

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In The Matter of the Petition of)	DOCKET NO. <u>A-050528</u>
)	
WILLIAM L. STUTH, and AQUA TEST, INC.,)	STUTH AND AQUA TEST INITIAL BRIEF IN SUPPORT OF SUMMARY DETERMINATION FOR DECLARA-
For Declaratory Order Designating)	TORY ORDER DESIGNATING A
a Public Service Company)	PUBLIC SERVICE COMPANY
_____)	

I. RELIEF REQUESTED

Pursuant to WAC 480-07-380(2) and the Prehearing Conference Order (as amended by the Order On Clarification), Petitioners William Stuth and Aqua Test, Inc., hereby move for the summary determination that a person or corporation owning, operating and managing large on-site sewage systems (at a minimum)¹ dedicated and

¹ The original Petition for Declaratory Order was focused solely on the ownership, operation and management of large on-site sewage systems (LOSS). Since then, however, local public health agencies and other interested companies have expressed their support that a WUTC-regulated public service company also be capable and equipped to provide utility service for the public served by all on-site sewage systems, not just LOSS; e.g., on-site sewage systems larger than 14,500 gpd; mechanical and lagoon systems under Washington Department of Ecology regulation; and even on-site sewage systems for individual use. There is also a move at the present time by the Puget Sound Action Team to designate certain areas of Puget Sound that will require increased management of on-site sewage systems to protect public health and

devoted to the use of the public served thereby for hire and on demand is as a matter of fact a public service company subject to regulation by the Washington Utilities and Transportation Commission.²

II. INTRODUCTION

Petitioners in this matter are William L. Stuth, individually, and Aqua Test, Inc., a Washington corporation. Together they have petitioned the WUTC to issue a Declaratory Order pursuant to its authority under RCW 34.05.240 and WAC 480-07-930 finding and concluding that a private, for-profit company which independently³ owns, operates and manages on a permanent basis large on-site sewage systems for the public served by such
(..continued)
the environment. Stuth and Aqua Test support these positions and consider a WUTC-regulated public service company as the ideal service provider for all such systems and areas of the State.

² Hereafter denominated a "**Wastewater Company**". A Wastewater Company is dedicated to service the public need through its facilities devoted to public use. See **Exhibit "E"**. It must be noted that although the original Petition for Declaratory Order was presented in terms of the ownership, operation and management of LOSS, it is implicit that a Wastewater Company that is a WUTC-regulated public service company will also be capable and equipped to provide utility services for all on-site sewage systems of whatever size and kind wherever located in the State of Washington.

³ The person or corporation comprising the Wastewater Company thus excludes any nonprofit homeowner associations or any other form of enterprise that is member or subscriber controlled. If a Wastewater Company is a corporate entity, its shareholders and board will be independent from and not subject to the control of the public served thereby.

systems for hire and on demand wherever located in the State of Washington is a public service company subject to regulation by the WUTC.⁴

III. BACKGROUND STATEMENT

For the past 19 years Stuth and Aqua Test have provided management and operation services related to large on-site sewage systems serving the public.⁵ To date, however, their services can be offered only where there is guaranteed backup provided by a municipality or sewer district in accordance with State Department of Health rules.⁶ The DOH has identified a growing problem as fewer of such bodies are willing and able to provide the required backup.

⁴ Attached hereto as **Exhibit "A"** is a copy of the original Petition for Declaratory Order filed with the WUTC by Stuth and Aqua Test.

⁵ A large on-site sewage system (LOSS) is defined as "an integrated arrangement of components for a residence, building, industrial establishment or other places not connected to a public sewer system which conveys, stores, treats, and/or provides subsurface soil treatment and disposal on the property where it originates, or on adjacent or nearby property; and includes piping, treatment devices, other accessories, and soil underlying the disposal component of the initial and reserve areas; and 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). WAC 246-272B-01001; WAC 246-272B-03001(5)(a). A LOSS generating the maximum 14,500 gpd at any common point represents a residential subdivision or portion thereof consisting of about 60 single-family homes. WAC 246-272B-11501(2)(C)(i).

⁶ WAC 246-272B-08001(2)(a)(vi) (and former WAC 246-272-08001(2)(a)(vi)).

Our requirement for a municipal entity is controversial and in many cases hasn't provided the assurance we hoped for. Developers complain there is a lack of municipal entities or special districts willing and able to directly manage such systems or to serve as a third party trust. . . . We have received complaints from homeowner associations required to pay ongoing fees to maintain the trust relationship without receiving any service in return. Some special sewer districts have struggled to provide adequate management services and in at least one case the municipal entity failed to meet its obligations upon failure of the private management entity.

Exhibit "A" at Exhibit 1, p. 1 (March 9, 2005 Letter to WUTC from Richard Benson, P.E., DOH). Recognizing that solving this problem is a "top priority", the DOH is actively seeking "a reasonable and appropriate alternative to a municipal corporation to provide long-term and secure management, operation, and maintenance of large on-site sewage systems in the State of Washington."⁷ As a result of its researching options, the DOH concluded that a WUTC-regulated public service company would be an acceptable public entity that could directly manage large on-site sewage systems without further municipal backup.

As a utility serving the general public who depend on a LOSS, a UTC regulated public service company could fill this growing need and serve an essential public function by protecting public health and safety [and the environment] across the State.

⁷ **Exhibit "A"** at Exhibit 1, p. 2.

Exhibit "A" at Exhibit 1, p. 2.⁸

In order to fill this need to serve the public interest as identified by DOH, Stuth and Aqua Test must first have answered the question as to whether a private company providing LOSS services to the general public constitutes a public service company subject to WUTC authority. WUTC has never before answered this specific query and its affirmative answer is essential to providing this service.

IV. PROCEDURAL BACKGROUND

In order to have the WUTC make a formal determination of fact pursuant to RCW 80.04.015⁹ that a private company offering LOSS utility services including ownership, operation and management to the general public for hire is a public service company subject to

⁸ And based on its familiarity and experience with Stuth and Aqua Test, the DOH endorsed the Petition for Declaratory Order and the determination by WUTC that a private company providing management services to the general public is a public service company subject to WUTC regulation. **Exhibit "A"** at Exhibit 1, p. 2. In addition and subject to approval/consent of the Department of Ecology, a WUTC-regulated public service company should also be qualified to own, operate, and manage in the same manner as a LOSS, those mechanical and other on-site systems greater than 14,500 gpd under WDOE jurisdiction. And, with concurrence from local health departments, the ownership, operation and management of smaller on-site systems.

⁹ "Whether or not any person or corporation is conducting business subject to regulation under [Title 80 RCW], or has performed or is performing any act requiring registration or approval of the commission without securing such registration or approval, shall be a question of fact to be determined by the commission." RCW 80.04.015.

WUTC regulation, Stuth and Aqua Test formally petitioned the WUTC to enter a declaratory order. **Exhibit "A"**.

Any interested person may petition the commission for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the commission, as provided by RCW 34.05.240.

WAC 480-07-930.

Initially the WUTC reacted to the Petition by summarily declining to enter a declaratory order solely as a matter of law.

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

Exhibit "B".¹⁰ It is clear, however, that RCW 80.04.015 requires that the determination as to whether any person or corporation is a public service company subject to WUTC regulation be made as a question of fact. Accordingly, Stuth and Aqua Test commenced an action against WUTC under the Administrative Procedures Act seeking judicial review of WUTC's initial decision declining to enter a Declaratory Order.¹¹ An administrative law review trial was held

¹⁰ Copy of the WUTC letter dated April 8, 2005 declining to enter a declaratory order as petitioned for by Stuth and Aqua Test, Docket No. A-050528.

¹¹ Stuth and Aqua Test v. WUTC, Thurston County Superior

before the Honorable Judge Richard D. Hicks on September 2, 2005.

After a full hearing and as its decision, the Court "revers[ed] the summary finding by the Commission and remand[ed] this matter back to the Commission to hold the statutory mandated fact finding hearing."¹² The final Order of the Court remanding this matter to WUTC was entered on September 16, 2005.

V. ISSUE PRESENTED

As set forth in the Prehearing Conference Order and as amended by the Order On Clarification, the ultimate question for Commission determination is whether the operator¹³ of a large on-site sewage system is a public service company as defined in the public service laws of the State of Washington, and thereby subject to Commission regulation as a public service company. The answer to that question is to be determined as a matter of fact (i.e., what activities the petitioners engage in) with reference

(..continued)
Court No. 05-2-00782-3.

¹² Attached hereto as **Exhibit "C"** is the transcript of Judge Hicks' complete decision as rendered September 2, 2005. The quoted portion is found at Page 12.

¹³ And as amended by the Order On Clarification, the term "operator" is not used in its narrow sense to include only physical or technical mechanics of operation. Consistent with the relevant documents and with the discussions at the prehearing conference, the term is meant in its broader management sense to encompass activities that may be necessary to provide a service, such as management, maintenance, and ownership. See Order On Clarification, para. 5.

to the applicable law defining public service companies and the authority of the Commission.¹⁴

VI. EVIDENCE RELIED UPON

Petitioners rely on the following evidence in support of its verified Petition for Declaratory Order and this verified Motion for Summary Determination:

1. Verified Petition for Declaratory Order (**Exhibit "A"**), including Exhibit 1 attached thereto; and this verified Motion for Summary Determination and all exhibits attached hereto.
2. Additional letters and statements by individuals, professionals, and companies that are interested in and support the Petition underscoring the need for and public interest served by the WUTC's designation of a public service company. See Exhibits "D" and "I".
3. Transcript of Judge Richard D. Hicks' full decision rendered in Stuth and Aqua Test v. WUTC, Thurston County Superior Court No. 05-2-00782-3 (**Exhibit "C"**).
4. The Wastewater Company Model Rules Overview set forth in **Exhibit "E"**. See also Exhibits "F", "G", and "H".
5. The public record as filed with and compiled by the WUTC in this matter.

VII. APPLICABLE LEGAL STANDARDS

The statutory breadth of WUTC's jurisdiction is to "regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons

¹⁴ See Prehearing Conference Order, para. 7.

engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, electrical companies, gas companies, . . . and water companies." RCW 80.01.040(3) (emphasis added).¹⁵ The term "public service company includes every gas company, electrical company, telecommunications company, and water company." RCW 80.04.010 (emphasis added).

The word "includes" is a term of enlargement, not of limitation, and denotes a nonexclusive exemplary listing.

[T]he statute's use of the term "includes," denotes a nonexclusive exemplary listing. See 2A Norman J. Singer, Statutes and Statutory Construction § 47.07, at 231 (6th ed. 2000 ("includes" is usually a term of enlargement, not limitation).

State v. Hall, 112 Wn. App. 164, 169, 48 P.3d 350 (2002).¹⁶

¹⁵ A utility is defined to mean "every public service company that has not been classified as competitive by the commission." WAC 480-80-030. Nowhere in WUTC regulation is a utility that provides ownership, operation, and management services to the public related to large on-site sewage systems classified as "competitive". Wastewater companies thus have a captive customer as to whom no alternative exists for service.

¹⁶ See also Brown v. Scott Paper Worldwide Company, 143 Wn.2d 349, 359, 20 P.3d 921 (2001); Publishers Building Company v. Miller, 25 Wn.2d 927, 939, 172 P.2d 489 (1946); Wheeler v. Department of Licensing, 86 Wn. App. 83, 88, 936 P.2d 17 (1997). In contrast, the Legislature uses the word "means" where it intends to create a limitation. Queets Band of Indians v. State, 102 Wn.2d 1, 4, 682 P.2d 909 (1984).

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

Argosy Limited v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968).¹⁷ A broadened scope of companies subject to WUTC's jurisdiction fits within the general expansive framework of the statute, as the term "service is used in [Title 80 RCW] in its **broadest and most inclusive** sense." RCW 80.04.010 (emphasis added).¹⁸ And as to the specific manner that a determination is made whether or not any particular company comes under the WUTC's jurisdiction, no more straight-forward and unambiguous mandate could be stated by the Legislature than as expressly **provided by the public service laws** as follows:

Whether or not any person or corporation is conducting business subject to regulation under [Title 80 RCW], or has performed or is performing any act requiring

¹⁷ "When the term 'include' is used in a statute, it is generally improper to conclude that entities not specifically enumerated are excluded. . . . The legislative intent that 'include' be read as a term of enlargement rather than limitation is further underscored by coupling its use with the phrase 'but not limited to.'" Gholson v. United States, 532 A.2d 118, 119 (D.C.App. 1987). See also Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Association, 306 A.2d 881, 885 (Pa. 1973).

¹⁸ "In fact, it is generally improper to conclude that entities not specifically enumerated are excluded when the legislature uses the word 'including'." Paxson v. Board of Education of School District No. 87, Cook County, Illinois, 658 N.E.2d 1309, 1314-15 (Ill.App. 1995).

registration or approval of the commission without securing such registration or approval, ***shall be a question of fact to be determined by the commission.***

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

The general test used by our courts to determine if a company is subject to regulation by the WUTC, ***and ingrained as part of our "public service laws"***, is well-established and long-standing:

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

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

The question of the character of a corporation is one

¹⁹ "As used in statutes, contracts, or the like, [the word shall] is generally imperative or mandatory." Black's Law Dictionary p. 1233 (5th ed. 1979).

of fact to be determined by the evidence disclosed by the record. . . . What it does is the important thing, not what it, or the state, says that it is.

Inland Empire, 199 Wash. at 538.²⁰

Thus, whether a private company providing ownership, management, operation, and maintenance services on an independent, for profit, contractual, and permanent basis to any and all members of the general public in the State of Washington serviced by large on-site sewage systems, constitutes a "public service company" subject to WUTC regulation under Title 80 RCW is a question of fact to be determined by the Commission on a case-by-case basis properly in a Declaratory Order proceeding.²¹ See WAC 480-07-930.²²

²⁰ The Supreme Court in West Valley Land Company, Inc. v. Nob Hill Water Association, 107 Wn.2d 359, 366, 729 P.2d 42 (1986), noted that distinguishing factors include whether the company is an independent corporation engaged in business for profit to itself at the expense of a consuming public which has no voice in the management of its affairs and no interest in the financial returns. See also State ex rel. Addy v. Department of Public Works, 158 Wash. 462, 465, 291 Pac. 346 (1930). See also United and Informed Citizen Advocates Network v. Washington Utilities and Transportation Commission, 106 Wn. App. 605, 611-12, 24 P.3d 471 (2001), review denied, 145 Wn.2d 1021 (2002) (the WUTC has clear authority to determine whether any person or corporation is subject to regulation under RCW 80.04.015 as a question of fact).

²¹ See Exhibit "C" at pp. 12-13.

²² As service providers in the business sought to be regulated, Stuth and Aqua Test have the requisite standing to petition for a Declaratory Order. It should be noted that it is not uncommon for private entities to petition the WUTC for a declaratory order regarding jurisdictional questions. See, e.g., 1999 Petition for Declaratory Order submitted by TECWA Power,

VIII. REARGUMENT AND CONSIDERATION BY THE ALJ OF THE ISSUE OF
WUTC JURISDICTION AS A QUESTION OF LAW IS IMPROPER AS SUCH
HAS PREVIOUSLY BEEN DECIDED AGAINST THE WUTC BY A SUPERIOR

COURT JUDGE IN THE RELATED JUDICIAL PROCEEDING

WUTC staff in its Statement of Fact and Law express the desire to once more bring up its question as to whether the WUTC has jurisdiction over Wastewater Companies as a matter of law.

Since the public service laws do not provide the Commission authority to regulate managers of LOSS, the Commission does not have jurisdiction over such companies.

Commission Staff's Administrative Statement Of Fact And Law, pp. 2-3.²³

WUTC staff continues to point to the Washington Supreme Court decision in Cole v. Washington Utilities and Transportation Commission, 79 Wn.2d 302, 485 P.2d 71 (1971) as what it contends to be the dispositive decision which purportedly sets definite limits on the bounds of its jurisdiction.²⁴ Staff also contends
(..continued)

Inc., Docket Number UE-991993 (TECWA Power requested the WUTC to enter an order declaring that a separate company it was in the process of acquiring which in turn would own certain electric facilities would not be subject to regulation by WUTC as a public service company; the WUTC did so in a matter of only 3 months from the submittal of the Petition).

²³ This is, in essence, the assertion that "if the law doesn't say that you can, then you can't".

²⁴ WUTC Staff Statement of Fact and Law, at p. 3. Cole is, however, inapposite as that case has nothing whatsoever in common with the facts and issues presented in the case now before the WUTC ALJ. The context in which the Supreme Court considered the

that the decision of the Court of Appeals in Washington Independent Telephone Association v. Telecommunications Ratepayers Association for Cost-Based and Equitable Rates, 75 Wn. App. 356, 880 P.2d 50 (1994) reinforces its assertion of lack of jurisdiction.²⁵ For more than a mere succinct response that the jurisdictional question has already been fully argued to and decided against WUTC by a court of competent jurisdiction, WUTC staff's "lack of jurisdiction as a matter of law" argument is without merit.

The law is very clear that an administrative agency has no

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clause "as provided by the public service laws" under RCW 80.01.040(3) was with respect to whether the WUTC had "authority to consider the effect of a regulated utility upon a nonregulated business" in order to provide grounds for such nonregulated business to intervene in complaint proceedings before it. Cole, 79 Wn.2d at 306. Rather than setting out a cast-in-concrete jurisdictional test, all the Cole Court stated was that the Oil Heat Institute "fail[ed] to point out any section of title 80 **which suggests that** nonregulated fuel oil dealers are within the jurisdictional concern of the commission." Id. (Emphasis added.)

WUTC staff now tries to apply the Institute's failure to suggest a jurisdictional nexus in its case as a hard and fast exclusionary rule applicable to all cases, contrary to the full language of RCW 80.01.040(3) and those mandates for fact finding as set forth in RCW 80.04.015. In any event, unlike the Institute's failure in Cole, Stuth and Aqua Test point to very specific provisions in Title 80 RCW and caselaw that do much more than merely "suggest" that the business of owning, operating, and managing large on-site sewage systems is a public service company subject to WUTC's jurisdiction and regulation, but mandate such as a factual finding and determination WUTC has the statutory duty to make upon full consideration of the record.

²⁵ WUTC Staff Statement of Fact and Law, pp. 4-5.

power to ignore the mandate of a reviewing court.

Judicial decisions on appeal from administrative decisions or orders determining questions of law are final and conclusive on the administrative body, and the administrative body is bound to honor such judicial decisions, and when its continuing jurisdiction conflicts with a prior judicial determination, it may act only in a changed situation. . . . An administrative agency is without power to do anything which is contrary to either the letter or spirit of the mandate construed in light of the opinion of the . . . court.

73A C.J.S. Public Administrative Law and Procedure § 466 (2004).²⁶

This is, in essence, the *law of the case* doctrine; to wit, "once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case."²⁷ In Stuth and Aqua Test v. WUTC, the WUTC presented the identical issue and argument (lack

²⁶ See **Exhibit "C"**. Administrative agencies are duty bound to follow and apply the law as found by a court of competent jurisdiction where such ruling was not further appealed. Allegheny General Hospital v. NLRB, 608 F.2d 965, 970 (3rd Cir. 1979). In re Wella A. G., 858 F.2d 725, 728 (Fed. Cir. 1988) (agency has duty to comply with the mandate of the reviewing court); Butler Lime and Cement Co. v. Occupational Safety and Health Review Commission, 658 F.2d 544 (7th Cir. 1981) (the rule that an agency is limited on remand by the instructions of the reviewing court is settled beyond question); Chicago & North Western Transportation Company v. United States, 574 F.2d 926, 930 (7th Cir. 1978) (on remand agency is bound to apply the legal principles laid down by the court); Elliott v. Weinberger, 564 F.2d 1219, 1226 (9th Cir. 1977) (agency's duty is to follow the court's decision).

²⁷ Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah, 114 F.3d 1513, 1520 (10th Cir. 1997).

of jurisdiction as a matter of law) to the Court;²⁸ it was soundly rejected by Judge Hicks;²⁹ and no appeal was taken by WUTC.³⁰

In any event and in stark contrast to both Cole and WITA, here Stuth and Aqua Test expressly point to RCW 80.04.015, WAC 480-07-930, and caselaw as comprising those specific "public service laws" that grant WUTC the jurisdiction to enter a declaratory order and make a determination as a question of fact whether a private company providing LOSS ownership, operation and management services to the public for hire constitutes a public service company subject to regulation by the WUTC.³¹ See Exhibit

²⁸ **Exhibit "C"**, at pp. 8-10.

²⁹ "[T]his is the kind of company that may qualify as a public service company such that it should not be summarily dismissed as a matter of law that no such qualification could ever be possible. . . . So I don't see that it is a requirement that Title 80 mentioned sewage systems. To me that's contrary to what both the legislature and the Supreme Court have decided on prior occasions." **Exhibit "C"**, at pp. 12 and 14.

³⁰ Thompson v. State Department of Licensing, 138 Wn.2d 783, 799-800, 982 P.2d 601 (1999) (issue preclusion applies where no further judicial review is sought by agency regardless of correctness of decision).

³¹ Stuth and Aqua Test also point out that under these public service laws the essential determination that must be made is "what it does is the important thing, not what it, or the state, says that it is." West Valley Land Company, 107 Wn.2d at 366. Stuth and Aqua Test further point out that the enumeration of public service companies in Title 80 is exemplary only and does not constitute an exclusive listing. If in fact Title 80 embodied an all-inclusive list establishing the bounds to WUTC's jurisdictional reach, there would be no reason for the Legislature to include the mandate that "whether or not any person or corporation is conducting business subject to regulation [under

"C", at pp. 13-14. Clearly, Stuth and Aqua Test have here expressly and specifically pointed to those parts of our public service laws which affirmatively demonstrate that the WUTC has jurisdiction to (1) enter a declaratory order as to which they have petitioned, and (2) determine that a person or corporation dedicated to service the public need with its facilities devoted to public use by providing LOSS ownership, operation, and management services to the public for hire wherever located, continuously and on demand in this State is in fact subject to regulation by WUTC as a public service company.

I'll say again that we live in a dynamic, growing society and culture and that this is not so much "filling the gap," . . . rather, this is addressing a new bud on a growing tree. There were times when toilets were outhouses. . . . There was a time when telephone wires had to be strung, and for a while all they'd take is Morse code, and then all of a sudden they could be voice by wire. Now wireless communication through cell phones is overtaking the world. There are many, many, many examples I could give about how the world changes and is dynamic. And I think that's exactly why the legislature has this all-inclusive language, because they were wise enough to see they couldn't foresee every possible

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Title 80] . . . shall be a question of fact to be determined by the commission." RCW 80.04.015. Moreover, such a construction would render the Legislature's words "includes" and "including, but not limited to" in RCW 80.04.010 and RCW 80.01. 040(3) surplusage and a complete nullity; something that is not ascribed to legislative enactments. "Statutes are to be construed, wherever possible, so that no clause, sentence or word shall be superfluous, void, or insignificant." United Parcel Service, Inc. v. Department of Revenue, 102 Wn.2d 355, 361-62, 687 P.2d 186 (1984).

service that may come to be a public service. And the Supreme Court was wise enough to give the test in the Inland Empire case that says it isn't what you call yourself, it's what, in fact, you do that must be determined as to whether or not you qualify and should be regulated by the government.

Exhibit "C", at pp. 13-14. *This issue has been laid to rest -- period!*³²

**IX. THE LID ON PANDORA'S BOX IS KEPT SECURED BY
MAKING A FACTUAL CASE-BY-CASE DETERMINATION AS TO
WHETHER ANY PARTICULAR PERSON OR CORPORATION IS A
PUBLIC SERVICE COMPANY SUBJECT TO WUTC REGULATION**

It is indeed well-settled under the public service laws of this State that whether any person or corporation is a public service company must be determined on a case-by-case basis as a question of fact. As a matter of law, making such a determination in this case does not thereby open Pandora's Box extending WUTC's authority to regulate all general businesses that provide services or sell commodities to the public. The concern as to over-extending regulatory authority has long been answered in the negative under the public service laws of this State. Consider

³² The Chief ALJ has it correct that the issue as to whether a Wastewater Company is a public service company subject to WUTC regulation is a question of fact based on the evidence considered in light of the body of principles embodied in Washington public service laws. Prehearing Conference Order, at p. 2 para. 7. "The classification statute, RCW 80.04.015, clearly focuses on whether a person or a corporation conducts business subject to regulation under Title 80 RCW. It is the conduct that makes the corporation subject to regulation." Citizen Advocates, 106 Wn. App. at 611.

the following excellent discussion from over 70 years ago regarding this issue:

What is a public utility, over which the state may exercise its regulatory control without regard to the private interests which may be affected thereby? In its broadest sense everything upon which man bestows labor for purposes other than 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 instance 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 that under the police power of the state it may well be subject to regulation, and in many places and instances so regulated. The preservation of cleanliness, the inspection of meats to see that they are wholesome, all such matters are within the due and reasonable regulatory powers of the state or nation. But these regulatory powers are not called into exercise because the butcher has devoted his property to public service so as to make it a public utility. He still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates all such activities from a true public utility is this, and this only: That the devotion to public use must be of such character that the public 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 conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and by every individual member of it, as a legal right.

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

Here, the case-specific determination that must be made as a question of fact is whether:

(a) a person or corporation organized as a private, for-profit business enterprise under applicable laws;

(b) whose service is dedicated to the ownership, management and operation of large on-site sewage systems (at a minimum);

(c) for hire pursuant to a contract with the general public or customers served by and wholly dependent upon such devoted facilities for essential wastewater utility services on a continuous basis 24 hours a day, 7 days a week and 365 days a year;

(d) on demand for such service wherever situated in the State of Washington for both existing LOSS and new LOSS;

(e) pursuant to and in accordance with State and local health department and environmental requirements regarding design, construction, and performance standards; and

(f) is separate and independent from its public customers served thereby, and as to which its customers are not members, share- or stock-holders and derive no income from the services provided, and exercise no influence in the private business enterprise as either officers or board members;

is a public service company subject to regulatory control by WUTC as to approval of reasonable tariffs and other business aspects regarding its enterprise? ***This is but a very focused query that even where answered affirmatively, Pandora's Box remains intact.***

**X. THE CASE FOR DESIGNATION AS A
PUBLIC SERVICE COMPANY**

Under the public service laws of the State of Washington, the determination as to whether any person or corporation is a public service company subject to regulation by the WUTC is a question of fact based on what such company does. Factors to be considered include:

1. Whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility pursuant to private contract entitling the users to continuous service; or whether, on the contrary, it merely offers to serve only particular individuals of its own selection such as its members or stockholders. Inland Empire Rural Electrification, 199 Wash. at 537; State ex rel. Addy, 158 Wash. at 464-65.

2. Whether the company is an independent corporation engaged in business for profit to itself at the expense of a consuming public which has no voice in the management of its affairs and no interest in the financial returns. West Valley Land Company, 107 Wn.2d at 366.

3. Whether the company's devotion to public use is of such character that the public generally, or that part of it which has

been served and which has accepted service, has the right to demand that such service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Clark, 177 Wash. at 246.

4. Whether the public interest will be served by regulation of the company as a public utility as demonstrated by need for the service and fairness in the delivery of the service. RCW 80.01.040 (3).

It is against these factors that the Proposed Business Model for a company owning, operating and managing large on-site sewage systems must be evaluated. As presented by Petitioners to the WUTC for its factual determination as meeting all the foregoing tests, the **Proposed Business Model** consists of the following attributes:

(A) A person or corporation organized as a private, for-profit business enterprise under applicable laws;

(B) Whose service is dedicated to the ownership, management, and operation of large on-site sewage systems (at a minimum);

(C) For hire pursuant to a contract with the general public or customers served by and wholly dependent upon such devoted facilities for essential wastewater utility services on a continuous basis 24 hours a day, 7 days a week and 365 days a year;

(D) On demand for such service wherever situated in the State of Washington for both existing LOSS and new LOSS;

(E) Pursuant to and in accordance with State and local health department and environmental requirements relating to design, construction, and performance; and

(F) Is separate and independent from its public customers served thereby, and as to which its customers are not members, share- or stock-holders and derive no income from the services provided, and exercise no influence in the private business enterprise as either officers or board members.

That the public interest will be served by such a company regulated by WUTC as a public utility is not only beyond peradventure, such public interest is firmly established as fact.

As a utility serving the general public who depend on a LOSS, a UTC regulated public service company could fill this growing need [for operation and management services] and serve an essential public function by protecting public health and safety [and environment] across the State.

Exhibit "A" at Exhibit 1, p. 2. And as further found and concluded by Judge Hicks:

[Petitioners'] services [presently] can only be offered where there is a guaranteed backup provided by a city or a sewer district in accordance with Department of Health rules. The State Department of Health has identified this as a growing problem since cities and special districts are unable to accommodate the rapidly

growing needs for required backup. The State Department of Health has concluded that a WUTC-regulated public service company would in their opinion, be an acceptable public entity to undertake this State Department of Health requirement. . . . [T]he petitioner is correct; that not only because of what's taking place in Tennessee but that they're being urged by the Department of Health to provide a service that is ordinarily provided to the public by a municipality or special government district . . . that this is the kind of company that may qualify as a public service company.

Exhibit "C" at p. 12.

The foregoing concerns, need and necessity for such service to be provided by a WUTC-regulated public service company is echoed in the additional letters and statements of support included in **Exhibit "D"**. Included therein are the following comments regarding the public interest served by WUTC designation and regulation:

It is our belief that allowing private companies to serve as public utilities would be good for public welfare as well. Specifically, as with Remington Heights, plats where these systems are located may have Homeowners Associations in place that require the owners to pay for services relating to the operation and maintenance of the LOSS systems. By allowing private companies to serve as public utilities and be regulated as such, this would provide protection to homeowners by normalizing a rate structure that the public utility must adhere to.

Barclays North, Inc., Letter at p. 2.

In my professional opinion, Aqua Test's application for authorization as a WUTC-regulated public service company is an excellent alternative to a municipal corporation or management district for the proper management of LOSS systems. In this case the management

entity would be a private company regulated as a public utility and monitored by the WUTC, which in my mind would make the entire endeavor more responsive to ratepayers while serving to protect the public health and the environment.

Stewart M. Oakley, Ph.D., Letter at p. 2.

Regulation by the WUTC of a private utility company has many benefits to the public, some of which are:

1. Standardized regulations in how a company is structured, operated, and managed with respect to its capabilities in identifying and tracking both physical and financial performance issues/features.
2. Minimizes the risks of un-regulated, un-disciplined, inadequately staffed companies/competition taking advantage of the general lack of public knowledge with regards to wastewater facilities and operations.

Terry Bounds, P.E., Letter at p. 1.

The approach of having a service provider being designated as a public utility and thus operating under the public utility rules is forward thinking. It protects the public from being overcharged and provides for a stable and reliable entity that should be there for many years to serve the public. Also the public has a sense of security because they are dealing with a public utility. The public utility concept is ideal for subdivisions as it allows the developer or the home owners association to contract with a known entity and be assured that they are protected under the law and by the rules set forth for public utilities.

James C. Converse, Ph.D., P.E., Letter at p. 1. See also A. Robert Rubin, Professor Emeritus N.C. State, Letter at pp. 2-3.

The recurring and established theme in the foregoing is the

public interest is served by allowing for a WUTC-regulated public service company as described herein to provide ownership, operation and management services to the public dependent upon large on-site sewage systems through a controlled program providing for fiscally responsible and stable companies affording continuous, dependable delivery of an essential utility service for fair and reasonable rates.

**XI. FACILITIES OWNERSHIP IS AN INTEGRAL AND ESSENTIAL
ATTRIBUTE OF A REGULATED WASTEWATER COMPANY**

The Proposed Business Model includes as an integral and essential attribute of any regulated Wastewater Company the ownership of the physical facilities comprising a LOSS.³³ With ownership of the physical facilities comes the capability to design and construct new LOSS for developing and existing communities, especially in the critical Puget Sound marine recovery areas.³⁴ The US EPA emphasizes the ownership of on-

³³ "The key element to a sustainable management structure is the ability to enforce design and operational requirements on customers/clients of the facility." **Exhibit "D"**, Letter from A. Robert Rubin, Professor Emeritus, N.C. State University. This key lies in the fundamental attribute a Wastewater Company must possess of facility ownership.

³⁴ It should also be noted here that the Puget Sound Action Team has expressed a desire and support for WUTC "regulation of firms whose purpose is LOSS maintenance as public service companies" for a variety of reasons, including the fact that "WUTC regulation will ensure that companies engaged in this business provide fair rates, accountable business practices, and timely service . .

site/clustered wastewater treatment systems³⁵ as an essential attribute of Responsible Management Entities (RME).

The designated management entity owns, operates, and manages the decentralized wastewater treatment systems in a manner analogous to central sewerage. Under this approach, the RME maintains control of planning and management, as well as operation and maintenance [to] provide a . . . higher level of control of system performance [and] reduce the likelihood of disputes [with] the property owner. The RME can also more readily replace existing systems with higher-performance units or clustered systems when necessary.

Voluntary National Guidelines for Management of Onsite and Clustered (Decentralized) Wastewater Treatment Systems, p. 20 - "Model 5" (US EPA 832-B-03-001, March 2003).³⁶

(..continued)

. to meet high standards and ensure protection of the environment." PSAT Position Paper titled "WUTC Regulation of Large Onsite Sewage Systems," Terry Hull (October 25, 2005). See **Exhibit "I"**. This paper is in the possession of and was produced by WUTC staff in response to Stuth and Aqua Test's informal discovery request and formal request for public records. Also produced by WUTC staff was a copy of the NRRI Briefing Paper titled "State Commission Regulation of Wastewater," dated October 2005. As characterized by WUTC's Chris Rose, "this paper . . . points out the rationale for developing a team approach by environmental and regulatory agencies . . . and the utility regulators bring the 'economic regulation' expertise into the picture to help put the companies on a more sound management and financial footing". (Rose to David Danner Memo dated October 26, 2005).

³⁵ On-site and clustered wastewater treatment systems serve approximately 25 percent of U.S. households (about 25 million) and approximately 33 percent of new development. U.S. Department of Commerce, U.S. Census Bureau, American Housing Survey for the United States - 1995 (issued September 1997).

³⁶ A "Responsible Management Entity" upon which Model 5 is

XII. THE TENNESSEE EXPERIENCE

The State of Tennessee has since 1994 regulated private Wastewater Companies as public utilities under a statutory scheme very similar to RCW Title 80.

Public utility means every individual, copartnership, association, corporation, or joint stock company . . . that own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, **or any other like system, plant or equipment**, affected by and dedicated to the public use . . .

Tennessee Code § 65-4-101(6) (emphasis added). Tennessee's test for inclusion is "or any other like system, . . ."; whereas Washington enlarges the scope of covered activities by using "including, but not limited to" -- a distinction without a difference.³⁷

(..continued)

based is defined as "a legal entity responsible for providing various management services with the requisite managerial, financial and technical capacity to ensure the long-term, cost-effective management of decentralized onsite or clustered wastewater treatment facilities in accordance with applicable regulations and performance criteria." EPA Voluntary National Guidelines, at p. 29. A "Clustered System" is defined somewhat similar to a LOSS except that it covers two or more dwellings under common ownership. *Id.* at p. 27. RME ownership is the "preferred management program for clustered systems serving multiple properties under different ownership (i.e., subdivisions)." *Id.* at p. 16. Our Proposed Business Model satisfies the criteria of EPA's Model 5 for RME (i.e., a WUTC -regulated public service company) ownership of the LOSS.

³⁷ Contrary to WUTC staff contentions, the Tennessee public utility statute is very comparable to that of Title 80 RCW. WUTC Staff Statement of Fact and Law, at pp. 8-9. Similar to Washing-

The Tennessee Regulatory Authority granted 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 business-related requirements and tariffs.³⁸ The TRA is currently proposing administrative rules that cover in detail its regulation of Wastewater Companies as public utilities. TRA Rule Chapter 1220-4-12.³⁹

WUTC is invited in this Declaratory Order proceeding to take official notice (RCW 34.05.452(5); WAC 480-07-495(2)) of the State of Tennessee's regulatory program and Petitioners' Wastewater Company Model Rules Overview as a proffer of fact and law demonstrating both the feasibility and practicality of regulating private Wastewater Companies as public utilities. RCW 80.01.040(4). As duly and correctly noted by Judge Hicks as part

(..continued)

ton's body of public service laws, under the Tennessee public utility laws it is held that "whether a business operation may be classed as that of a public utility is controlled by the facts of a particular case." Johnson City v. Milligan Utility District, 276 S.W.2d 748, 753 (Tn.App. 1954) [cert. denied, 1955].

³⁸ Attached hereto as **Exhibit "F"** is a copy of available public records obtained from the TRA and from its website relating to and regarding the initial and subsequent designation of private Wastewater Companies as regulated public utilities.

³⁹ Attached hereto as **Exhibit "G"** is a copy of the underlying Tennessee Code and the current red-lined version of the TRA's proposed Wastewater Regulations.

of the Court's decision:

I'll say again that we live in a dynamic, growing society and culture and that this is not so much "filling the gap," which I think counsel for the WUTC is correct in saying the agency shouldn't be doing; rather, this is addressing a new bud on a growing tree. . . [T]he Utilities and Transportation Commission, despite whatever meager funding they have to do these kinds of things, need to hold a fact finding hearing, and if they do determine that this is the kind of thing that can be a public service company the way it's been determined in Tennessee, they will have to promulgate rules and regulations. But there is guidance from the legislature through either the Department of Health and the Department of Ecology, the same way there is now with water systems. So I don't see that it is a requirement that Title 80 mentioned sewage systems. To me that's contrary to what both the legislature and the Supreme Court have decided on prior occasions.

Exhibit "C" at pp. 13-14. The Tennessee experience should be tapped by WUTC and molded to fit Washington's specific needs.

**XIII. WUTC REGULATION OF WASTEWATER COMPANIES NEITHER
CONFLICTS WITH NOR DUPLICATES THE REGULATION OF LOSS BY DOH**

WUTC opines that WUTC regulation of the business enterprise owning, operating and managing LOSS somehow conflicts with or duplicates the regulatory authority of DOH.⁴⁰ It is clear, however, that the DOH and WUTC have very well-defined and distinctly different regulatory roles to play when the subject is LOSS. Whereas,

⁴⁰ Or simply that the Legislature has delegated the world of LOSS and everything in and related to it to DOH. WUTC Staff Statement of Fact and Law, at pp. 7-8.

DOH has authority regarding the criteria and standards related to design, construction and performance of the LOSS itself;⁴¹ WUTC has the focus of its authority on controlling the business practices of the person or corporation owning, operating and managing a LOSS as a public utility service.

The utilities and transportation commission shall:

(3) Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities

RCW 80.01.040. See also Ch. 480-80 WAC (utilities' general rules).

As for the ultimate implementation of the regulatory world as such relates to Wastewater Companies there will be no conflicts or overlapping of the distinct statutory authorities granted the various state and/or local agencies. Each agency may draw upon the expertise of and powers vested in the other to effect the full force of its own regulatory program. For example, where DOH regulations require that a "public entity" serve as the primary

⁴¹ "This chapter regulates the location, design, installation, operation, maintenance, and monitoring of large on-site sewage systems to (a) achieve long-term sewage treatment and effluent disposal; and (b) limit the discharge of contaminants to waters of the state." WAC 246-272B-00101(2).

management entity for LOSS,⁴² it may rely on a WUTC-regulated public service company to provide required LOSS management services to all the public served thereby on demand, continuously, and for reasonable rates.⁴³ And where WUTC regulations are facility-specific as to standards such must meet, it may rely on DOH adopted rules and regulations specifically related to LOSS design, construction and performance.⁴⁴ Certainly, Judge Hicks saw no conflict -- only a direct benefit to WUTC from this symbiotic relationship:

[T]he [WUTC], despite whatever meager funding they have to do these kinds of things . . . will have to promulgate rules and regulations. But there is guidance from the legislature through either the Department of Health and the Department of Ecology, the same way there is now with water systems.

Exhibit "C", at p. 14.⁴⁵

⁴² WAC 246-272B-08001(2)(a)(vi)(A)(I).

⁴³ **Exhibit "A"** at Exhibit 1, p. 2.

⁴⁴ There is no conflict of authority at the present time with DOH setting the standards and criteria for design, construction and performance of LOSS, and those municipal entities or special public districts providing LOSS management services.

⁴⁵ It is commonplace for WUTC to adopt other agency regulations and standards by reference in its "999" rule series; e.g., WAC 480-110-999 (Water Companies), WAC 480-120-999 (Telephone Companies), WAC 480-100-999 (Electric Companies), WAC 480-93-999 (Gas Companies), WAC 480-70-999 (Solid Waste and Refuse Collection Companies), WAC 480-14-999 (Carriers). See also WAC 480-110-365(3) (Maintenance), -365(4) (Quality of Water), -365(5) (Protection of Water Supply), -365(6) (Operation and Maintenance)

In sum, there is no conflict as to the respective authorities and regulatory domains of WUTC and DOH. It is the public interest that will be served by WUTC regulating Wastewater Companies, and it will be the environment and public health that will be protected by requiring Wastewater Companies to be the responsible public entity meeting all DOH standards and criteria for LOSS.

XIV. CONCLUSIONS

The WUTC is not venturing into a total void, black hole, or bottomless abyss in making a determination that, as a question of fact, the Proposed Business Model by Petitioners Stuth and Aqua Test qualifies and must be regulated by WUTC as a public service company.⁴⁶ In addition to a wealth of existing public utility (..continued) for particular reference to DOH rules. It may also be prudent for WUTC to consider what Tennessee is proposing as its Wastewater Regulations regarding "Adequacy of Facilities". See **Exhibit "G"**, TRA Draft Rules at p. 3.

⁴⁶ The process for determining authority to regulate a particular business enterprise as a utility or contract carrier without specific inclusion of such business by name in statute is certainly not foreign to the WUTC. For example, the case of State v. Diamond Tank Transport, Inc., 2 Wn.2d 13, 97 P.2d 145 (1939), affirmed the regulation of garbage and refuse haulers by the WUTC's predecessor agency pursuant to its broad statutory mandate as constituting contract carriers of "property for compensation". It appears that WUTC practice of regulating garbage and refuse haulers extends back to at least 1937. See 1961-62 AGO No. 67, at p. 4. Specific statutory designation of the class as a "garbage and refuse collection company" was not given by the Legislature until 1961. Ch. 295, Laws of 1961. Moreover, not everything regarding WUTC regulation of an industry must be spelled out in black and white in the statutes. State ex rel. Don Williams Export, Inc. v. Timm, 78 Wn.2d 520, 525, 477 P.2d 15 (1970) ("While the Motor Carrier Act is silent on the specific standards

regulations covering water, gas and electric companies, the WUTC can avail itself of what sister State agencies have done and are doing with respect to the regulation of Wastewater Companies as a public utility. See NRRI Briefing Paper and TRA Rules. Finally, Petitioners are offering suggestions for WUTC's consideration that are included as a Model Rules Overview. **Exhibit "E"**.⁴⁷

WUTC's designation of the Petitioners' Proposed Business Model as a public service company is consistent with and satisfies all the factors that must be considered under the public service laws of this State, and moreover not only is such designation in the public interest but is in fact in the best interest of the public of this State dependent on large on-site sewage systems providing a daily, essential public utility.⁴⁸

Based on the foregoing, Petitioners Stuth and Aqua Test resp-
(..continued)
to be applied by the commission in transfer of permit proceedings, the commission has applied a public need, public interest test which is well within its delegated authority.").

⁴⁷ Northwest Cascade, Inc. has offered suggestions relating to various requirements relevant to WUTC-regulated Wastewater Companies. (Under "Private Utility Formation Criteria".)

⁴⁸ Attached hereto as **Exhibit "H"** is a copy of the currently inventoried large on-site sewage systems as kept and reported by the Department of Health. That Wastewater Companies owning, operating, and managing such systems efficiently, effectively, continuously, and reasonably priced will provide the public in this State with a useful service that "is of public consequence and need" is beyond peradventure, and is an established fact under the evidence in this matter. 73B C.J.S. Public Utilities § 1 (2004).

ectfully ask the WUTC to grant its Petition and enter a Declaratory Order finding and concluding that the **Proposed Business Model**, see supra, at pp. 22-23, qualifies and must be regulated as a public service company (suggested to be denominated as a "Wastewater Company") under Title 80 RCW.⁴⁹

DATED this _____ day of December, 2005.

Respectfully submitted,

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

Rhys A. Sterling, WSBA #13846
Attorney for Petitioners

⁴⁹ As a final note, absolutely no negative comments from the public or others to the Stuth and Aqua Test proposal were submitted to WUTC in response to its call for input sent to an extensive and comprehensive mailing list.

CERTIFICATION DECLARATION

I certify and declare under penalty of perjury under the laws of the State of Washington that I have read the foregoing Initial Brief; that I am a Petitioner in this matter individually and also as a principal owner and President of Aqua Test, Inc.; and that the stated facts included in and supporting the foregoing, including the Proposed Business Model as envisioned, are all consistent with our original Petition for Declaratory Order and are true and accurate to the best of my own personal knowledge, information, and belief.

DATE

WILLIAM L. STUTH (WRITTEN)

PLACE OF SIGNATURE

WILLIAM L. STUTH (PRINTED)