as *Exhibit 1*.

27 **V. IDENTIFICATION OF PARTIES IN**

28 **UNDERLYING PETITION FOR DECLARATORY ORDER**

29 The only parties involved in the petition for declaratory ord-
30 er were Stuth and Aqua Test, the Petitioners herein. The only ag-
31 ency involved in the underlying decision was the WUTC, the Respond-
32 ent herein.

1 VI. PETITIONER'S STANDING

2 Stuth and Aqua Test were the petitioners before the WUTC req-
3 uesting that agency enter a declaratory order that a company pro-
4 viding management and operation services related to large on-site
5 sewage systems to the public was in fact a public service company
6 subject to regulation by the WUTC. A copy of the Petition For Dec-
7 laratory Order is attached hereto as *Exhibit 2*.

8 Stuth and Aqua Test are currently providing management and op-
9 eration services related to large on-site sewage systems but only
10 with backup provided by a governmental body or sewer district purs-
11 uant to State Department of Health rules. A growing problem threa-
12 tens the environment and public health as fewer government agencies
13 are willing and able to provide the required backup. The DOH end-
14 orses the Stuth and Aqua Test proposal to provide management and
15 operational services for large on-site sewage systems by a public
16 entity that is a private company regulated by WUTC as a public ser-
17 vice company. Long-term, stable management services would be pro-
18 vided under such a program with rates charged the public regulated
19 by WUTC approved tariffs. Management and operation services will
20 be provided statewide to all segments of the public that depend on
21 large on-site sewage systems by contract.

22 The WUTC declining to enter a declaratory order as requested
23 substantially adversely affects, prejudices and violates the rights
24 of Stuth and Aqua Test by denying them status as a public service
25 company regulated by the WUTC that qualifies as a public entity un-
26 der the DOH large on-site sewage system regulations. The WUTC com-
27 mitted clear and reversible error of law where it denied the Stuth
28 and Aqua Test petition as a matter of law, rather than to make a
29 determination on jurisdiction as a question of fact as required by
30 law. RCW 80.04.015. A judgment in favor of Stuth and Aqua Test will
31 allow them to meet the DOH requirements for public entity manage-
32 ment of LOSS systems and provide a direct benefit to the public.

1 Accordingly, Stuth and Aqua Test have standing to seek judici-
2 al review by this Court of the WUTC's action denying their Petition
3 for Declaratory Order. See RCW 34.05.514(1); RCW 34.05.530.

4 **VII. REASONS FOR GRANTING RELIEF**

5 The WUTC has a statutory duty to "regulate in the public int-
6 erest, as provided by the public service laws, the rates, services,
7 facilities, and practices of all persons engaging within this state
8 in the business of supplying any utility service or commodity to
9 the public for compensation, and related activities" RCW
10 80.01.040(3). The term "service is used in [Title 80 RCW] in its
11 broadest and most inclusive sense." RCW 80.04.010. The specific
12 statutory mandate the WUTC patently failed in its duty to perform
13 by and in its decision denying entry of a declaratory order is set
14 forth as follows:

15 Whether or not any person or corporation is conducting
16 business subject to regulation under [Title 80 RCW], or
17 has performed or is performing any act requiring regis-
18 tration or approval of the commission without securing
19 such registration or approval, *shall be a question of*
20 *fact to be determined by the commission.*

21 RCW 80.04.015 (emphasis added).

22 The WUTC expressly and solely denied the Stuth and Aqua Test
23 Petition for Declaratory Order purely as a matter of law, rather
24 than making its decision as a question of fact as is its mandate
25 and duty under the applicable law.¹

26 ¹ "The question of the character of a corporation is one of fact to be de-
27 termined by the evidence disclosed by the record. . . . What it does is the im-
28 portant thing" Inland Empire Rural Electrification Inc. v. Department
29 of Public Service, 199 Wash. 527, 538, 92 P.2d 258 (1939) (emphasis added). "A
30 corporation becomes a public service corporation, subject to regulation by the
31 [WUTC], only when, and to the extent that, its business is dedicated or devoted
32 to a public use. The test to be applied is whether or not the corporation holds
itself out, expressly or impliedly, to supply its service or product for use ei-
ther 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 particular
individuals of its own selection." Inland Empire, 199 Wash. at 537.

1 The Commission declines to begin a declaratory order
2 proceeding because it believes, as a matter of law, that
3 it has no jurisdiction over companies providing such ser-
vices.

4 Exhibit 1, at p. 2. Because such a decision was made without ben-
5 efit of an adjudicative proceeding, judicial review of this agency
6 action under the APA is available pursuant to RCW 34.05.570(4)(b)
7 and -.570(4)(c).

8 Stuth and Aqua Test contend that the WUTC's summary decision
9 to deny their Petition for Declaratory Order as a matter of law in
10 total disregard of its duty to make a determination of jurisdiction
11 as a question of fact based on the evidence in the record is:

- 12 1. A failure to perform a duty that is required by law to be
13 performed, RCW 34.05.570(4)(b);
- 14 2. Unconstitutional as a violation of substantive and/or
15 procedural due process, RCW 34.05.570(4)(c)(i);
- 16 3. Outside the statutory authority of the agency or the au-
17 thority conferred by a provision of law, RCW 34.05.570(4)(c)(ii);
- 18 4. Arbitrary or capricious, RCW 34.05.570(4)(c)(iii); or
- 19 5. An abuse of discretion, RCW 34.05.570(4)(c).²

20 **VIII. ALTERNATIVE RELIEF BY WRIT OF CERTIORARI**

21 Should this Court determine that judicial review of this mat-
22 ter is unavailable under the APA, Stuth and Aqua Test respectfully
23 apply to the Court to issue a writ of certiorari to the WUTC under
24 which the Court may review the administrative record.

25 An appropriate writ of certiorari may be issued in this case
26 under either the statutory authority of RCW 7.16.040 or the Court's
27 inherent constitutional authority pursuant to Wash. Const. art. IV,
28 § 6.

30 ² A decision made by a State official found to be arbitrary, capricious,
31 or an otherwise unreasonable departure from regulatory requirements, is thus an
32 abuse of discretion. Babcock v. State, 116 Wn.2d 596, 618, 809 P.2d 143 (1991).

1 A court will issue a *statutory* writ of review, pursuant
2 to chapter 7.16 RCW, if the petitioner can show that (1)
3 an inferior tribunal or officer (2) exercising judicial
4 functions (3) exceeded its jurisdiction or acted illegal-
5 ly, and (4) there is no other avenue of review or adequate
6 remedy at law. See RCW 7.16.040. . . . If any of the
7 factors is absent, then there is no basis for superior
8 court review. . . . But *if these factors are shown, review is mandatory*. See RCW 7.16.040. . . .

9 By contrast, the *constitutional* writ of certiorari em-
10 bodied in article IV, section 6 (amendment 87) of the Wa-
11 shington Constitution is available in somewhat narrower
12 circumstances. . . . Under article IV, section 6 (amend-
13 ment 87), a superior court possesses the power to review
14 arbitrary decisions by issuing constitutional writs of
15 certiorari. . . . Thus, *a court will accept review only*
16 *if the petitioner can allege facts that, if verified, es-*
17 *tablish the lower tribunal's decision was arbitrary and*
18 *capricious or illegal*. . . . [This] form of review lies
19 entirely within the trial court's discretion.

20 Clark County Public Utility District No. 1 v. Wilkinson, 139 Wn.2d
21 840, 845-46, 991 P.2d 1161 (2000) (emphasis added).

22 As a general proposition and regardless of form, "certiorari
23 is available to provide for judicial review where there is a stat-
24 utory and contractual hiatus that provides no clearly articulated
25 mechanism for obtaining judicial review of a decision." Wilkinson,
26 139 Wn.2d at 844-45.

27 Stuth and Aqua Test have exhausted all administrative remedies
28 and recourse available under statute and the WUTC regulations with
29 respect to a petition for declaratory order. If the APA does not
30 afford an avenue for judicial review, there is no appeal nor any
31 plain, speedy and adequate remedy at law available to Stuth and
32 Aqua Test under which to obtain review of the WUTC's decision not
to enter a declaratory order as requested. The WUTC constitutes an
inferior tribunal or officer. The WUTC exercised judicial or quasi-
judicial functions in exercising authority regarding the review and
denial of the Stuth and Aqua Test Petition for Declaratory Order.

1 In summarily declining to enter a declaratory order as a mat-
2 ter of law rather than making its decision as a question of fact as
3 required by statutory duty and mandate, and in light of uncontested
4 facts sufficient on their face to require jurisdiction and regula-
5 tion of the described service as a public service company, the WUTC
6 acted illegally and erroneously under the law so as to constitute
7 a clear and serious or gross abuse of discretion.

8 Stuth and Aqua Test are entitled as a matter of law to this
9 Court issuing a writ of certiorari pursuant to RCW 7.16.040 dir-
10 ecting the WUTC promptly file with the Court for its review a cer-
11 tified and full copy of their Petition for Declaratory Order, in-
12 cluding all exhibits thereto. RCW 7.16.060; RCW 7.16.070.

13 In the further alternative where this Court determines that a
14 statutory writ of certiorari will not lie, Stuth and Aqua Test re-
15 spectfully ask the Court to invoke its constitutional power to rev-
16 iew the WUTC's decision pursuant to Wash. Const. art. IV, § 6, as
17 there is a statutory and contractual hiatus that provides no clear-
18 ly articulated mechanism for obtaining judicial review of the WUTC
19 decision declining to enter a declaratory order in response to the
20 Petition filed by Stuth and Aqua Test. A constitutional writ of
21 certiorari will issue to review decisions that are arbitrary and
22 capricious or illegal. In summarily declining to enter a declara-
23 tory order as a matter of law rather than making its decision as a
24 question of fact as required by statutory duty and mandate, and in
25 light of uncontested facts sufficient on their face to mandate jur-
26 isdiction and regulation of the described service as a public serv-
27 ice company, the WUTC acted arbitrarily and capriciously, and ill-
28 egally.

29 In the alternative, Stuth and Aqua Test are entitled to this
30 Court invoking its inherent authority under the Constitution to
31 issue a writ of certiorari directing the WUTC promptly file with
32 the Court the administrative record in this case for its review.

1 IX. REQUEST FOR RELIEF

2 Stuth and Aqua Test respectfully asks the Court to grant them
3 the following relief:

- 4 1. Under RCW 34.05.574(1), vacate the WUTC's decision dec-
5 lining to enter a declaratory order and remand this mat-
6 ter to the WUTC with the direction to enter a declaratory
7 order as requested by Stuth and Aqua Test and as required
8 by law under the mandate of RCW 80.04.015 as a question
9 of fact based on the evidence in the record.
- 10 2. In the alternative in the event this Court determines the
11 APA does not afford judicial review in this case, grant
12 this application of Stuth and Aqua Test and issue either
13 a statutory or constitutional writ of certiorari, as app-
14 propriate, to the WUTC directing it to promptly certify
15 and submit to this Court the administrative record in
16 this case for purposes of judicial review and further
17 action as deemed appropriate and proper thereafter, in-
18 cluding but not limited to an order directing the WUTC to
19 enter a declaratory order as requested by Stuth and Aqua
20 Test following the mandate of law.
- 21 3. Such other and further relief that the Court deems just
22 and proper in this matter in accordance with law and eq-
23 uity, including an award of attorney fees and costs.

24
25 DATED this 19th day of April, 2005.

26
27 RHYS A. STERLING, P.E., J.D.

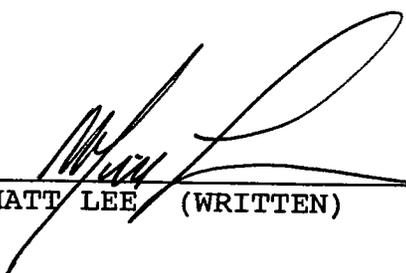
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31 Rhys A. Sterling, WSBA #13846
32 Attorney for Petitioners Stuth
and Aqua Test

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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 Judicial Review and, in the alternative, Application for Writ of Certiorari; that I am an owner and the General Manager of Aqua Test, Inc.; that the stated facts supporting this Petition and Application are true and accurate to the best of my personal knowledge, information, and belief; that I have authority from Petitioner William L. Stuth to sign this Petition on his behalf and for Aqua Test, Inc.; that I am and represent a beneficially interested party for purposes of the alternative application for writ of certiorari; and that this Petition and Application are not submitted and filed for any improper purpose.

4-20-05
DATE


MATT LEE (WRITTEN)

BLACK DIAMOND V&A
PLACE OF SIGNATURE

MATT LEE
MATT LEE (PRINTED)

* * * * *

EXHIBIT 1

* * * * *

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

Page 2

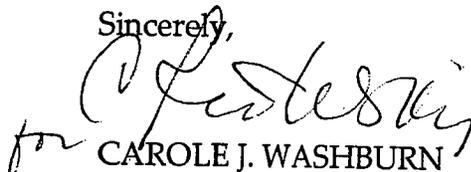
company is a public service company is a question of fact to be determined by the Commission, and you urge that the Commission should conduct a declaratory order proceeding to determine whether your clients' LOSS management service constitutes a public service company.

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,



CAROLE J. WASHBURN

Executive Secretary

* * * * *

EXHIBIT 2

* * * * *

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

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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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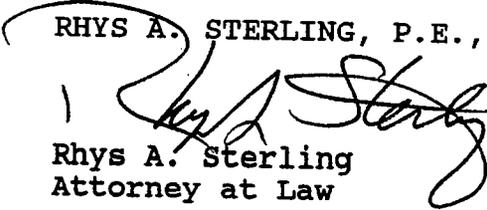
Honorable Commissioners:

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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STATE OF WASH.
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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

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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

PETITION FOR DECLARATORY
ORDER

-- PAGE 3 OF 10

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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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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-
12 forceable by the commission, as provided by RCW 34.05.
13 240.

14 WAC 480-07-930.

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

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IV. REQUESTED RELIEF

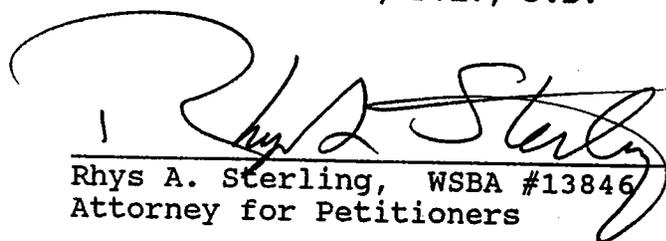
4.1 Petitioners respectfully ask the WUTC to promptly issue an Order declaring that a privately owned for-profit company providing services to the public including and not limited to the management, ownership, operation, and maintenance of large on-site sewage systems and any components thereof all as 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