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May 16, 2005

Betty J. Gould, County Clerk
Thurston County Superior Court
Building #2, Room 120
2000 Lakeridge Drive S.W.
Olympia, Washington 98502-6045

RECEIVED

MAY 17 2005

ATTY GEN DIV
WUTC

Re: Stuth and Aqua Test, Inc. v. WUTC
Thurston County Superior Court Civil No. 05-2-00782-3
PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Dear Ms. Gould:

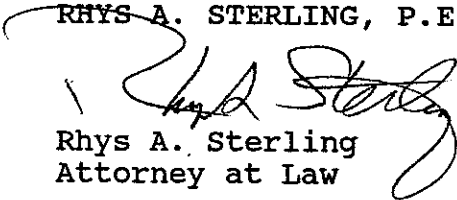
Enclosed herewith is one (1) original of Plaintiffs/Petitioners' MOTION FOR SUMMARY JUDGMENT TO REMAND TO WUTC TO MAKE A DECISION ON THE MERITS OF PETITION FOR DECLARATORY ORDER previously set for hearing before Judge Richard D. Hicks on Friday, June 17, 2005 at 9:00 am.

I have sent a working copy of this Motion for Summary Judgment directly to Judge Hicks, together with the original Order.

If you have any questions, please phone me at 425-391-6650. Thank you for your assistance in this matter.

Very truly yours,

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


Rhys A. Sterling
Attorney at Law

Enclosure

cc: Honorable Judge Richard D. Hicks
Chris Swanson, Assistant Attorney General

HONORABLE JUDGE RICHARD D. HICKS
PETITIONERS' MOTION FOR SUMMARY JUDGMENT
HEARING DATE: FRIDAY, JUNE 17, 2005 @ 9 AM

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

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12 WILLIAM L. STUTH, Sr. individually;) No. 05-2-00782-3
13 and AQUA TEST, INC., a Washington)
14 corporation,)
15) PETITIONERS,)
16)
17) v.) MOTION FOR SUMMARY JUDGMENT
18)) TO REMAND TO WUTC TO MAKE
19)) A DECISION ON THE MERITS OF
20)) PETITION FOR A DECLARATORY
21)) ORDER
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WASHINGTON UTILITIES AND TRANSPOR-)
TATION COMMISSION, an agency of the)
State of Washington,)
RESPONDENT.)

I. RELIEF REQUESTED

Pursuant to CR 56(a), Petitioners William Stuth and Aqua Test, Inc. respectfully move this Court to grant them summary judgment on their Petition for Judicial Review brought under the Administrative Procedure Act in order to remand this matter to the Washington Utilities and Transportation Commission for the WUTC to consider their Petition for Declaratory Order pursuant to the mandate of RCW 80.04.015. The WUTC declined to enter a declaratory order solely as a matter of law and thus there are no issues of fact in the administrative record for this Court to consider. LCR 56(b). However, should the Court wish to at least view these referenced materials, a copy of the Petition for Declaratory Order and the WUTC's notice of denial are attached hereto as Exhibits.

STUTH AND AQUA TEST'S MO-
TION FOR SUMMARY JUDGMENT
-- PAGE 1 OF 11

COPY

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1 II. BACKGROUND STATEMENT

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 to the public related to
5 large on-site sewage systems is in fact a public service company
6 subject to regulation by the WUTC.¹

7 Stuth and Aqua Test are currently providing management and op-
8 eration services related to large on-site sewage systems² but only
9 with backup provided by a governmental body or sewer district purs-
10 uant to State Department of Health rules.³ A growing problem threa-
11 tens the environment and public health as fewer government agencies
12 are willing and able to provide the required backup. The DOH end-
13 orses the Stuth and Aqua Test proposal to provide management and
14 operational services for large on-site sewage systems by a public
15 entity that is a private company regulated by WUTC as a public ser-
16 vice company.⁴ Long-term, stable management services would be pro-
17

18
19 ¹ A copy of the Petition For Declaratory Order is attached hereto as Exhib-
20 it 1.

21 ² A large on-site sewage system (LOSS) is defined as "an integrated arr-
22 angement of components for a residence, building, industrial establishment or
23 other places not connected to a public sewer system which conveys, stores,
24 treats, and/or provides subsurface soil treatment and disposal on the property
25 where it originates, or on adjacent or nearby property; and includes piping,
26 treatment devices, other accessories, and soil underlying the disposal component
27 of the initial and reserve areas; and has design flows, at any common point,
28 greater than three thousand five hundred gallons per day" but less than 14,500
29 gallons per day (gpd). WAC 246-272B-01001; WAC 246-272B-03001(5)(a). A LOSS
30 generating the maximum 14,500 gpd at any common point represents a residential
31 subdivision or portion thereof consisting of about 60 single-family homes. WAC
32 246-272B-11501(2)(C)(i).

³ Stuth and Aqua Test for 19 years have provided large on-site sewage sys-
tem operation and management services to the public pursuant to the provisions
of WAC 246-272B-08001(2)(a)(vi) (and former WAC 246-272-08001(2)(a)(vi)).

⁴ See Exhibit 1, Letter from DOH's Richard Benson, P.E.

1 vided under such a program with rates charged the public regulated
2 by WUTC approved tariffs. Management and operation services will
3 be provided by contract statewide to all segments of the public
4 that depend on large on-site sewage systems.

5 The WUTC held no hearing and made no fact finding, yet summar-
6 ily declined to enter a declaratory order as requested solely as a
7 matter of law.

8 We believe that without legislation defining the serv-
9 ice as a regulated public service business, and without
10 a specific statute defining the Commission's regulatory
11 role and granting it the authority to act, the agency has
12 no authority to regulate the operation or management of
13 large on-site sewage systems.

14 WUTC Letter dated April 8, 2005.⁵

15 In essence, the WUTC has taken the position that "if the law
16 doesn't say that you can, then you can't" rather than the more ap-
17 propriate approach mandated by RCW 80.04.015 that espouses "if the
18 law doesn't say that you can't, then you can". *This is the precise
19 reason why RCW 80.04.015 mandates that jurisdictional issues be re-
20 solved as a question of fact.*

21 The WUTC declined to enter a declaratory order solely on the
22 ground that it "believes" as a matter of law that without express
23 legislation a private company providing operation and management
24 services for large on-site sewage systems to the public cannot be
25 a public service company subject to WUTC jurisdiction. In so doing,
26 however, the WUTC patently ignored its clear statutory mandate.

27 III. ISSUE PRESENTED

28 The sole issue presented to this Court for resolution in this

29 ⁵ The final action subject to this judicial review was taken by WUTC on
30 April 8, 2005 pursuant to RCW 34.05.240(5)(d) and WAC 480-07-930(5)(b); namely,
31 its formally declining to enter a declaratory order as petitioned for by Stuth
32 and Aqua Test, Docket No. A-050528. A copy of the final decision of the WUTC as
to the underlying Petition for Declaratory Order is attached hereto as Exhibit 2.

1 summary judgment proceeding is set forth as follows:

2 Whether the WUTC properly declined to enter a declara-
3 tory order because it believes as a matter of law that it
4 has no jurisdiction over companies providing operation
5 and management services to the public related to large
6 on-site sewage systems notwithstanding its duty to make
7 such decisions as a question of fact under RCW 80.04.015?

8 **IV. EVIDENCE RELIED UPON**

9 The evidence relied upon by Stuth and Aqua Test in support of
10 their motion for summary judgment is:

- 11 1. The *Verified* Petition for Judicial Review filed and serv-
12 ed in this case, and the Exhibits attached thereto; and
- 13 2. The Court files and records compiled in this case.

14 **V. STANDARD AND SCOPE OF REVIEW**

15 The WUTC declined to enter a declaratory order as a matter of
16 law, without the benefit of an adjudicative proceeding or fact fin-
17 ding. Judicial review of this agency action under the APA is avai-
18 lable pursuant to RCW 34.05.570(4)(b) and -.570(4)(c). Moreover,

19 Statutory construction is a question of law and is rev-
20 iewed de novo. Stuckey v. Dep't of Labor & Indus., 129
21 Wn.2d 289, 295, 916 P.2d 399 (1996). The primary goal of
22 statutory construction is to carry out legislative int-
23 ent. Rozner v. City of Bellevue, 116 Wn.2d 342, 347, 804
24 P.2d 24 (1991). If a statute is plain and unambiguous,
25 its meaning must be primarily derived from the language
26 itself. Dep't of Transp. v. State Employees' Ins. Bd.,
27 97 Wn.2d 454, 458, 645 P.2d 1076 (1982).

28 Cockle v. Department of Labor and Industries, 142 Wn.2d 801, 807,
29 16 P.3d 583 (2001). "It is well settled that statutes must not be
30 construed in a manner that renders any portion thereof meaningless
31 or superfluous." Cockle, 142 Wn.2d at 809. And as to what weight
32 if any to afford an agency's interpretation of law:

While we may "defer to an agency's interpretation when
that will help the court achieve a proper understanding
of the statute," . . . such interpretation is not binding
on us. . . . Indeed, we have deemed such deference "*inap-
propriate*" when the agency's interpretation conflicts
with a statutory mandate.

1 Cockle, 142 Wn.2d at 812 (emphasis added). And most emphatically,
2 the courts do not defer to an agency's own determination as to its
3 scope of authority. Campbell v. Department of Social and Health
4 Services, 150 Wn.2d 881, 894 n.4, 83 P.3d 999 (2004).

5 An agency may not finally decide the limits of its sta-
6 tutory power. That is a judicial function.

7 Social Security Board v. Nierotko, 327 U.S. 358, 369, 66 S.Ct. 637,
8 643, 90 L.Ed. 718 (1946).

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

- 14 1. A failure to perform a duty that is required by law
15 [i.e., RCW 80.04.015] to be performed, RCW 34.05.570
16 (4) (b);
- 17 2. Unconstitutional as a violation of substantive and/or
18 procedural due process, RCW 34.05.570(4) (c) (i);
- 19 3. Outside the statutory authority of the agency or the au-
20 thority conferred by a provision of law, RCW 34.05.570(4)
21 (c) (ii);
- 22 4. Arbitrary or capricious, RCW 34.05.570(4) (c) (iii); or
- 23 5. An abuse of discretion, RCW 34.05.570(4) (c).⁶

24 VI. ARGUMENT/DISCUSSION

25 The jurisdiction of the WUTC over any particular company as a
26 public service company is statutorily mandated to be determined as
27 a question of fact. RCW 80.04.015. The WUTC failed in its statu-
28 torily imposed duty to factually make such a determination based on

29 ⁶ The duty arises that a State official must exercise discretion in a reas-
30 onable and unabusive manner consistent with statutory requirements. Babcock v.
31 State, 116 Wn.2d 596, 618, 809 P.2d 143 (1991). An official government decision
32 found to be an unreasonable departure from statutory requirements, is thus an ab-
use of discretion. Id. at 618.

1 Stuth and Aqua Test's Petition for Declaratory Order, and instead
2 declined to enter a declaratory order solely on its "belief" that
3 as a matter of law it had no jurisdiction over companies providing
4 operation and management services to the public related to large
5 on-site sewage systems. The WUTC's summary declining to enter a
6 declaratory order on such grounds is a clear violation of duty, an
7 error of law, arbitrary and capricious, and/or an abuse of discre-
8 tion. Based on the foregoing and grounded upon its statutory mand-
9 ate, WUTC's decision is not immune from judicial review.

10 The statutory breadth of WUTC's jurisdiction is to "regulate
11 in the public interest, as provided by the public service laws, the
12 rates, services, facilities, and practices of all persons engaging
13 within this state in the *business of supplying any utility service*
14 *or commodity to the public for compensation, and related activit-*
15 *ies; including, but not limited to,* electrical companies, gas comp-
16 anies, . . . and water companies." RCW 80.01.040(3) (emphasis add-
17 ed).⁷ The term "public service company *includes* every gas company,
18 electrical company, telecommunications company, and water company."
19 RCW 80.04.010 (emphasis added). The word "includes" is a term of
20 enlargement, not of limitation, and denotes a nonexclusive exampla-
21 ry listing.⁸

22 The word 'includes' is usually a term of enlargement,
23 and not of limitation. . . . It therefore conveys the
24 conclusion that there are other items includable, though
25 not specifically enumerated by the statutes.

26 ⁷ A utility is defined to mean "every public service company that has not
27 been classified as competitive by the commission." WAC 480-80-030. Nowhere in
28 WUTC regulation is a utility that provides operation and management services to
29 the public related to large on-site sewage systems classified as "competitive".

30 ⁸ See Brown v. Scott Paper Worldwide Company, 143 Wn.2d 349, 359, 20 P.3d
31 921 (2001); Publishers Building Company v. Miller, 25 Wn.2d 927, 939, 172 P.2d
32 489 (1946); State v. Hall, 112 Wn. App. 164, 169, 48 P.3d 350 (2002); Wheeler v.
Department of Licensing, 86 Wn. App. 83, 88, 936 P.2d 17 (1997); 2A Norman Sing-
er, Statutes and Statutory Construction, § 47.07, at 231 (6th ed. 2000).

1 Argosy Limited v. Hennigan, 404 F.2d 14, 20 (1968).⁹ A broadened
2 scope of companies subject to the WUTC's jurisdiction fits within
3 the general expansive framework of the statute, as the term "ser-
4 vice is used in [Title 80 RCW] in its *broadest and most inclusive*
5 sense." RCW 80.04.010 (emphasis added).¹⁰ And as to the specific
6 manner in which a determination is made whether or not any particu-
7 lar company comes under the WUTC's jurisdiction, no more straight-
8 forward and unambiguous mandate could be stated by the Legislature
9 than the following:

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

16 RCW 80.04.015 (emphasis added).¹¹ In other words, the listing of
17 certain identified companies in RCW 80.01.040(3) and RCW 80.04.010
18 does not automatically exclude all other types of companies and
19 services simply because they are not expressly named therein.¹²

19 ⁹ "When the term 'include' is used in a statute, it is generally improper
20 to conclude that entities not specifically enumerated are excluded. . . . The
21 legislative intent that 'include' be read as a term of enlargement rather than
22 limitation is further underscored by coupling its use with the phrase 'but not
23 limited to.'" Gholson v. United States, 532 A.2d 118, 119 (D.C.App. 1987). See
24 also Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Associ-
25 ation, 306 A.2d 881, 885 (Pa. 1973).

26 ¹⁰ "In fact, it is generally improper to conclude that entities not speci-
27 fically enumerated are excluded when the legislature use the word "including".
28 Paxson v. Board of Education of School District No. 87, Cook County, Illinois,
29 658 N.E.2d 1309, 1314-15 (Ill.App. 1995).

30 ¹¹ "As used in statutes, contracts, or the like, [the word shall] is gener-
31 ally imperative or mandatory." Black's Law Dictionary p. 1233 (5th ed. 1979).

32 ¹² It is an accepted legal principle in determining the extent of jurisdic-
tion of a public utility commission that "we cannot presume that . . . providers
are outside the Commission's jurisdiction simply because they are not mentioned
(continued...)

1 The general test used by our courts to determine if a company
2 is subject to regulation by the WUTC is well-established and long-
3 standing:

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

14 Inland Empire Rural Electrification Inc. v. Department of Public
15 Service, 199 Wash. 527, 537, 92 P. 2d 258 (1939).

16 The question of the character of a corporation is one
17 of fact to be determined by the evidence disclosed by the
18 record. . . . What it does is the important thing . . .

19 Inland Empire, 199 Wash. at 538.¹³

20 Thus, whether any company providing ownership, management, op-
21 eration, and maintenance services on an independent, for profit,
22 contractual, and permanent basis to any and all members of the gen-
23 eral public in the State of Washington serviced by large on-site

24 ¹²(...continued)

25 in the [Public Utility Act] statutes and regulations [as] legislative silence by
26 itself is not an expression of legislative intent." Morningstar Water Users As-
27 sociation v. New Mexico Public Utility Commission, 904 P.2d 28, 35 (N.M. 1995).

28 ¹³ The Supreme Court in West Valley Land Company, Inc. v. Nob Hill Water
29 Association, 107 Wn.2d 359, 366, 729 P.2d 42 (1986), noted that distinguishing
30 factors include whether the company is an independent corporation engaged in
31 business for profit to itself at the expense of a consuming public which has no
32 voice in the management of its affairs and no interest in the financial returns.
See also State ex rel. Addy v. Department of Public Works, 158 Wash. 462, 465,
291 Pac. 346 (1930). See also United and Informed Citizen Advocates Network v.
Washington Utilities and Transportation Commission, 106 Wn. App. 605, 611-12, 24
P.3d 471 (2001), review denied, 145 Wn.2d 1021 (2002) (the WUTC has clear auth-
ority to determine whether any person or corporation is subject to regulation un-
der RCW 80.04.015 as a question of fact).

1 sewage systems, constitutes a "public service company" subject to
2 WUTC regulation under Title 80 RCW is a question of fact to be de-
3 termined by the Commission in a Declaratory Order proceeding.

4 Any interested person may petition the commission for
5 a declaratory order with respect to the applicability to
6 specified circumstances of a rule, order, or statute en-
7 forceable by the commission, as provided by RCW 34.05.
8 240.

9 WAC 480-07-930.¹⁴

10 The WUTC declining to enter a declaratory order as requested
11 substantially adversely affects, prejudices and violates the rights
12 of Stuth and Aqua Test by denying them status as a public service
13 company regulated by the WUTC that qualifies as a public entity un-
14 der the DOH large on-site sewage system regulations. Such summary
15 dismissal of its statutory duty also has substantial adverse impact
16 on the public by denying them a necessary public service to protect
17 public health and the environment.

18 VII. CONCLUSIONS

19 The Petition for Declaratory Order submitted to the WUTC by
20 Stuth and Aqua Test is the available and appropriate legal means to
21 determine as a question of fact whether a company providing owner-
22 ship, management, operation, and maintenance services on an inde-
23 pendent, for profit, contractual, and permanent basis to any and
24 all members of the general public in the State of Washington ser-
25 viced by large on-site sewage systems, constitutes a "public serv-
26 ice company" subject to WUTC regulation under Title 80 RCW. WAC

27
28 ¹⁴ Because whether a company providing the services to the public identi-
29 fied by Stuth and Aqua Test legally constitutes a public service company is a
30 question of fact, there exists uncertainty that must be resolved only by specific
31 determination of the WUTC. This question has not been answered previously and,
32 based on the need and support expressed by the State DOH, the WUTC's determina-
tion that such company is to be regulated as a public service company is essen-
tial in order to be recognized under law as a public entity for purposes of LOSS
management.

1 480-07-930.

2 By summarily declining to entertain Stuth and Aqua Test's Pet-
3 ition and declining to enter a declaratory order as a matter of law
4 the WUTC violated its clear and unambiguous statutory mandate and
5 duty to base its determination whether any particular company is a
6 public service company subject to WUTC jurisdiction as a question
7 of fact upon all the evidence produced for its consideration. RCW
8 80.04.015. The summary decision by the WUTC is a violation of its
9 statutory duty, is arbitrary and capricious, is an error of law, or
10 is a clear and serious abuse of discretion.¹⁵ RCW 34.05.570(4).

11 For the foregoing reasons, Stuth and Aqua Test respectfully
12 ask this Court to grant their motion for summary judgment and order
13 this matter remanded to the WUTC with direction to properly and
14 promptly consider Stuth and Aqua Test's Petition for Declaratory
15 Order and to make its determination as a question of fact.

16 **VIII. PROPOSED ORDER**

17 Attached hereto is a proposed Order that grants Stuth and Aqua
18 Test the relief they have requested herein.

19 The original Order has been included with the Motion working
20 copy delivered to Judge Hicks.

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26 ¹⁵ Even where discretion is involved, such does not necessarily tip the
27 balance to a purely ministerial action shielded from judicial review where there
28 is alleged (as is in our case) a clear or serious abuse of discretion. If the
29 APA is found wanting, the writ of certiorari is nonetheless available as an al-
30 ternative means to secure judicial review. 14 Am.Jur.2d Certiorari § 28, p. 651
31 (2000); Arkansas Democrat-Gazette v. Zimmerman, 20 S.W.3d 301, 304 (Ark. 2000).
32 "An abuse of discretion occurs when a . . . decision is manifestly 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 discretion. Cf. Babcock, 116 Wn.2d at 618.

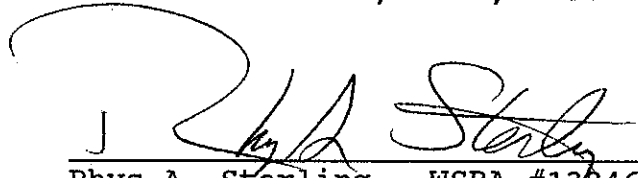
STUTH AND AQUA TEST'S MO-
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DATED this 16th day of May, 2005.

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



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

CERTIFICATION OF SERVICE

I certify under penalty of perjury
under the laws of the State of Washington
that on the 16th day of May
~~2005~~, I mailed a copy of this document
to all parties.

DATED at Issaquah, Washington



* * * * *

PROPOSED ORDER

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HONORABLE JUDGE RICHARD D. HICKS

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 TRANSPOR-)
TATION COMMISSION, an agency of the)
State of Washington,)
RESPONDENT.)

No. 05-2-00782-3

PROPOSED
ORDER GRANTING STUTH AND
AQUA TEST'S MOTION FOR SUM-
MARY JUDGMENT AND ORDER OF
REMAND TO WUTC

This matter having come on regularly for hearing before this Court on June 17, 2005 on Petitioners William Stuth and Aqua Test, Inc.'s Motion for Summary Judgment to Remand to WUTC to Make a Decision on the Merits of Petition for a Declaratory Order, and the Court having considered all matters pursuant to these motions, including the following legal and evidentiary materials:

1. Stuth and Aqua Test's Motion for Summary Judgment and Brief, including all Exhibits attached thereto;
2. WUTC's Responsive Brief and any Exhibits attached thereto;
3. Stuth and Aqua Test's Reply Brief; and
4. The Court records compiled for this action to date.

And having heard argument and being otherwise fully apprised,

ORDER GRANTING STUTH AND AQUA
TEST'S MOTION FOR SUMMARY JUDG-
MENT -- PAGE 1 OF 3

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1 *NOW THEREFORE, WITH REFERENCE TO THE FOREGOING EVIDENCE AND IN*
2 *CONSIDERATION OF THE PARTICULAR MATTERS IDENTIFIED HEREINBELOW, THE*
3 *COURT FINDS AND CONCLUDES THAT:*

- 4 1. There are no genuine issues of material fact and this matter
5 is appropriate to be considered solely as a question of law;
6 2. Whether or not the WUTC has jurisdiction in this matter to en-
7 ter a declaratory order is a question of law to be answered in
8 light of the mandate in RCW 80.04.015;
9 3. The WUTC summarily declined to enter a declaratory order as
10 requested by Stuth and Aqua Test as a matter of law based on
11 its belief as to the scope of its jurisdiction rather than as
12 a considered question of fact as is its duty under RCW 80.04.
13 015 and as such is a breach of statutory duty and is arbitrary
14 and capricious; and
15 4. It is therefore appropriate pursuant to RCW 34.05.570(4) (b)
16 and -.570(4) (c) for this matter to be remanded to the WUTC for
17 consideration of the Stuth and Aqua Test Petition for Declar-
18 atory Order as a question of fact.

19 *THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:*

- 20 A. Stuth and Aqua Test's Motion for Summary Judgment is hereby
21 GRANTED;
22 B. The April 8, 2005 notice that WUTC declines to enter a declar-
23 atory order in Docket No. A-050528 is hereby VACATED; and
24 C. This matter is hereby remanded to the WUTC for its full, fair
25 and prompt consideration of the underlying Stuth and Aqua Test
26 Petition for Declaratory Order as a question of fact pursuant
27 to RCW 80.04.015.

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32
DONE IN OPEN COURT this _____ day of June, 2005.

JUDGE RICHARD D. HICKS

ORDER GRANTING STUTH AND AQUA
TEST'S MOTION FOR SUMMARY JUDG-
MENT -- PAGE 2 OF 3

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Presented by:

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

* * * * *

EXHIBIT 1

* * * * *

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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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

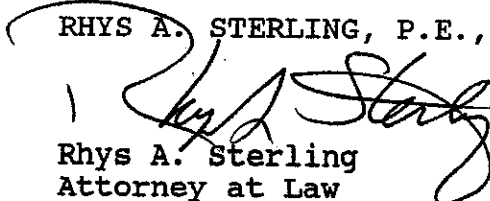
Honorable Commissioners:

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.

RECEIVED
RECORDS MANAGEMENT

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STATE OF WASH.
UTIL. AND TRANSP.
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.

PETITION FOR DECLARATORY
ORDER

-- PAGE 1 OF 10

ORIGINAL

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

PETITION FOR DECLARATORY
ORDER

-- PAGE 2 OF 10

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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

-- PAGE 4 OF 10

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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.

PETITION FOR DECLARATORY
ORDER

-- PAGE 5 OF 10

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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-
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).

PETITION FOR DECLARATORY
ORDER

-- PAGE 8 OF 10

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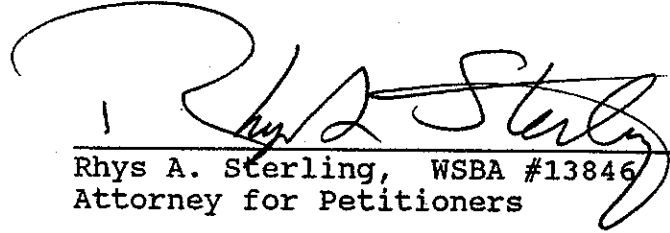
IV. REQUESTED RELIEF

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

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.

EXHIBIT 2

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

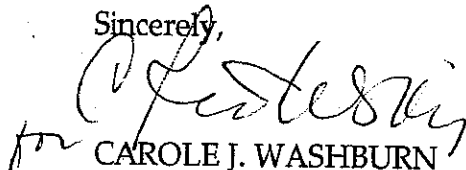
company is a public service company is a question of fact to be determined by the Commission, and you urge that the Commission should conduct a declaratory order proceeding to determine whether your clients' LOSS management service constitutes a public service company.

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,


for CAROLE J. WASHBURN
Executive Secretary