



Rob McKenna

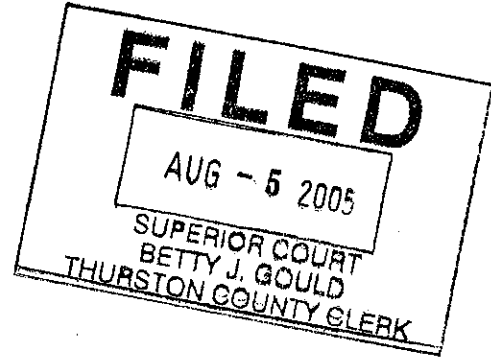
ATTORNEY GENERAL OF WASHINGTON

Utilities and Transportation Division

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

August 5, 2005

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



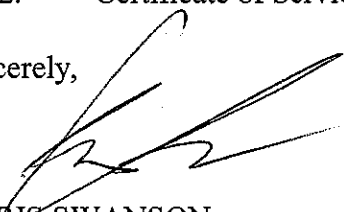
Re: *William A. Stuth, Sr. and Aqua Test, Inc. V. WUTC*
Case No. 05-2-00782-3

Dear Clerk:

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

1. Reply to Petitioners' Trial Brief
2. Certificate of Service

Sincerely,


CHRIS SWANSON
Assistant Attorney General

CS:tmw
Enclosures
cc: Parties



1 EXPEDITE
2 Hearing is set:
3 Date: September 2, 2005
4 Time: 1:30 pm
5 Judge/Calendar: Judge Hicks

FILED
AUG - 5 2005
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

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9 STATE OF WASHINGTON
10 THURSTON COUNTY SUPERIOR COURT

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

15 Petitioners,

16 v.

17 WASHINGTON UTILITIES AND
18 TRANSPORTATION
19 COMMISSION,

20 Respondent.

CASE NO. 05-2-00782-3

REPLY TO PETITIONERS'
TRIAL BRIEF

21 **REPLY BRIEF OF THE WASHINGTON UTILITIES AND**
22 **TRANSPORTATION COMMISSION**

1 **TABLE OF AUTHORITIES**

2 Cases

3 *Board of Regents of State Colleges v. Roth,*
4 408 U.S. 564, 92 S. Ct. 2701 (1972) 16

5 *Citizens Advocates v. WUTC,*
6 106 Wn.App. 605, 611 (2001) 4

7 *Cole v. Wn. Util. & Transp. Comm'n,*
8 79 Wn.2d 302, 305 (1971) 5, 6, 7

9 *Green River Cmty. V. Higher Educ. Pers. Bd.,*
10 95 Wn.2d 108, 112 (1980) 7

11 *Hillis v. Dep't of Ecology,*
12 131 Wn.2d 373, 383 (1997) 16, 17

13 *Inland Empire v. Dep't of Public Service,*
14 199 Wn.2d 527 (1939) 4, 5

15 *Mathews v. Eldridge,*
16 424 U.S. 319, 96 S.Ct. 893 (1976) 15

17 *Telephone Ass'n v. Ratepayers Ass'n,*
18 75 Wn.App. 356 (1994) 6, 7

19 *WEA v. WSPDC,*
20 150 Wn.2d 612 (2003) 12, 13, 14

21 *WITA v. WUTC,*
22 149 Wn.2d 17, 24-26 (2003) 15, 16

23 Statutes and Regulations

24 RCW 34.05 1

25 RCW 34.05.240 2, 10, 11, 14, 15, 16

26 RCW 34.05.240(1)(a) 11

RCW 34.05.240(1)(b) 11

RCW 34.05.240(4)(b) 12

RCW 34.05.240(4)(d) 14

RCW 34.05.570 16

1	RCW 34.05.570(a)	2
2	RCW 34.05.570(c)	3
3	RCW 34.05.570(d)	2
4	RCW 80	4, 7, 8
5	RCW 80.01.040(3)	4, 5, 6, 7
6	RCW 80.04.015	4, 9, 10, 11, 12, 15, 16
7	WAC 246-272B-01001	1, 3
8	WAC 246-272B-03001(5)(a)	1, 3
9	WAC 480-07-930	1, 4
10	WAC 480-07-930(4)	12

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I. INTRODUCTION

THE MATTER before the court is a petition for judicial review under the Administrative Procedure Act (APA), RCW 34.05, of an action of the Washington Utilities and Transportation Commission (Commission) declining to enter a declaratory order. This Trial Brief is submitted in response to Stuth and Aqua Test's (Petitioners') Trial Brief.

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II. RELIEF REQUESTED

Respondent Commission requests that its action declining to enter a declaratory order is affirmed.

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III. STATEMENT OF FACTS

Petitioners petitioned the Commission to enter an order under RCW 34.05.240 and WAC 480-07-930 declaring that a manager of a large on-site sewage systems, as that term is defined by Department of Health WAC 246-272B-01001; WAC 246-272B-03001(5)(a), is subject to regulation by the Commission. Administrative Record (AR) 1. The Commission declined to enter a declaratory order stating that it believed it lacked jurisdiction to regulate such companies as a matter of law. AR 15.

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III. STATEMENT OF THE ISSUE

May the Commission decline to enter a declaratory order when the question of whether the Commission has jurisdiction over large on-site sewage systems lacks controversy because it involves settled legal principles?

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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(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(d). Relief for person aggrieved by the performance of an agency action, including the exercise of discretion (or 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:

- 20 a. Unconstitutional;
- 21 b. Outside the statutory authority of the agency or the authority
- 22 conferred by a provision of law;
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1 c. Arbitrary or capricious.¹

2 RCW 34.05.570(c).

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4 **V. ARGUMENT**

5 **A. The Commission correctly concluded it did not have jurisdiction**
6 **over large on site sewage systems.**

7 Petitioners assert in their petition that they manage large on-site
8 sewage systems, as defined by WAC 246-272B-01001.² AR 1. The
9 Commission properly exercised its discretion not to enter a declaratory order
10 since the law is settled that the Commission does not have authority to
11 regulate large on-site sewage systems.
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14 The Commission declined to enter a declaratory order because
15 Petitioners' activities could not possibly fall under the Commission's
16 jurisdiction.³ This determination was made "as a matter of law" since the
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20 ¹ Relief may also be granted if it is "Taken by persons who were not properly constituted as
21 agency officials entitled to take such action." However, Petitioner has not raised this issue in its Trial
22 Brief.

23 ² WAC 246-272B-01001; WAC 246-272B-03001(5)(a) define a *large on-site sewage system* as "
24 .. an integrated arrangement of components for a residence, building, industrial establishment or other
25 places not connected to a public sewer system which: (a) conveys, stores, treats, and/or provides
26 subsurface soil treatment 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).

³ Much is made by Petitioners about the use of the phrase "could not possibly fall under the
Commission's jurisdiction" contained in the briefing filed with this court. However, as Petitioners are well
aware, the actual determinations of the Commission are contained in the record and speak for themselves.
The above-quoted phrase, on the other hand, is legal argument used by counsel to vigorously argue the
Commission's position. It should be construed as nothing more and nothing less.

1 scope of the Commission's authority has been unambiguously addressed by
2 the state supreme court.

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4 As Petitioners correctly point out, under RCW 80.01.040(3) the
5 Commission has authority:

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

13 It is true that RCW 80.01.040(3) gives broad authority for the
14 Commission to regulate. However, Petitioners are incorrect that the
15 "including, but not limited to language" contained in RCW 80.01.040(3)
16 provides the Commission unbridled discretion to regulate any entity "in the
17 business of supplying any utility service or commodity to the public for
18 compensation and related activities."⁴ Instead, the authority in RCW
19 80.01.040(3) is limited to those activities provided for in the public service
20 laws. Since the public service laws do not provide the Commission
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25 ⁴ Petitioners claim that the Commission attempts to read the "including, but not limited to"
26 language out of the statute. Petitioners are incorrect. Interpreted correctly, this language means that as long as the Commission is provided authority in the public service laws to regulate a particular activity, it may do so. Thus, the list of specifically enumerated activities in RCW 80.01.040(3) is not necessarily exhaustive.

1 authority to regulate large on-site sewage systems,⁵ the Commission
2 correctly determined the scope of its jurisdiction.⁶
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4 This issue was settled in *Cole v. Wn. Util. & Transp. Comm'n.*, 79
5 Wn.2d 302, 305 (1971). In *Cole* the Commission declined to permit a fuel
6 oil dealer's institute to intervene in a Commission proceeding. Following a
7 challenge by the institute, the court unambiguously interpreted the scope of
8 the commission's authority. The court said "[a]lthough RCW 80.01.040(3)
9 demands regulation in the public interest, that mandate is qualified by the
10 following clause 'as provided by the public service laws . . . ' Appellants fail
11 to point out any section of title 80 which suggests that nonregulated fuel oil
12 dealers are within the jurisdictional concern of the commission." 79 Wn.2d
13 at 306.
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17 The court went on to say "[a]n administrative agency must be strictly
18 limited in its operations to those powers granted by the legislature" and
19 concluded "[s]ince the Commission had neither express nor implied
20 authority to examine the institute's contentions, its denial of the institute's
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23 ⁵ Petitioners imply that RCW 80.04.015 and WAC 480-07-930 are public service laws that may
24 give the Commission authority to regulate large on-site sewage systems. However, WAC 480-07-930
25 addresses only the procedural right to petition for a declaratory order and "[t]he classification statute, RCW
26 Title 80 RCW." *Citizen Advocates v. WUTC*, 106 Wn.App. 605, 611 (2001).

⁶ Petitioners also imply, citing *Inland Empire v. Department of Public Service*, 199 Wn. 527
(1939) that the only test of Commission's jurisdiction is whether Stuth and Aquestest hold themselves out as
public service corporations. However, in that case the court engaged in a two step process: first, whether
the entity was regulated under the public service law, and second, whether the entity is a public service
corporation. 199 Wn.2d at 534-540.

1 petition to intervene was both proper and reasonable.” *Id.* Thus, RCW
2 80.01.040(3) is not the final step for determining the scope of the
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4 Commission’s authority as Petitioners contend.

5 In *Telephone Ass’n. v. Ratepayers Ass’n.*, 75 Wn.App. 356 (1994), the
6 Court of Appeals reaffirmed the reasoning of *Cole* case with the same result
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8 In that case, a Commission rule creating a special fund was challenged as
9 not being authorized by law. The trial court invalidated the rule. The
10 Washington Independent Telephone Association (WITA) appealed, arguing
11 that RCW 80.01.040(3) permitted the Commission to determine the rule was
12 in the public interest and “fill in the gaps to effect the intent of the
13 Legislature.” 75 Wn.App. at 368. Telecommunications Ratepayers
14 Association for Cost-Based and Equitable Rates (TRACER) defended the
15
16 trial court’s decision.

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18 The Court of Appeals rejected WITA’s argument and concluded that
19 the court in *Cole* had already decided the issue. Similar to the *Cole* court,
20 the court in *Telephone Ass’n* reasoned “[h]ere, WITA has not cited any
21 section of Title 80 of the Revised Code of Washington that permits the
22 Commission to set up a fund[.]” The court concluded that “TRACER does
23 not contest that the [rule] may be in the public interest, but it correctly
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25 observes that the [rule] is not authorized by the public service laws. As the
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1 court in *Cole* stated, “[a]n administrative agency must be strictly limited in
2 its operation to those powers granted by the legislature.” 75 Wn.App. at
3 368. Thus, the law is clear that the Commission may only regulate those
4 activities that are provided for in the public service laws.
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6 Apart from the fact that RCW 80.01.040(3) has already been
7 unambiguously interpreted by the courts, the implications of the broad
8 reading that Petitioners advocate are extremely problematic. For example, if
9 Petitioners’ interpretation were adopted, the Commission jurisdiction could
10 extend to any business “supplying any . . . commodity to the public for
11 compensation.” This could open up the Commission’s authority to regulate
12 all kinds of businesses, including agricultural products, gasoline, oil, coal,
13 wood, etc. Virtually any business that sells commodities to the public would
14 be fair game. Similarly, if Petitioners are correct that the courts should
15 simply look to what utilities in other states regulate, such as Tennessee’s
16 regulation of sewage systems instead of the explicit statutory authority in the
17 public service laws, the Commissioners authority could grow exponentially
18 larger.
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24 Petitioners’ interpretation is also inconsistent with legal principles
25 dictating the extent of agency authority to regulate absent specific legislative
26 directive. *See Green River Cmty. Coll. v. Higher Educ. Pers. Bd.*, 95

1 Wash.2d 108, 112 (1980) (administrative agencies do not have the power to
2 promulgate rules that would amend or change legislative enactment, but
3 agency rules may be used to fill in the gaps in legislation if such rules are
4 necessary to the effectuation of a general statutory scheme). It can hardly be
5 said that Commission authority to pick and choose which business and
6 industries it will regulate is simply "filling in the gaps" left by the
7
8 Legislature.
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10 Similarly, once the Commission decides to regulate a business or
11 industry, it would be faced with promulgating agency rules with almost no
12 guidance as to the extent of its authority. The Commission, in fact, would be
13 left with the unbridled authority to regulate "the rates, services, facilities,
14 and practices" of these business. Read broadly, Commission authority could
15 be virtually unlimited.⁷ Finally, the Commission regulatory scheme would
16 have the potential duplicate regulation by other agencies and create
17 confusion among the public.
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21 Thus, the Commission properly determined, and was reasonable in its
22 belief, that it could not regulate Petitioners as a matter of law. Therefore, it
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26 ⁷ This is to be distinguished from the traditional utilities, such as telephone, water, electric, and gas companies for which the Legislature has provided the Commission specific statutory guidance on the extent of its authority in Title 80 RCW.

1 was entirely appropriate for the Commission to decline to enter a declaratory
2 order because the law on the issue was settled.

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4 **B. The Commission may not institute a special proceeding to**
5 **investigate its jurisdiction until it has formed a preliminary belief**
6 **that has jurisdiction.**

7 Petitioners complain that RCW 80.04.015 requires a “question of
8 fact” determination, rather than a “matter of law” determination on the issue
9 of the Commission’s jurisdiction. Petitioners reason that the Commission
10 failed to comply with the requirements of RCW 80.04.015 because it
11 decided the issue of its jurisdiction as a matter of law. However, under
12 RCW 80.04.015, prior to any formal factual determination, the Commission
13 must form a preliminary belief that an entity is engaged in a regulated
14 activity. This is exactly the process the Commission employed in response
15 to the Petitioners Petition for a Declaratory Order.
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18 RCW 80.04.015 explicitly provides “[w]henver the Commission
19 *believes* [emphasis added] that any person or corporation is engaged in any
20 activity without first complying with the requirements of this title, it may
21 institute a special proceeding[.]”⁸ Thus, the Commission is not empowered
22 to institute a proceeding until it has formed a preliminary belief that it has
23 jurisdiction over an entity.
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⁸ Notably under the statute an entity is not entitled to demand such a proceeding.

1 RCW 80.04.015 goes on to describe the Commission's right to take
2 testimony, gather evidence and *weigh the facts*. It states "[t]he commission
3 may consider any and all facts that may indicate the true nature and extent of
4 the operations or acts and may subpoena such witnesses and documents as it
5 deems necessary." Therefore, a factual inquiry only occurs after the
6 Commission decides to initiate a proceeding. Finally, after the proceeding is
7 concluded, the Commission is granted authority to "issue the necessary order
8 or orders declaring the activities subject to, or not subject to, the provisions
9 of this title."⁹ RCW 80.04.015.

13 In this case, the Commission properly determined that it did not have
14 jurisdiction over Petitioners based on settled law. Thus, it never formed the
15 requisite preliminary belief that it had jurisdiction. Therefore, its action in
16 declining to institute a proceeding or enter a declaratory order was consistent
17 with the procedural requirements of RCW 80.04.015.

20 **C. RCW 80.04.015 and RCW 34.05.240 grant the Commission**
21 **discretion to choose to act or not act on a petition for a**
22 **declaratory order relating to the scope of its jurisdiction over an**
23 **entity.**

24 Petitioners are incorrect that the Commission is required to institute a
25 declaratory order proceeding in response to their petition. RCW 80.04.015

26 ⁹ The statute goes on to say "[i]n the event the activities are found to be subject to the provisions of this title, the commission shall issue such orders as may be necessary to require all parties involved in the activities to comply with this title[.]"

1 makes it clear that the Commission's determination whether or not to
2 institute a proceeding is entirely discretionary, even it believes it has
3 jurisdiction over an entity.¹⁰ Therefore, even if Petitioners had made it past
4 the threshold "belief of jurisdiction" requirement of RCW 80.04.015, the
5 Commission retained the discretion to choose not to institute a proceeding.
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8 Similarly, RCW 34.05.240 provides the Commission discretion to
9 determine whether or not it will enter a declaratory order. Although the
10 statute does not limit an agency to particular facts justifying its decision, the
11 statute does suggest at least one possible reason that applies to the
12 Commission's decision in this case: the issue raised by Petitioners is not
13 controversial.
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16 RCW 34.05.240(1)(a) through (b) require the petition for declaratory
17 order to set forth facts and reasons showing uncertainty and controversy.
18 Since the law relating to Petitioners' question was settled, the Commission
19 properly determined that the issues were not sufficiently uncertain or
20 controversial to merit a declaratory order proceeding. Therefore, it was
21 appropriate and consistent with the law for the Commission to decline to
22 enter a declaratory order.
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26 ¹⁰ "*Whenever* [emphasis added] the Commission believes that any person or corporation is engaged in any activity without first complying with the requirements of this chapter it *may* [emphasis added] institute a special proceeding[.]"

1 **D. Petitioners do not have a statutory or constitutional right to a**
2 **declaratory order determining the scope of the Commission's**
3 **jurisdiction.**

4 As discussed in the preceding section, neither the APA nor RCW
5 80.04.015 require the Commission to enter a declaratory order or conduct an
6 adjudicative or other proceeding in response to a petition to determine the
7 scope of the Commission's jurisdiction.¹¹ In fact, in declining to enter a
8 declaratory order in response to Petitioners' petition, the Commission
9 followed all applicable substantive and procedural requirements.
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11 Under RCW 34.05.240(4)(b) if the Commission declines to enter an
12 order, it must state the reasons for its action. The Commission complied
13 with this requirement by stating that it would not enter a declaratory order
14 because it did not believe it had jurisdiction over Petitioners as a matter of
15 law. Petitioners imply, however, that the Commission's communication of
16 this informal legal opinion implicates their right to a hearing and/or their
17 substantive constitutional rights. This simply is not true.
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21 One need only examine *Washington Education Association v.*
22 *Washington State Public Disclosure Commission*, to conclude that an
23 agency's nonbinding expression of its opinion on the law does not
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26 ¹¹ Additionally, the Commission has discretion over what type of proceeding to conduct if it
decides to conduct a proceeding. WAC 480-07-930(4).

1 necessarily implicate statutory or constitutional rights. In *WEA v. WSPDC*,
2 150 Wn.2d 612 (2003) the Washington Education Association challenged
3 interpretative statements issued by the Washington State Public Disclosure
4 Commission as unlawful agency action and a violation of its constitutional
5 rights. 150 Wn.2d at 608. The interpretative statements expressed the
6 PDC's opinion about the state of law. 150 Wn.2d at 610.
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9 In analyzing whether or not there was unlawful agency action, the
10 court noted that "an agency's written interpretation of the law does not
11 implement or enforce the law and is 'advisory only.'" *Id.* The court
12 recognized that, "[i]n contrast, rules or declaratory orders adopted by an
13 agency are enforceable, and a violation 'subjects a person to a penalty or
14 administrative sanction.'" The court then concluded that "[t]he WEA
15 challenges the PDC's opinion only; thus, there is no 'agency action' for the
16 court to review pursuant to WEA's petition for judicial review. Likewise,
17 there is no action by the individual commissioners that deprived the WEA of
18 any 'rights, privileges, or immunities secured by the Constitution and
19 laws[.]'"¹² 150 Wn.2d at 622.
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24 ¹² Similar to WEA, the Petitioners in this case, are challenging, albeit in a backdoor way, the
25 substance of the Commission's legal interpretation. The Petitioners challenge the substance of the
26 Commission's nonbinding opinion by couching their argument as a challenge of the Commission's
procedures. In fact, it is somewhat unclear to what extent the Petitioners are challenging the procedures
used by the Commission since they devote nearly their entire brief to their disagreement with the substance
of the Commission's informal opinion.

1 Although a declaratory order itself is binding, as noted by the court, it
2 certainly cannot be said that the Commission's opinion or belief about the
3 state of the law provided to Petitioners pursuant to RCW 34.05.240(4)(d) is
4 binding on anyone. Nor did the Commission purport that it was binding.
5 Therefore, Petitioner's are not prevented from continuing to pursue, by any
6 lawfully permitted means, their goal of being regulated by the
7 Commission.¹³ More importantly, however, the court in *WEA* looked to the
8 effect of the agency's advisory opinion on the *WEA* to determine whether
9 any statutory or constitutional rights were violated.
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13 In this case, the only effect of the agency expression of its opinion
14 was to deny to Petitioners a declaratory order, which is something they did
15 not have a right to in the first place.¹⁴ Petitioners are correct that exercise of
16 agency discretion must not be arbitrary or capricious. However, as
17 previously discussed, the Commission acted properly. In fact, the
18 Commission's action was consistent with the law since the Commission
19 does not have jurisdiction over large on-site sewage systems, RCW
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24 ¹³ However, as noted by the court in *WEA* Petitioners do not have the right to pursue an action that
25 is not justiciable, such as challenging the substance of informal agency opinions that have no binding
26 effect, including the Commission's opinion about the state of the law in this case. 150 Wn.2d at 622. Nor
do Petitioners have the power to transform an action that is discretionary (the issuance of a declaratory
order) into a right.

¹⁴ Petitioners may be confusing their right to petition for a declaratory order with a right to have a
declaratory order entered. RCW 34.05.240 is clear that they do not have a right to have a declaratory order
entered in response to their petition.

1 80.04.015 does not permit the agency to institute a formal proceeding to
2 investigate the scope of its jurisdiction until it forms a preliminary belief that
3 it has jurisdiction, and both RCW 80.04.015 and RCW 34.05.240 provide
4 the Commission broad discretion to decline to enter a declaratory order
5 relating to the scope of its jurisdiction.
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8 Finally, Petitioners make mention of procedural due process rights.
9 Procedural due process rights attach only if a liberty or property interest are
10 at issue. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). It is clear
11 that neither are present in this case. Applying *Mathews* and other U.S.
12 Supreme Court precedent, the Washington Supreme Court properly held in
13 *WITA v. WUTC* that a failure to establish a protected property interest in the
14 outcome of the case is fatal to a claim that due process has been deprived.¹⁵
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16 *WITA v. WUTC*, 149 Wn.2d 17, 24-26, (2003). In the *WITA* decision, the
17 Court emphasized that the range of interests protected by procedural due
18 process is not infinite, and that to have a property interest in a benefit, a
19 person clearly must have more than an abstract need or desire for it or a
20 unilateral expectation of it. He or she must, instead, have a legitimate claim
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25 ¹⁵ In the *WITA* case, the Washington Independent Telephone Association appealed the
26 Commission's designation of U.S. Cellular Company as an eligible telecommunications carrier ("ETC") at
an open meeting and without granting WITA a full adjudicatory hearing on the matter. After the Superior
Court and Court of Appeals 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".

1 of entitlement to it. *Id.* at 24 (quoting *Board of Regents of State Colleges v.*
2 *Roth*, 408 U.S. 564, 92 S. Ct. 2701(1972). Petitioners can make no showing
3 that protected liberty or property interests were at issue.
4

5 VI. CONCLUSION

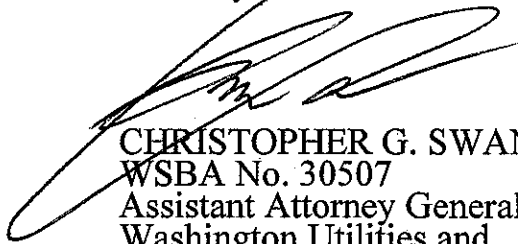
6 The Commission is given discretion to enter a declaratory order or
7 decline to do so. The Commission's action in declining to enter the
8 declaratory order due to its belief that it lacked jurisdiction over Petitioners
9 as a matter of law did not violate the standards of RCW 34.05.570 since the
10 Commission acted within its discretion and consistent with the requirements
11 of RCW 34.05.240 and RCW 80.04.015. Most importantly, the
12 Commission's action was not arbitrary or capricious because its action was
13 not "willful and unreasoning and taken without regard to the attendant facts
14 and circumstances". *Hillis v. Department of Ecology*, 131 Wn.2d. 373, 383
15 (1997). On the contrary, the Commission came to a reasonable belief about
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1 the state of the law and exercised its discretion based on that that belief.¹⁶

2 Therefore, the Commission's action in declining to enter a declaratory order
3 should be affirmed.¹⁷
4

5 DATED this 5th day of August, 2005.

6
7 ROB MCKENNA
8 Attorney General

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10 
11 CHRISTOPHER G. SWANSON
12 WSBA No. 30507
13 Assistant Attorney General
14 Washington Utilities and
15 Transportation Commission
16 (360) 664-1220
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24 ¹⁶ "Where there is room for two opinions, an action taken after due consideration is not arbitrary
and capricious even though a reviewing court may believe it to be erroneous." 131 Wn.2d at 383.

25 ¹⁷ Even if this court were to determine remand to the Commission is appropriate, it should not rule
26 on the substance of the Commission's interpretation of the law since the Commission's informal opinion
about the state of the law is not a binding conclusion of law and is, therefore, not subject to de novo review.
Instead, the agency action, including the informal legal opinion, is only subject to the arbitrary or
capricious standard. Nor should this court order the Commission to enter a declaratory order since
entering such an order remains a matter of discretion even if the case were remanded.

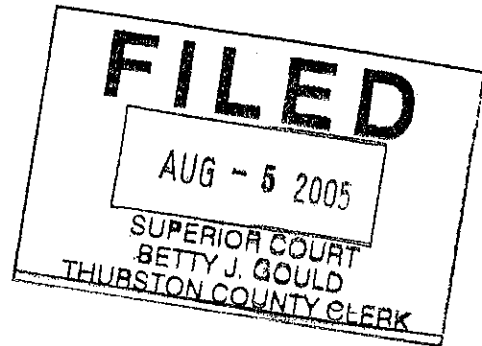
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2 Hearing is set:

3 Date: September 2, 2005

4 Time: 1:30 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
14 Corporation,

15 Petitioners,

16 v.

17 WASHINGTON UTILITIES AND
18 TRANSPORTATION COMMISSION,

19 Respondent.

CASE NO. 05-2-00782-3

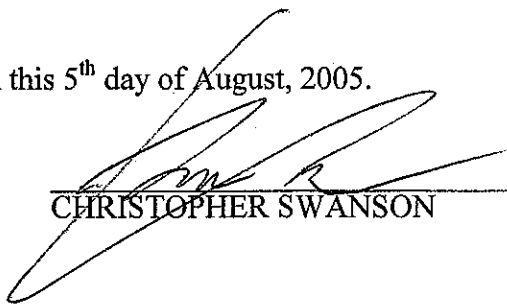
CERTIFICATE OF SERVICE

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. Reply to Petitioners' Trial Brief
25 2. Certificate of Service
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DATED at Olympia, Washington this 5th day of August, 2005.



CHRISTOPHER SWANSON

For Aqua Test:

Rhys A. Sterling
Attorney at Law
P.O. Box 218
Hobart, WA 98025-0218
Fax: (425) 391-6689
Phone: (425) 391-6650
E-mail: RhysHobart@aol.com