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August 11, 2005

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

RECEIVED

AUG 12 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 TRIAL BRIEF

Dear Ms. Gould:

Enclosed herewith is one (1) original of Petitioners' REPLY TRIAL BRIEF. Please file this in the court file for this matter.

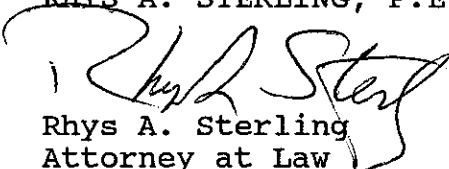
The trial date has been set for Friday, September 2, 2005 at 1:30 p.m. before the Honorable Judge Richard D. Hicks.

I have mailed a working copy of this Reply Trial 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

X *Trial Date is set:*
Date: Friday, September 2, 2005
Time: 1:30 P.M.
Judge/Calendar:
Judge Richard D. Hicks

No. 05-2-00782-3

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 TRANSPORTATION COMMISSION,
an agency of the State of Washington,

RESPONDENT.

PETITIONERS' *REPLY* TRIAL BRIEF

RHYS A. STERLING, WSBA #13846
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1 X **Trial Date is set:**
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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

8 WILLIAM L. STUTH, Sr. individually;) No. 05-2-00782-3
9 and AQUA TEST, INC., a Washington)
corporation,)
10 PETITIONERS,) PETITIONERS' **REPLY**
) TRIAL BRIEF
11 v.)
)
12 WASHINGTON UTILITIES AND TRANSPOR-)
TATION COMMISSION, an agency of the)
13 State of Washington,)
RESPONDENT.)
14

15 WUTC's recurring themes in defense of its denial to en-
16 ter a declaratory order are:

17 1. *The law is settled* -- if you're not in, you're out.

18 WUTC's Reply To Trial Brief at 3 - 9.

19 2. *Pandora's Box would be opened* -- Mom & Pop grocery
20 stores would be regulated as public service companies. WUTC's
21 Reply To Trial Brief at 7.

22 3. *WUTC has absolute discretion* -- the WUTC can simply
23 say "no" to any petition for declaratory order. WUTC's Reply
24 To Trial Brief at 10 - 11.

PETITIONERS' **REPLY**
TRIAL BRIEF
-- PAGE 1 OF 10

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1 **THE LAW IS SETTLED, BUT NOT AS WUTC PRESENTS IT**

2 WUTC asserts that the "public service laws do not pro-
3 vide the Commission with authority to regulate large on-site
4 sewage systems." WUTC's Reply To Trial Brief at 4 - 5. *But*
5 *no one is asking* the WUTC to "regulate large on-site sewage
6 systems," as such is the province of the State Department of
7 Health and local health departments.¹ What is being asked of
8 WUTC is to regulate as public service companies those *persons*
9 *and corporations that manage and operate* large on-site sewage
10 systems under contract with the public served by such systems
11 wherever situated in the State of Washington.²

12 WUTC vigorously defends its position by asserting that
13 "the scope of the Commission's authority has been unambigu-
14 ously addressed by the state supreme court." WUTC's Reply To
15 Trial Brief at 3 - 4. WUTC further claims that "this issue
16 was settled in Cole v. Wn. Util. & Transp. Comm'n., 79 Wn.2d
17 302, 305 (1971)." WUTC's Reply To Trial Brief at 5.

18
19

20 ¹ See, e.g., Chapter 246-272B WAC.

21 ² With WUTC approving the tariffs and other related as-
22 pects of the persons and corporations providing such utility
23 services to the public, the DOH can close an ever-increasing
24 gap in protecting public health, safety, and the environment
 by accepting such public service companies as public entities
 suitable to manage large on-site sewage systems without muni-
 cipal backup. See Petitioners' Trial Brief, Exhibit "A" at
 Exhibit 1 (March 9, 2005 Letter to WUTC from Richard Benson,
 P.E., DOH).

1 Although the law regarding the WUTC's jurisdiction is
2 indeed well-settled, it is not settled as presented by WUTC.

3 WUTC's jurisdiction extends to "all persons engaging wi-
4 thin this state in the business of supplying any utility ser-
5 vice or commodity to the public for compensation, and related
6 activities, including, but not limited to," RCW 80.
7 01.040(3). And "whether or not any person or corporation is
8 conducting business subject to regulation [by WUTC as a pub-
9 lic service company] . . . shall be a question of fact to be
10 determined by the commission." RCW 80.04.015.³

11 This is the well-settled law and the application of this
12 law to the issue presented by Petitioners has never been add-
13 ressed and unambiguously answered by the State Supreme Court
14 in Cole or in any other case. The answer is only found in a
15 case-by-case evaluation as a *question of fact* -- just as the

16
17 ³ Washington courts have consistently held that legisla-
18 tive use of the word "any" means "every and all". State v.
19 Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). The word "in-
20 cludes" and the phrase "including, but not limited to" are
21 "terms of enlargement, not limitation". United States v. Hof-
22 fman, 2005 Wash. LEXIS 657, *12 n.4 (2005). It is thus very
23 clear that it is in the public interest that under the public
24 service laws **every and all** persons and corporations can be a
public service company regulated by WUTC if the facts so qua-
lify them, not just those few examples enumerated in Title 80
RCW. To hold otherwise would require the court to disregard
numerous words and phrases in Title 80 RCW. However, "stat-
utes . . . should be construed so that no clause, sentence or
word shall be superfluous, void, or insignificant." Washing-
ton Economic Development Finance Authority v. Grimm, 119 Wn.
2d 738, 746, 837 P.2d 606 (1992).

1 law mandates. The facts to be determined to answer the ques-
2 tion whether managers and operators of large on-site sewage
3 systems are in fact public service companies are described in
4 detail in the public service laws of this State.

5 The test [used to determine if a corporation is
6 to be regulated by the UTC] is whether or not the
7 *corporation holds itself out, expressly or implied-*
8 *ly, to supply its service or product for use either*
9 *by the public as a class or by that portion of it*
10 *that can be served by the utility; or whether, on*
11 *the contrary, it merely offers to serve only parti-*
12 *cular individuals of its own selection.*

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

16 The question of the character of a corporation is
17 one of fact to be determined by the evidence dis-
18 closed by the record. . . . What it does is the im-
19 portant thing, not what it, or the state, says that
20 it is.

21 Inland Empire, 199 Wash. at 538. See West Valley Land Com-
22 pany v. Nob Hill Water Association, 107 Wn.2d 359, 365-66,
23 729 P.2d 42 (1986). Whether any person or corporation is a
24 public service company subject to regulation by WUTC is for
very good reason a question of fact; to wit, the public int-
erest is best served under the public service laws for WUTC
to determine its jurisdiction on a case-by-case basis rather
than to paint with a very narrow brush the bounds of its au-
thority and thereby omit what are in fact and law public ser-

1 vice companies merely because such person or company does not
2 nicely fit under the umbrella of those examples enumerated in
3 Title 80 RCW.

4 The law is indeed well-settled; however, it is settled
5 under the public service laws that whether any person or cor-
6 poration is a public service company must be determined on a
7 case-by-case basis as a question of fact.

8 CASE-BY-CASE FACTUAL DETERMINATIONS DO NOT OPEN
9 PANDORA'S BOX

10 WUTC seems most concerned that this case could open Pan-
11 dora's Box, thereby extending "the Commission's authority to
12 regulate all kinds of businesses, including agricultural pro-
13 ducts, gasoline, oil, coal, wood, etc. [and] [v]irtually any
14 business that sells commodities to the public would be fair
15 game." WUTC's Reply To Trial Brief at 7; *id.* at 8.

16 This concern has long been answered in the negative un-
17 der the public service laws. Consider the following excell-
18 ent discussion of this issue:

19 What is a public utility, over which the state
20 may exercise its regulatory control without regard
21 to the private interests which may be affected
22 thereby? In its broadest sense everything upon
23 which man bestows labor for purposes other than
24 those for the benefit of his immediate family, is
impressed with a public use. No occupation escapes
it, no merchant can avoid it, no professional man
can deny it. As an illustrative type one may in-
stance the butcher. He deals with the public, he
invites and is urgent that the public should deal
with him. The character of his business is such

1 that under the police power of the state it may
2 well be subject to regulation, and in many places
3 and instances so regulated. The preservation of
4 cleanliness, the inspection of meats to see that
5 they are wholesome, all such matters are within the
6 due and reasonable regulatory powers of the state
7 or nation. But these regulatory powers are not
8 called into exercise because the butcher has devo-
9 ted his property to public service so as to make it
10 a public utility. He still has the unquestioned
11 right to fix his prices; he still has the unques-
12 tioned right to say that he will or will not con-
tract with any member of the public. What differen-
tiates all such activities from a true public util-
ity is this, and this only: That the devotion to
public use must be of such character that the pub-
lic generally, or that part of it which has been
served and which has accepted service, has the
right to demand that that service shall be conduct-
ed, so long as it is continued, with reasonable ef-
ficiency under reasonable charges. Public use,
then, means the use by the public and by every in-
dividual member of it, as a legal right.

13 Clark v. Olson, 177 Wash. 237, 246, 31 P.2d 534 (1934). See
14 also Inland Empire Rural Elect., 199 Wash. at 537-38.

15 Here, the case-specific determination that must be made
16 as a question of fact is whether a person or corporation that
17 manages and operates large on-site sewage systems under pri-
18 vate contract with the general public served by and wholly
19 dependent upon it for essential wastewater utility services
20 24 hours a day, 7 days a week, and 365 days a year, wherever
21 situated in the State of Washington and pursuant to State and
22 local health department and environmental requirements, is a
23 public service company subject to regulatory control by the
24 WUTC as to approval of reasonable tariffs and other aspects

1 regarding its enterprise. *This is but a very focused query*
2 *that must be answered, and Pandora's Box remains intact.*⁴

3 WUTC CANNOT AVOID ITS MANDATORY STATUTORY DUTIES
4 UNDER THE GUISE OF DISCRETION

5 WUTC claims it has extensive and, apparently, unbridled
6 discretion in (1) forming a preliminary belief that it does
7 or does not have jurisdiction,⁵ and (2) choosing to act or
8 not act on a petition for a declaratory order.⁶

9 First and foremost, an agency's determination as to its
10 jurisdiction is reviewed by the courts *de novo* as a question
11 of law.⁷

12 Second, there is nothing in Title 80 RCW that prohibits
13 an individual person or corporation from bringing a petition
14 for declaratory order intended to resolve an unsettled ques-
15 tion regarding whether the public services provided by such

16
17 ⁴ Recall that under statutes very similar to Title 80
18 RCW the Tennessee Regulatory Authority in fact regulates pri-
19 vate managers/operators of on-site sewage systems as public
20 utilities. Such fact makes the WUTC's decision to reject the
21 same determination out of hand as a "matter of law" even more
22 obviously arbitrary, capricious, and an abuse of discretion.

23 ⁵ WUTC's Reply To Trial Brief at 9 - 10.

24 ⁶ WUTC's Reply To Trial Brief at 10 - 11.

⁷ Campbell v. Department of Social and Health Services,
150 Wn.2d 881, 894 n.4, 83 P.3d 999 (2004). "An agency may
not finally decide the limits of its statutory power. That
is a judicial function." Social Security Board v. Nierotko,
327 U.S. 358, 369, 66 S.Ct. 637, 643, 90 L.Ed. 718 (1946).

1 an entity make it a public service company subject to the
2 regulatory control of WUTC.⁸ In fact, such is the specific
3 purpose underlying the declaratory order proceeding.

4 Any interested person may petition the commission
5 for a declaratory order with respect to the applic-
6 ability to specified circumstances of a rule, ord-
er, or statute enforceable by the commission, as
provided by RCW 34.05.240.

7 WAC 480-07-930. Petitioners did precisely what they are em-
8 powered by law to do. Nothing in Title 80 RCW divests them
9 of this right or vests WUTC with discretion to ignore them.

10 Third, even if discretion is involved, discretion must
11 not be abused or applied contrary to statutory mandate. RCW
12 34.05.570(4)(b). Contrary to WUTC's contentions, WUTC's Re-
13 ply To Trial Brief at 10 - 11, it clearly abused its discre-
14 tion by refusing to follow its statutory mandate.⁹

15 _____
16 ⁸ Contrary to WUTC's contention, the public service laws
17 do not preclude the use of the declaratory order by individu-
18 al persons or corporations for such purpose. WUTC's Reply
19 Trial Brief at 9 n.8. The WUTC may undertake a determination
on its own volition, or "any interested person" such as Peti-
tioners may invoke WUTC's authority by filing a proper peti-
tion for declaratory order.

20 ⁹ "An abuse of discretion occurs when a . . . decision
21 is manifestly unreasonable, or exercised on untenable grounds
22 or for untenable reasons." Phillips v. City of Seattle, 51
23 Wn. App. 415, 423, 754 P.2d 116 (1988), aff'd, 111 Wn.2d 903,
24 766 P.2d 1099 (1989). Even if an act is discretionary, an ag-
ency "must comply with the clear language of the statute when
it exercises that discretion," and failure to comply with a
mandate is an abuse of discretion. Washington State Coalition
for the Homeless v. Department of Social and Health Services,
133 Wn.2d 894, 912, 949 P.2d 1291 (1997).

1 And finally, fundamental rights are called into play¹⁰
2 where, as here, WUTC's summary rejection of a just petition
3 for declaratory order presented in accordance with law, in
4 order to resolve an important and unsettled matter of public
5 interest and necessity as a question of fact, is an arbitrary
6 and capricious act violative of fundamental rights.

7 An agency's violation of the rules which govern
8 its exercise of discretion is certainly contrary to
9 law and, just as the right to be free from arbitrar-
10 y and capricious action, the right to have the ag-
11 ency abide by the rules to which it is subject is
12 also fundamental.

13 Pierce County Sheriff v. Civil Service Commission for Sher-
14 iff's Employees of Pierce County, 98 Wn.2d 690, 694, 658 P.2d
15 648 (1983).¹¹ The rules to which WUTC are subject mandate the
16 determination as to whether any person or corporation is a
17 public service company subject to regulatory control by the
18 WUTC shall be a question of fact made on a case-by-case bas-
19 is.¹² Clearly, this is a fundamental right and expectation.

20 ¹⁰ Contrary to WUTC's contention that fundamental rights
21 are not involved in this case. WUTC's Reply To Trial Brief
22 at 12 - 16.

23 ¹¹ There is a fundamental "expectation of freedom from
24 arbitrary action, which dictates being treated consistent
with the [governing] statutes". Williams v. Seattle School
District No. 1, 97 Wn.2d 215, 222, 643 P.2d 426 (1982).

¹² Curiously, on the one hand WUTC asserts that "it cer-
tainly cannot be said that the Commission's opinion or belief
about the state of the law provided to Petitioners pursuant
(continued...)

CONCLUSIONS

To simply conduct a name check is contrary to the mandatory statutory duty imposed on WUTC, does not serve the public interest, and is not consistent with the public service laws applicable to the State of Washington.¹³

This matter must be remanded to WUTC to conduct a thorough and unbiased factual determination as mandated by statute and as requested by the Petitioners. Although the ultimate outcome cannot be ordered, the process must be enforced.

DATED this 11th day of August, 2005.

Respectfully submitted,

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


Rhys A. Sterling, WSBA #13846
Attorney for Petitioners

¹²(...continued)
to RCW 34.05.240(4)(d) is binding on anyone," WUTC's Reply To Trial Brief at 14, while on the other hand asserts that its "determination [not to enter a declaratory order] was made as a matter of law since the scope of the Commission's authority has been unambiguously addressed by the state supreme court." WUTC's Reply at 3 - 4. WUTC's decision was indeed intended as binding and was not a mere advisory opinion.

¹³ Just because the type of service the Petitioners provide to the public is not specifically enumerated in Title 80 RCW does not, as a matter of law, exclude such service from qualifying and being regulated by WUTC as a public service company. For WUTC to hold otherwise is contrary to law, is arbitrary and capricious, is an abuse of discretion, and is a violation of fundamental rights. RCW 34.05.570(4).

CERTIFICATION OF SERVICE

I certify under penalty of perjury
under the laws of the State of Washington
that on the 21st day of August
~~2005~~, I mailed a copy of this document
to all parties.

DATED at Bellevue, Washington

Cheryl A. Stentz