



Rob McKenna

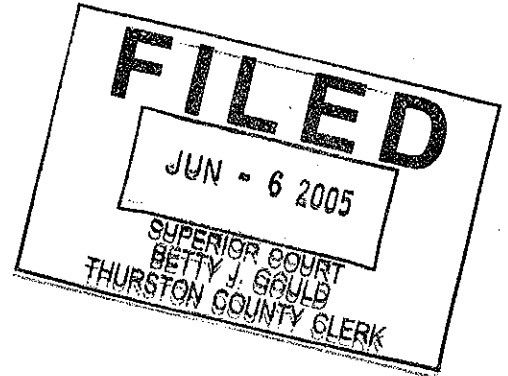
# ATTORNEY GENERAL OF WASHINGTON

Utilities and Transportation Division

1400 S Evergreen Park Drive SW • PO Box 40128 • Olympia WA 98504-0128 • (360) 664-1183

May 11, 2005

Clerk  
Thurston County Superior Court  
2000 Lakeridge Dr. SW  
Olympia, WA 98502



Re: *William A. Stuth, Sr. and Aqua Test, Inc. V. WUTC*  
Case No. 05-2-00782-3

Dear Clerk:

Enclosed for filing in the above-referenced docket are the original and 2 copies of the following documents:

1. WUTC Response to Motion for Summary Judgment and Memorandum in Support of Cross Motion for Summary Judgment
2. Cross Motion for Summary Judgment
3. Proposed Order on Cross Motion for Summary Judgment
4. Civil Notice of Issue
5. Certificate of Service

Very truly yours,

CHRIS SWANSON

Assistant Attorney General

CS:kll

Enclosures

cc: Parties



**EXPEDITE** (if filing within 5 court days of hearing)  
 Hearing is set:  
 Date: June 17, 2005  
 Time: 9:00 am  
 Judge/Calendar: Judge Richard D. Hicks

**SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY**

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William L. Stuth and Aqua Test, Inc.  
 Plaintiff/Petitioner,  
 vs.  
WUTC  
 Defendant/Respondent.

**NO. 05-2-00782-3**  
**CIVIL NOTICE OF ISSUE (NTIS)**  
**Clerk's Action Required**

**TO: THURSTON COUNTY CLERK** and to all other parties listed herein:  
**PLEASE TAKE NOTICE** that an issue of law in this case will be heard on the date below and the Clerk is directed to note this issue on the calendar checked below.  
**FRIDAY, June 17, 2005, 9:00 a.m. MOTION CALENDAR**

Bench/Judge Copies: Deliver to Superior Court, Building 2, Rm. 150 Filing Deadlines: Friday noon, preceding Friday noted, pursuant to LCR 5(b)(1) & (2). Confirmation: E-mail to <a href="mailto:civlaw@co.thurston.wa.us">civlaw@co.thurston.wa.us</a> , fax to (360) 753-4033, or call (360) 786-5423 by 12:00 noon three court days prior to the hearing date [LCR 16(f)(2)]. Court Address: 2000 Lakeridge Drive SW, Building 2, Olympia, WA 98502.	
<b>ASSIGNED JUDGE:</b> <input type="checkbox"/> Judge Paula Casey <input checked="" type="checkbox"/> Judge Richard D. Hicks <input type="checkbox"/> Judge Richard A. Strophy <input type="checkbox"/> Judge Gary R. Tabor <input type="checkbox"/> Judge Wm. Thomas McPhee <input type="checkbox"/> Judge Chris Wickham	
<p style="text-align: center;"><b>CIVIL MOTIONS</b></p> <input type="checkbox"/> Default <input type="checkbox"/> Discovery <input checked="" type="checkbox"/> Summary Judgment/Dismissal <input type="checkbox"/> Change Venue <input type="checkbox"/> Continue Trial <input type="checkbox"/> Show Cause <input type="checkbox"/> Present Order <input type="checkbox"/> TRO/Preliminary Injunction <input type="checkbox"/> Contested Probate Motion <input type="checkbox"/> Other: _____	<p style="text-align: center;"><b>PROBATE</b></p> <input type="checkbox"/> Petition for Letters of Administration/Guardianship <input type="checkbox"/> Petition for Probate of Will and Letters Testamentary <input type="checkbox"/> Petition to Set Aside Property in Lieu of Homestead <input type="checkbox"/> Annual Report of Guardianship <input type="checkbox"/> Final Account <input type="checkbox"/> Other: _____

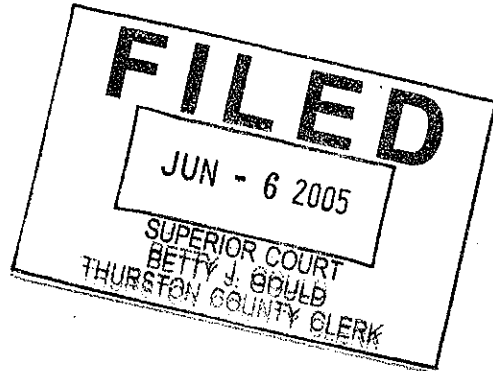
1  EXPEDITE

2  Hearing is set:

3 Date: July 22, 2005

4 Time: 9:00 a.m.

5 Judge: Honorable Richard D. Hicks



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9 STATE OF WASHINGTON  
10 THURSTON COUNTY SUPERIOR COURT

11  
12 WILLIAM L. STUTH, Sr., individually; and  
13 AQUA TEST, INC., a Washington  
Corporation,

14 Petitioners,

15 v.

16 WASHINGTON UTILITIES AND  
17 TRANSPORTATION COMMISSION,

18 Respondent.

CASE NO. 05-2-00782-3

CERTIFICATE OF SERVICE

19  
20 I hereby certify that I have this day served the following documents upon the persons  
21 and entities listed on the Service List below via facsimile (by agreement with petitioner's  
22 counsel), and by depositing a copy of said document in the United States mail, addressed as  
23 shown, with first class postage prepaid

- 24 1. WUTC Response to Motion for Summary Judgment and Memorandum in Support  
25 of Cross Motion for Summary Judgment  
26 2. Cross Motion for Summary Judgment

1  EXPEDITE

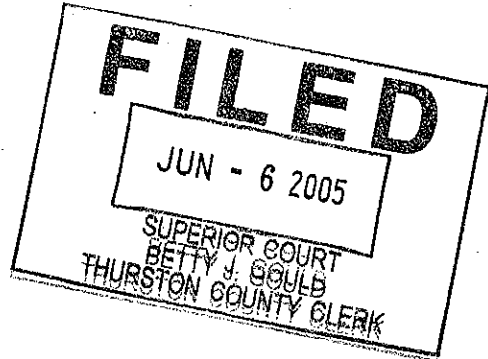
2  Hearing is set:

3 Date: June 17, 2005

4 Time: 9:00 am

5 Judge/Calendar:

Honorable Richard D. Hicks



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9 STATE OF WASHINGTON  
10 THURSTON COUNTY SUPERIOR COURT

11  
12 WILLIAM L. STUTH, Sr., individually; and  
13 AQUA TEST, INC., a Washington  
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14 Petitioners,

15 v.

16 WASHINGTON UTILITIES AND  
17 TRANSPORTATION COMMISSION,

18 Respondent.

CASE NO. 05-2-00782-3

WASHINGTON UTILITIES AND  
TRANSPORTATION  
COMMISSION CROSS MOTION  
FOR SUMMARY JUDGMENT

19 **I. RELIEF REQUESTED**

20 Respondent Washington Utilities and Transportation Commission (Commission)  
21 moves for summary judgment as follows:

22 Respondent Commission moves for summary judgment affirming its action in declining  
23 to enter a declaratory order in response to the petition of Petitioners Stuth and Aqua Test  
24 because as a matter of law the Commission had discretion to decline to enter the order and its  
25 action was not in violation of the standards set forth in RCW 34.05.570.  
26

1 **II. MEMORANDUM IN SUPPORT**

2 This Motion is based on the memorandum in support of this motion accompanying this  
3 motion.

4 **III. STATEMENT OF THE ISSUES**

5 The following issues are presented for resolution by the court:

6  
7 1. Are Petitioners entitled to a declaratory order proceeding where the decision to  
8 investigate Petitioners, conduct a declaratory order proceeding, and enter a declaratory order is  
9 discretionary with the Commission, Petitioners presented their Petition for a Declaratory Order  
10 as a pure legal issue that could be analyzed as a matter of law, and the Commission does not  
11 have statutory authority to regulate Petitioners as a matter of law?

12  
13 2. Should summary judgment be granted in favor of Respondent Commission  
14 where its action in declining to enter a declaratory order was not a failure to perform a duty  
15 required by law, was not unconstitutional, was not outside the statutory authority of the agency  
16 or the authority conferred by a provision of law, was not arbitrary and capricious, and was not  
17 an abuse of discretion?

18 **IV. EVIDENCE RELIED UPON**

19 This motion is based on the pleadings and evidence submitted by Petitioners.

20 **IV. LEGAL AUTHORITY**

21 This motion is made pursuant to CR 56(b), which provides in pertinent part: "A party  
22 against whom a claim . . . is asserted . . . may move with or without supporting affidavits for a  
23 summary judgment in his favor[.]"  
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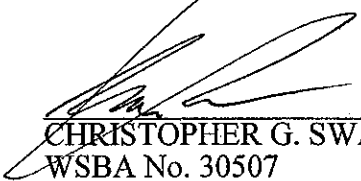
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**V. PROPOSED ORDER**

A proposed order granting the relief requested accompanies this motion.

DATED this 6th day of June, 2005.

ROB MCKENNA  
Attorney General



CHRISTOPHER G. SWANSON  
WSBA No. 30507  
Assistant Attorney General  
Washington Utilities and  
Transportation Commission  
(360) 664-1220

1  EXPEDITE

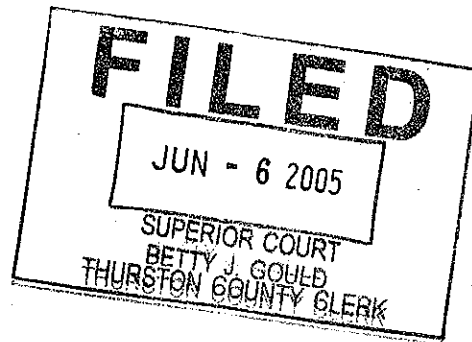
2  Hearing is set:

3 Date: June 17, 2005

4 Time: 9:00 am

5 Judge/Calendar:

Honorable Richard D. Hicks



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9 STATE OF WASHINGTON  
10 THURSTON COUNTY SUPERIOR COURT

11  
12 WILLIAM L. STUTH, Sr., individually; and  
13 AQUA TEST, INC., a Washington  
Corporation,

14 Petitioners,

15 v.

16 WASHINGTON UTILITIES AND  
17 TRANSPORTATION COMMISSION,

18 Respondent.

CASE NO. 05-2-00782-3

WASHINGTON UTILITIES AND  
TRANSPORTATION  
COMMISSION RESPONSE TO  
MOTION FOR SUMMARY  
JUDGMENT AND  
MEMORANDUM IN SUPPORT OF  
CROSS MOTION FOR SUMMARY  
JUDGMENT

19 THE MATTER before the court is a petition for judicial review under the  
20 Administrative Procedure Act (APA), RCW 34.05, of an action of the Washington Utilities and  
21 Transportation Commission (Commission) declining to enter a declaratory order. This  
22 memorandum is submitted in response to Petitioner Stuth and Aqua Test's Motion for  
23 Summary Judgment (Petitioners' Motion) and to support Respondent Commission's Cross  
24 Motion for Summary Judgment (Respondent's Motion).  
25  
26

1 **I. RELIEF REQUESTED**

2 Respondent Commission asks that Petitioners' Motion under CR 56(a) be denied,  
3 Respondent's Motion under CR 56(b) be granted, and the Commission's action declining to  
4 enter a declaratory order be affirmed.  
5

6 **II. STATEMENT OF FACTS**

7 Petitioners asked the Commission to enter an order under RCW 34.05.240 and WAC  
8 480-07-930 declaring that a manager of a large on-site sewage systems, as that term is defined  
9 by Department of Health WAC 246-272B-01001; WAC 246-272B-03001(5)(a), is subject to  
10 regulation by the Commission. Petitioner's Motion, page 2-3. The Commission declined to  
11 enter a declaratory order stating that it lacked jurisdiction to regulate such companies as a  
12 matter of law. Petitioner's Motion, page 3.  
13

14 **III. STATEMENT OF THE ISSUE**

15 A. Are Petitioners entitled to a declaratory order proceeding where the decision to  
16 investigate Petitioners, conduct a declaratory order proceeding, and enter a declaratory order is  
17 discretionary with the Commission, Petitioners presented their Petition for a Declaratory Order  
18 as a pure legal issue that could be analyzed as a matter of law, and the Commission does not  
19 have statutory authority to regulate Petitioners as a matter of law?  
20

21 B. Should summary judgment be granted in favor of Respondent Commission where its  
22 action in declining to enter a declaratory order was not a failure to perform a duty required by  
23 law, was not unconstitutional, was not outside the statutory authority of the agency or the  
24 authority conferred by a provision of law, was not arbitrary and capricious, and was not an  
25 abuse of discretion?  
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#### IV. STANDARDS OF REVIEW

The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a). The court shall grant relief only if it determines that a person seeking review has been substantially prejudiced by the action complained of. RCW 34.05.570(1)(d). Relief for person aggrieved by the performance of an agency action, including the exercise of discretion (or relief for a person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed) can be granted only if the court determines the action is:

- (a) Unconstitutional;
- (b) Outside the statutory authority of the agency or the authority conferred by a provision of law;
- (c) Arbitrary or capricious.<sup>1</sup>

RCW 34.05.570(4)(c).

#### VI. ARGUMENT

**A. The Commission's exercise of discretion in declining to enter the declaratory order was not an abuse of discretion, was not arbitrary or capricious, and was consistent with its statutory authority.**

The Commission properly exercised its discretion not to enter a declaratory order since the Commission does not have authority to regulate Petitioners *as a matter of law*. Petitioner asserted in his Petition for Declaratory Order that he manages large on-site sewage systems, as defined by Department of Health rule.<sup>2</sup>

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<sup>1</sup> Relief may also be granted if it is "Taken by persons who were not properly constituted as agency officials entitled to take such action." However, Petitioner has not raised this issue in its Motion.

<sup>2</sup> WAC 246-272B-01001; WAC 246-272B-03001(5)(a) define a *large on-site sewage system* as "... an integrated arrangement of components for a residence, building, industrial establishment or other places not

1 The Commission declined to enter a declaratory order because the Commission  
2 believed Petitioners' activities could not possibly fall under the Commission's jurisdiction.  
3 This determination was made "as a matter of law" since the scope of the Commission's  
4 authority over unregulated activities has been unambiguously addressed by the state supreme  
5 court.  
6

7 Under RCW 80.01.040(3) the Commission has authority:

8 to regulate in the public interest, *as provided by the public service laws* [emphasis  
9 added], the rates, services, facilities, and practices of all persons engaging within this  
10 state in the business of supplying any utility service or commodity to the public for  
11 compensation, and related activities, including, but not limited to, electrical companies,  
gas companies, irrigation companies, telecommunication companies, and water  
companies.

12 RCW 80.01.040(3) provides broad authority for the Commission to regulate. However, as is  
13 plain from the language of the statute, that authority is limited to those activities provided for  
14 in the public service laws. The meaning of this statute was addressed and settled in *Cole v.*  
15 *Wn. Util. & Transp. Comm'n*, 79 Wn.2d 302, 305, 485 P.2d 71 (1971).  
16

17 In *Cole* the Commission declined to permit a fuel oil dealer's institute to intervene in a  
18 Commission proceeding. Following a challenge by the institute, the court unambiguously  
19 interpreted the scope of the commission's authority. The court said "Although RCW  
20 80.01.040(3) demands regulation in the public interest, that mandate is qualified by the  
21 following clause 'as provided by the public service laws . . . ' Appellants fail to point out any  
22  
23

24 \_\_\_\_\_  
25 connected to a public sewer system which: (a) conveys, stores, treats, and/or provides subsurface soil treatment  
26 and disposal on the property where it originates, or on adjacent or nearby property; and (b) includes piping,  
treatment devices, other accessories, and soil underlying the disposal component of the initial and reserve areas;  
and (c) has design flows, at any common point, greater than three thousand five hundred gallons per day" but less  
than 14,500 gallons per day (gpd).

1 section of title 80 which suggests that nonregulated fuel oil dealers are within the jurisdictional  
2 concern of the commission.” 79 Wn.2d at 306.

3 The court went on to say “An administrative agency must be strictly limited in its  
4 operations to those powers granted by the legislature” and concluded “Since the Commission  
5 had neither express nor implied authority to examine the institute’s contentions, its denial of  
6 the institute’s petition to intervene was both proper and reasonable.” *Id.*

7  
8 Thus, RCW 80.01.040(3) is not the end point for determining the scope of the  
9 Commission’s authority as Petitioners contend. Instead, in order for the Commission to have  
10 the power to regulate a particular activity or business, the Legislature must have given the  
11 Commission the power in the public service laws. Petitioners have failed to point out any  
12 section of the public service laws allowing the Commission to regulate large on-site sewage  
13 systems.<sup>3</sup>  
14

15 Despite the clear legal authority, Petitioners appear to claim that even if it is clear as a  
16 matter of law that the Commission does not have authority to regulate, the Commission is  
17 required to engage in fact-finding whenever the Commission’s jurisdiction is at issue.  
18 Specifically, Petitioner complains that jurisdictional issues are to be resolved as “a question of  
19 fact” pursuant to RCW 80.04.015.  
20

21 However, as discussed above Petitioners’ own Petition for Declaratory Order raises  
22 only a question of law because their activities are defined by Department of Health rule.  
23 Therefore, there was nothing for the Commission to investigate. Furthermore, RCW 80.04.015  
24

25 <sup>3</sup> Petitioners also imply that the applicable test is whether Stuth and Aqua Test *decide* to hold themselves  
26 out as public service corporations. To accept this interpretation would result in a corporation having the power to  
declare itself a public service corporation under the jurisdiction of the Commission no matter what activity the  
corporation is engaged in. Petitioner provides no authority that stands for this proposition. Furthermore, the  
discretion to determine jurisdiction lies with the Commission, not the corporation. RCW 80.04.015.

1 provides the Commission the *discretion* to investigate activities “Whenever the Commission  
2 believes” that a person may be engaged in an activity within its jurisdiction. The statute does  
3 not *mandate* that the Commission investigate when it believes it does not have authority to  
4 regulate. In fact, the language of the statute stands for the opposite proposition. Thus, like the  
5 authority to issue a declaratory order (as discussed below), the authority to investigate the  
6 Commission’s jurisdiction may, but need not, be exercised by the Commission.  
7

8 Black’s law dictionary, Sixth Edition defines “matter of law” as “[w]hatever is to be  
9 ascertained or decided by the application of statutory rules or the principles and determinations  
10 of law, as distinguished from the investigation of particular facts.” The Commission accepted  
11 for purposes of consideration of the declaratory order petition Petitioners’ assertions that they  
12 were managers of large on-site sewage systems as defined by Department of Health rule. The  
13 Commission properly determined based on the *Cole* case that it could not regulate Petitioners  
14 as a matter of law since no section of the public service laws permitted the Commission to  
15 regulate managers or operators of large on-site sewage systems. Therefore, the Commission’s  
16 exercise of discretion in declining to enter a declaratory order or investigate Petitioner’s  
17 activities was not an abuse of discretion, was not arbitrary or capricious, and was consistent  
18 with its statutory authority.  
19

20  
21 **B. Petitioner does not have a statutory or constitutional right to a declaratory order.**

22 The APA does not require the Commission to enter a declaratory order or conduct an  
23 adjudicative or other proceeding in response to a petition. Under RCW 34.05.240 and WAC  
24 480-07-930 the Commission has discretion whether or not to enter a declaratory order. The  
25  
26

1 Commission also has discretion over what type of proceeding to conduct if it decides to  
2 conduct a proceeding. WAC 480-07-930(4).

3 If the Commission declines to enter a declaratory order, it must state the reasons for its  
4 action. RCW 34.05.240(4)(d) and WAC 480-07-930(5)(b). The Commission properly  
5 followed all required procedures under the APA and Commission rule. Additionally, despite  
6 Petitioners' contentions, no constitutional rights were implicated by the Commission's action  
7 in declining to enter a declaratory order.  
8

9 Federal procedural due process rights attach only if a liberty or property interest are at  
10 issue. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976). Applying *Mathews* and other  
11 U.S. Supreme Court precedent, the Washington Supreme Court properly held in *WITA v.*  
12 *WUTC* that a failure to establish a protected property interest in the outcome of the case is fatal  
13 to a claim that due process has been deprived.<sup>4</sup> *WITA v. WUTC*, 149 Wn.2d 17, 24-26, 65 P.3d  
14 319 (2003). In the *WITA* decision, the Court emphasized that the range of interests protected  
15 by procedural due process is not infinite, and that to have a property interest in a benefit, a  
16 person clearly must have more than an abstract need or desire for it or a unilateral expectation  
17 of it. He or she must, instead, have a legitimate claim of entitlement to it. *Id.* at 24 (quoting  
18 *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701(1972)). Petitioners  
19 can make no showing that protected liberty or property interests were at issue.<sup>5</sup>  
20  
21  
22

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23 <sup>4</sup> In the *WITA* case, the Washington Independent Telephone Association appealed this Commission's  
24 designation of U.S. Cellular Company as an eligible telecommunications carrier ("ETC") at an open meeting and  
25 without granting WITA a full adjudicatory hearing on the matter. After the Superior Court and Court of Appeals  
26 affirmed the Commission's order, the Washington Supreme Court affirmed as well, holding that WITA lacked a  
protected property interest in the ETC issue and were not entitled to a hearing or any "due process" for that  
matter.

<sup>5</sup> Petitioners have also claimed a violation of substantive due process, but have provided not support for  
this claim. Nor does federal precedent support such a claim.


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**VII. CONCLUSION**

The Commission is given discretion to enter a declaratory order to decline to do so. The Commission's action in declining to enter the declaratory order due to its lack of jurisdiction over Petitioners as a matter of law did not violate the standards of RCW 34.05.570 since the Commission followed all required procedures, the Commission had the discretion to decide whether or not to investigate Petitioners, and the Commission appropriately deferred to settled case law. Therefore, the Petitioner's Motion should be denied, the Respondent's Motion should be granted and the Commission's action in declining to enter a declaratory order should be affirmed.

DATED this 6th day of June, 2005.

ROB MCKENNA  
Attorney General



CHRISTOPHER G. SWANSON  
WSBA No. 30507  
Assistant Attorney General  
Washington Utilities and  
Transportation Commission  
(360) 664-1220

1  EXPEDITE

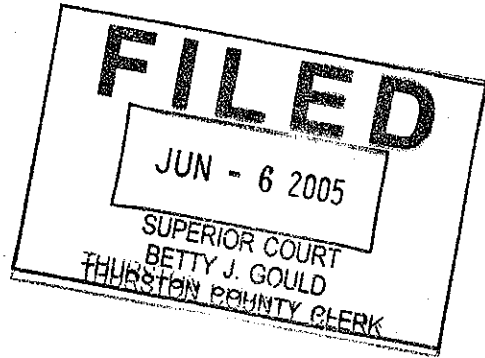
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3 Date: June 17, 2005

4 Time: 9:00 am

5 Judge/Calendar:

Honorable Richard D. Hicks



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9 STATE OF WASHINGTON  
10 THURSTON COUNTY SUPERIOR COURT

11  
12 WILLIAM L. STUTH, Sr., individually; and  
13 AQUA TEST, INC., a Washington  
Corporation,

14 Petitioners,

15 v.

16 WASHINGTON UTILITIES AND  
17 TRANSPORTATION COMMISSION,

18 Respondent.

CASE NO. 05-2-00782-3

[PROPOSED] ORDER GRANTING  
WASHINGTON UTILITIES AND  
TRANSPORTATION  
COMMISSION CROSS MOTION  
FOR SUMMARY JUDGMENT  
AND AFFIRMING AGENCY  
ACTION

19 This matter came before the Court for hearing on the Washington Utilities and  
20 Transportation Commission's (Commission) cross motion for summary judgment establishing  
21 that:

22 The Commission's actions in declining to enter a declaratory order in response to  
23 Petitioners' declaratory order petition were not a failure to perform a duty required by law,  
24 were not unconstitutional, were not outside the statutory authority of the agency or the  
25  
26

1 authority conferred by a provision of law, were not arbitrary and capricious, were not an abuse  
2 of discretion, and were not a violation of the Constitution. RCW 34.05.570.

3 The Court heard the oral argument of counsel for the parties. The Court considered the  
4 pleadings filed in the action.

5 Based on the argument of counsel, the pleadings and evidence presented, the Court  
6 finds:  
7

- 8 1. The undisputed factual record established that:
  - 9 a. Petitioners Stuth and Aqua Test asked the Commission to enter an order  
10 under RCW 34.05.240 and WAC 480-07-930 declaring that a manager  
11 of a large on-site sewage systems, as that term is defined by Department  
12 of Health WAC 246-272B-01001; WAC 246-272B-03001(5)(a), is  
13 subject to regulation by the Commission.  
14
  - 15 b. The Commission declined to enter a declaratory order stating that it  
16 lacked jurisdiction to regulate such companies as a matter of law.
  - 17 c. Petitioners petitioned for judicial review of the agency action under  
18 Chapter 34.05 RCW.
- 19 2. No genuine issue of material fact exists on Petitioner's claims for relief under  
20 RCW 34.05.570.

21  
22 Based upon the above findings, It Is Ordered:

- 23 1. Petitioner Stuth and Aqua Test's Motion for Summary Judgment is denied.
  - 24 2. Respondent Commission's Cross Motion for Summary Judgment is granted.
- 25  
26



3. Respondent Commission's action is affirmed.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

HONORABLE RICHARD D. HICKS

Presented by:

ROB MCKENNA  
Attorney General

\_\_\_\_\_  
CHRISTOPHER G. SWANSON  
WSBA No. 30507  
Assistant Attorney General  
Washington Utilities and  
Transportation Commission  
(360) 664-1220

Approved as to form:

\_\_\_\_\_  
RHYS STERLING  
WSBA No.  
Counsel for Petitioners

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

TRANSMISSION OK

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# FAX TRANSMISSION

## OFFICE OF THE ATTORNEY GENERAL

1400 S Evergreen Park Drive SW  
Olympia, WA 98504-0128  
(360) 664-1183  
Fax: (360) 586-5522

**To:** Rhys Sterling **Date:** June 6, 2005  
**Fax #:** 425-391-6689 **Pages:** 20 including this cover sheet.  
**From:** Chris Swanson  
**Subject:** *Stuth and Aqua Test, Inc. v. WUTC*, Thurston Cy. No. 05-2-00782-3

### COMMENTS:

Per our agreement, the following documents are served via facsimile:

1. WUTC Response to Motion for Summary Judgment and Memorandum in Support of Cross Motion for Summary Judgment
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