

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

Attorney at Law

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

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

June 9, 2005

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

RECEIVED
JUN 10 2005
ATTY GEN DIV
WUTC

Re: Stuth and Aqua Test, Inc. v. WUTC
Thurston County Superior Court Civil No. 05-2-00782-3
PETITIONERS' REPLY BRIEF AND RESPONSE IN OPPOSITION TO WUTC'S
MOTION FOR SUMMARY JUDGMENT

Dear Ms. Gould:

Enclosed herewith is one (1) original of Plaintiffs/Petitioners' REPLY BRIEF AND RESPONSE IN OPPOSITION TO WUTC'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL 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 Reply Brief directly to Judge Hicks.

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' REPLY BRIEF
FRIDAY, JUNE 17, 2005 @ 9 AM

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

WILLIAM L. STUTH, Sr. individually;)	No. <u>05-2-00782-3</u>
and AQUA TEST, INC., a Washington)	
corporation,)	
)	PETITIONERS' REPLY BRIEF
PETITIONERS,)	AND RESPONSE IN OPPOSITION
)	TO WUTC'S MOTION FOR SUMM-
v.)	ARY JUDGMENT OF DISMISSAL
)	
WASHINGTON UTILITIES AND TRANSPOR-)	
TATION COMMISSION, an agency of the)	
State of Washington,)	
RESPONDENT.)	

Giving the WUTC the benefit of the doubt, it states that "the Commission accepted for purposes of consideration of the declaratory order petition Petitioners' assertions that they were managers of large on-site sewage systems as defined by Department of Health rule."¹ To this singular finding of fact, the WUTC thereupon applied its interpretation of the Cole² decision and "determined that it could not regulate Petitioners as a matter of law since no section of the public service laws permitted the Commission to regul-

¹ WUTC Cross Motion For Summary Judgment p. 6.

² Cole v. Washington Utilities and Transportation Commission, 79 Wn.2d 302, 485 P.2d 71 (1971).

PETITIONERS' REPLY BRIEF
AND RESPONSE IN OPPOSITION
-- PAGE 1 OF 8

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 ate managers or operators of large on-site sewage systems."³ This
2 is the sum and substance of the WUTC decision-making process in re-
3 sponse to Stuth and Aqua Test's Petition for Declaratory Order; to
4 wit: WUTC factually inquired no further than to check Title 80 RCW
5 to see whether the specific type of business proposed by Stuth and
6 Aqua Test fit within any of those expressly enumerated activities
7 otherwise identified as public service companies in the law. When
8 the WUTC could not match the specific service provided by Stuth and
9 Aqua Test to any of those expressly listed in Title 80 RCW, WUTC
10 denied the Petition notwithstanding its statutory duty and mandate
11 set forth in RCW 80.04.015. Such summary and clearly erroneous dis-
12 position contravened its clear and unambiguous duty under the stat-
13 ute, violated fundamental rights preserved under our Constitution,
14 was arbitrary or capricious, and/or was an abuse of discretion.

15 The following single sentence sets out the entire defense and
16 ground presented by WUTC for its summary judgment of dismissal:

17 The Commission declined to enter a declaratory order
18 because the Commission believed Petitioners' activities
19 *could not possibly* fall under the Commission's jurisdic-
20 tion.

21 WUTC Cross Motion p. 4 (emphasis added).⁴

22 The word "possibly" is customarily defined to mean "by any
23 possibility; conceivably."⁵ Therefore, what the WUTC determined
24 as a matter of law is that under absolutely no possible or conceiv-
25 able set of facts could the management of large on-site sewage sys-

26 ³ WUTC Cross Motion p. 6.

27
28 ⁴ In support of its assertion as to absolute jurisdictional exclusion, the
29 WUTC relies on the saw "if the law doesn't say that you can, then you can't" and
30 points to Petitioners' purported failure to "point out any section of the public
31 service laws allowing the Commission to regulate large on-site sewage systems."
32 WUTC Cross Motion p. 5.

⁵ Webster's College Dictionary p. 1054 (Random House 1995).

1 tems by a private company, wherever located and for the public ser-
2 ved thereby and dependent thereon, ever fall under its jurisdiction
3 and subject to regulation as a public service company. In essence,
4 the WUTC builds a shield around its jurisdictional reach to include
5 only those expressly enumerated "activities provided for in the pu-
6 blic service laws" and no more, regardless of the facts.⁶

7 WUTC points to Cole v. Washington Utilities and Transportation
8 Commission, 79 Wn.2d 302, 485 P.2d 71 (1971) as the dispositive de-
9 cision which purportedly sets definite limits on the bounds of its
10 jurisdiction.⁷ Cole is, however, inapposite as that case has noth-
11 ing whatsoever in common with the facts and issues presented in the
12 case now before this Court. The context in which the Supreme Court
13 considered the clause "as provided by the public service laws" und-
14 er RCW 80.01.040(3) was with respect to whether the WUTC had "auth-
15 ority to consider the effect of a regulated utility upon a nonregu-
16 lated business" in order to provide grounds for such non-regulated
17 business to intervene in complaint proceedings before it. Cole, 79
18 Wn.2d at 306. Rather than setting out a cast-in-concrete jurisdic-
19 tional test, all the Cole Court stated was that the Oil Heat Insti-
20 tute "fail[ed] to point out any section of title 80 *which suggests*
21 *that* nonregulated fuel oil dealers are within the jurisdictional
22 concern of the commission." Id. (Emphasis added.) WUTC now tries
23 to apply the Institute's failure to suggest a jurisdictional nexus
24 in its case as a hard and fast exclusionary rule applicable to all
25 cases, contrary to the full language of RCW 80.01.040(3) and those
26 mandates for fact finding as set forth in RCW 80.04.015.

27 Unlike the Institute's failure in Cole, Stuth and Aqua Test
28 point to very specific provisions in Title 80 RCW and caselaw that
29

30
31 ⁶ WUTC Cross Motion p. 4.

32 ⁷ WUTC Cross Motion pp. 4-5.

1 do much more than merely "suggest" that the business of operating
2 and managing large on-site sewage systems is a public service comp-
3 any subject to WUTC's jurisdiction and regulation, but mandate such
4 as a factual finding and determination WUTC has the statutory duty
5 to make upon full consideration of the record.

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

12 RCW 80.04.015 (emphasis added). Within the broad jurisdictional
13 reach of the WUTC are "all persons engaging within this state in
14 the *business of supplying any utility service or commodity to the*
15 *public for compensation, and related activities; including, but not*
16 *limited to*, electrical companies, gas companies, . . . and water
17 companies." RCW 80.01.040(3) (emphasis added). Contrary to WUTC's
18 contention that any business not specifically mentioned by name in
19 this section or elsewhere in Title 80 "could not possibly fall und-
20 er the Commission's jurisdiction,"⁸ the naming of certain types of
21 activities in this section and elsewhere in Title 80 is intended as
22 an example only and does *not* present an exclusive limitation on the
23 bounds of WUTC jurisdiction.⁹

24 The use of the word "includes" is significant because
25 "includes" generally signifies an intent to enlarge a
26 statute's application, rather than limit it, and it im-
plies the conclusion that there are other items includ-
able, though not specifically enumerated. (List of ci-
tations omitted.)

27 Board of County Commissioners of Teton County v. Bassett, 8 P.3d

28
29 ⁸ As stated by WUTC to be the controlling legal premise in this case. WUTC
30 Cross Motion pp. 4-5.

31 ⁹ This is especially true in light of the legislative directive that "serv-
32 ice is used in [Title 80 RCW] in its broadest and most inclusive sense." RCW 80.
04.010 (emphasis added).

1 1079, 1083 (Wyo. 2000). With this Washington courts are totally in
2 accord.¹⁰ Thus it is that the public service laws set forth in Ti-
3 tle 80 RCW mandate that the determination as to whether any person
4 or company is subject to the jurisdiction and regulation of WUTC as
5 a public service company shall be a question of fact based on all
6 evidence and circumstances, and not merely based on a superficial
7 inquiry as to whether a specific business nicely fits under one of
8 the expressly enumerated activities already listed by name therein.
9 *The Petition for Declaratory Order contains all the requisite in-*
10 *formation from which to make an affirmative factual determination.*

11 The short-circuit of the decision-making process by the WUTC
12 in direct contravention of its duty under the statutory mandate in
13 RCW 80.04.015 violates Petitioners' fundamental right and "expecta-
14 tion of freedom from arbitrary action, which dictates being treated
15 consistent with the statutes . . . governing" the determination as
16 to whether their activity constitutes a public service company und-
17 er the public service laws.¹¹ Arbitrary and capricious action "is
18 willful and unreasoning and taken without regard to the attending
19 facts or circumstances." Rios v. Department of Labor & Industries,
20 145 Wn.2d 483, 501, 39 P.3d 961 (2002).¹² WUTC's decision made
21

22 ¹⁰ See, e.g., State v. Hall, 112 Wn. App. 164, 169, 48 P.3d 350 (2002)
23 (statute's use of term "includes" denotes a nonexclusive exemplary listing, as
24 "includes" is usually a term of enlargement, not limitation).

25 ¹¹ Cf. Williams v. Seattle School District No. 1, 97 Wn.2d 215, 222, 643
26 P.2d 426 (1982).

27 ¹² "In determining whether the agency acted in an arbitrary and capricious
28 manner, we must ensure that the agency decision was based on a consideration of
29 the relevant factors and examine whether there has been a clear error of judg-
30 ment." Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1167 (10th
31 Cir. 1999). Furthermore, it is clear that WUTC pre-judged this matter to reach
32 an outcome to which it subscribes; namely, to limit its jurisdictional reach to
only those expressly enumerated activities identified in Title 80 RCW, as regard-
(continued...)

1 without more mandatory factual inquiry than merely checking Title
2 80 RCW to determine whether the activity proposed by Stuth and Aqua
3 Test fit nicely under one of the expressly enumerated activities
4 identified as public service companies is arbitrary and capricious
5 and violates Petitioners' fundamental right to obtain a decision at
6 a minimum made consistent with statutory requirements.¹³

7 Whether or not entering a declaratory order upon proper peti-
8 tion submitted pursuant to RCW 34.05.240 falls under the discretion
9 of the WUTC is not the end of discussions as to whether this Court
10 has the authority under the APA¹⁴ to review such denial, as any ex-
11 ercise of discretion is reviewable by the judiciary for abuse of
12 discretion. RCW 34.05.570(4)(c); Cole, 79 Wn.2d at 306-307. An
13 agency decision found to be arbitrary, capricious, or an otherwise
14 unreasonable departure from statutory requirements, is an abuse of
15 discretion.¹⁵ WUTC's cutting off the statutorily mandated factual
16 inquiry under RCW 80.04.015 based on its erroneous interpretation
17 and misapplication of the Cole case, because operation and manage-
18 ment of large on-site sewage systems as a service to the public did

19
20 ¹² (...continued)

21 determinations as a question of fact, it "believed that Petitioners' activities
22 could not possibly fall under the Commission's jurisdiction." WUTC Cross Motion
23 p. 4. Such pre-judgment diminishes any deference that might otherwise be due the
24 WUTC under the arbitrary and capricious standard. Davis v. Mineta, 302 F.3d 1104,
1112 (10th Cir. 2002); International Snowmobile Manufacturers Association v. Nor-
ton, 340 F. Supp. 2d 1249, 1259-61 (D.Wyo. 2004).

25 ¹³ Such fundamental right and freedom falls within the ambit of procedural
26 and substantive due process as guaranteed by the U.S. Const. Amends. V and XIV,
27 and by the Wash. Const. art. 1, § 3.

28 ¹⁴ Or alternatively under statutory and constitutional writs of certiorari
29 as separately pleaded by Petitioners.

30 ¹⁵ The duty arises that a State official must exercise discretion in a rea-
31 sonable and unabusive manner consistent with statutory requirements. Babcock v.
32 State, 116 Wn.2d 596, 618, 809 P.2d 143 (1991). Decisions cannot be made arbi-
trarily or capriciously. Babcock, 116 Wn.2d at 659 (Anderson, J., dissenting).

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

1 not nicely fit under one of the expressly enumerated names of pub-
2 lic service companies in Title 80 RCW, is an abuse of discretion.

3 Finally, the actual test to be applied to all the facts found
4 by the WUTC is very clearly set forth in Inland Empire Rural Elec-
5 trification Inc. v. Department of Public Service, 199 Wash. 527,
6 537, 92 P. 2d 258 (1939).

7 The question of the character of a corporation is one
8 of fact to be determined by the evidence disclosed by the
9 record. . . . What it does is the important thing . . .

10 Inland Empire, 199 Wash. at 538.¹⁶ "*What it does is the important*
11 *thing*" and this is the essential question of fact that was ignored
12 by WUTC as it summarily cut the inquiry short and simply resorted
13 to matching names. Such short cut taken directly contravenes the
14 statutory duty WUTC is mandated to undertake, violates Petitioners'
15 fundamental right and expectation that their Petition would be con-
16 sidered consistent with mandatory statutory requirements, is an un-
17 reasonable and unwarranted departure from statutory requirements,
18 is arbitrary or capricious, and/or is an abuse of discretion.

19 Based on the foregoing and grounded on the clear requirements
20 of law that were violated and ignored by the WUTC, Stuth and Aqua
21 Test respectfully ask this Court to grant their motion for summary
22 judgment and remand this matter to the WUTC for full consideration
23 of their Petition as a question of fact under RCW 80.04.015,¹⁷ and
24 deny the WUTC's motion to dismiss.

25 ¹⁶ Nowhere stated is the applicable test under the law that a person or
26 company's mere "deci[sion] to hold themselves out as public service corporations"
27 is determinative. WUTC Cross Motion p. 5 n.3. Contrary to WUTC's contention,
28 Petitioners have nowhere implied that such is the test. Petitioners have asked
29 WUTC to make such a determination in a declaratory order proceeding as a question
30 of fact as mandated by RCW 80.04.015.

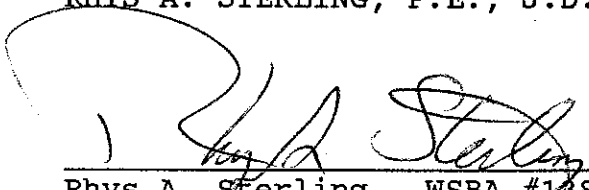
31 ¹⁷ Should the Court determine that the APA provides an inappropriate or un-
32 available avenue for judicial review, Petitioners ask this Court to grant their
alternative petition for writ of certiorari (statutory or constitutional). See
Petition For Judicial Review pp. 5-8.

1 Just as one last footnote for the Court's and WUTC's informa-
2 tion and consideration, to rebut once and for all the notion that
3 "Petitioners' activities *could not possibly* fall under the Commis-
4 sion's jurisdiction," one need only look to the State of Tennessee
5 and its determination pursuant to very similar public utility laws
6 as long ago as 1994 that a private corporation providing operation
7 and maintenance of on-site sewage systems for the public would be
8 regulated by the Tennessee Regulatory Authority as a public utili-
9 ty.¹⁸ This is the same utility service that Stuth and Aqua Test
10 propose to provide to the public here in the State of Washington.
11 One should never say "never".

12 DATED this 9th day of June, 2005.

13 Respectfully submitted,

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

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

22 ¹⁸ "Public utility means every individual, copartnership, association, cor-
23 poration, or joint stock company . . . that own, operate, manage or control, wi-
24 thin the state, any interurban electric railway, traction company, all other com-
25 mon carriers, express, gas, electric light, heat, power, water, telephone, tele-
26 graph, telecommunications services, or any other like system, plant or equipment,
27 affected by and dedicated to the public use" Tennessee Code § 65-4-101
28 (6) (emphasis added). Tennessee's test for inclusion is "or any other like sys-
29 tem, . . ."; whereas Washington enlarges the scope of covered activities by using
30 "including, but not limited to" -- different words but the same result should be
31 obtained under either statutory scheme. The Tennessee Regulatory Authority grant-
32 ed On-Site Systems, Inc. a Certificate of Convenience and Necessity on April 6,
1994 (Docket No. 93-09040) and has regulated that company as a public utility ever
since (now Tennessee Wastewater Systems, Inc.) including approval of operating
plans and tariffs. The TRA is currently proposing administrative rules that cover
in detail its regulation of wastewater companies as public utilities. Rule Chap-
ter 1220-4-12.

CERTIFICATION OF SERVICE

I certify under penalty of perjury
under the laws of the State of Washington
that on the 9th day of JUNE

~~2020~~ I mailed a copy of this document
to all parties.

DATED at Issaquah, Washington

[Signature]