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January 10, 2006

VIA FIRST CLASS MAIL

Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, Washington 98504-7250

Re: William Stuth and Aqua Test, Inc.
Petition for Declaratory Order, Docket No. A-050528
**STUTH AND AQUA TEST'S REPLY BRIEF IN SUPPORT OF SUMMARY
DETERMINATION FOR DECLARATORY ORDER DESIGNATING A PUBLIC
SERVICE COMPANY**

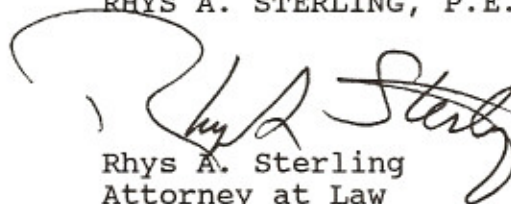
Dear Ms. Washburn:

Pursuant to WAC 480-07-380(2) and in accordance with the Pre-hearing Conference Order (amended by the Order On Clarification), submitted herewith and filed by mail with the WUTC is Stuth and Aqua Test's Reply Brief in Support of Summary Determination for Declaratory Order Designating a Public Service Company. In addition to the original and five hard copies, I am also e-mailing a *.pdf copy and a MS Word version of the reply brief to the WUTC records center and to all participating parties. (Note that Simon ffitich confirmed to me by phone conversation that his office is no longer actively participating in this matter.)

Please contact me if you have any questions regarding this matter. Thank you for your consideration and continued cooperation.

Very truly yours,

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



Rhys A. Sterling
Attorney at Law

Enclosures

cc: Christopher G. Swanson, AAG (via mail and e-mail)
Bill Stuth/Aqua Test, Inc.

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BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

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

Petitioners Stuth and Aqua Test hereinbelow reply to the WUTC Staff's Motion for Summary Determination.

The WUTC Staff continues to travel down their chosen path of attempting to focus the ALJ on summarily disposing this matter by determining as a matter of law that WUTC simply does not have "jurisdiction over large on-site sewage system (LOSS) operators, as that term is described in Order No. 02".¹ WUTC Staff then points to a selected excerpt from Judge Richard D. Hicks' decision as purported support for the ALJ to wander from the mandate issued by the Thurston County Superior Court.² However, omitted by the WUTC Staff

¹ Accordingly, WUTC asserts that "no issues of material fact exist as to" their motion for summary determination. WUTC Motion for Summary Determination, at p. 1.

² WUTC Motion, at p., 2.

STUTH AND AQUA TEST'S REPLY
BRIEF FOR SUMMARY DETERMINATION
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1 from this very same portion of text from Judge Hicks' decision to
2 remand is the remainder of this all-important paragraph, which con-
3 tinues immediately after the end of the WUTC excerpt with the foll-
4 owing "rul[ing]":

5 But I do rule that the petitioners in this case have
6 set out a prima facie case that requires the Commission
7 to hold a fact finding hearing and make a determination
8 as to whether or not this kind of company can be a pub-
9 lic utility.

10 Stuth and Aqua Test Initial Brief, Exhibit "C" at pp. 12-13 (empha-
11 sis added). Contrary to the WUTC Staff's contention that the door
12 is still open for the ALJ to revisit the threshold issue as to the
13 WUTC's jurisdiction as a matter of law, by directly and fully con-
14 sidering such jurisdictional issue as a question of law in the ad-
15 ministrative review trial held between these same parties,³ Judge
16 Hicks by ruling as he did that Stuth and Aqua Test have "set out a
17 prima facie case" firmly but forcefully closed that door. In fact,
18 as a preface to giving his decision, Judge Hicks made the following
19 statement on the record for all of us to pay careful attention:

20 I'll often make some kind of notes if I have the time,
21 and I did have time to make notes in this case because
22 everybody filed their briefs on time. Sometimes I abandon
23 the notes and just rule from memory, and it's tempting to
24 do that on a Friday afternoon like we have here. But be-
25 cause I think this case is of some importance, I want to
26 demonstrate to any later reviewer that I have considered
27 all of the arguments that were presented by both sides.

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³ See Stuth and Aqua Test Initial Brief, Exhibit "C" at pp. 4 (lines 15-24); and 8-10.

1 Stuth and Aqua Test Initial Brief, Exhibit "C" at p. 3 (emphasis
2 added).

3 And the arguments presented by the WUTC to Judge Hicks, and
4 that which he fully and carefully considered, were the legal bases
5 it contended supported its "hold[ing] that they have no jurisdic-
6 tion over such companies without a specific legislative declaration
7 citing Cole v. WUTC, 79 Wn.2d 302, 306 (1971) and they distinguish
8 the Inland Empire case"4 Judge Hicks continued with his
9 most thorough analysis of the statutes and caselaw,⁵ and concluded
10 that "the legislature has this all-inclusive language, because they
11 were wise enough to see they couldn't foresee every possible serv-
12 ice that may come to be a public service. And the Supreme Court was
13 wise enough to give the test in the Inland Empire case that says it
14 isn't what you call yourself, it's what, in fact, you do that must
15 be determined as to whether or not you qualify and should be regul-
16 ated by the government."⁶ And as a factual determination based on
17 what service is in fact being given to the public rather than mere-
18 ly looking at the name of such service, Judge Hicks observed that:

19 _____
20 4 Stuth and Aqua Test Initial Brief, Exhibit "C" at p. 4.

21 5 Carefully considering, *inter alia*, the Legislature's speci-
22 fic choice of words in Title 80; namely, "including, but not limit-
23 ed to" in RCW 80.01.040(3), and the definition of "service" in RCW
24 80.04.010 to be "in its broadest and most inclusive sense." Stuth
and Aqua Test Initial Brief, Exhibit "C" at pp. 6-7.

6 Stuth and Aqua Test Initial Brief, Exhibit "C" at pp. 13-
14.

STUTH AND AQUA TEST'S REPLY
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1 [N]ot only because of what's taking place in Tennessee
2 but that [the Petitioners are] being urged by the Depart-
3 ment of Health to provide a service that is ordinarily
4 provided to the public by a municipality or special gov-
5 ernment district; that this is the kind of company that
6 may qualify as a public service company such that it
7 should not be summarily dismissed as a matter of law that
8 no such qualification could ever be possible.

9 Stuth and Aqua Test Initial Brief, Exhibit "C" at p. 12.

10 A factual determination as to the qualification of the Stuth
11 and Aqua Test Proposed Business Model is what is required by law,
12 and is what Judge Hicks mandated WUTC to conduct on remand.⁷ And
13 even though Judge Hicks stated that the ultimate resolution of such
14 fact finding hearing "would have to be determined by the Commission
15 based on the facts it finds and the law it applies,"⁸ Judge Hicks
16 did make one essential "ruling" to guide the WUTC and ALJ in the
17 hearing process; to wit, "that the petitioners in this case have
18 set out a *prima facie case* that requires the Commission to hold a
19 fact finding hearing and make a determination as to whether or not
20 this kind of company can be a public utility."⁹ This is the part
21 of Judge Hicks' decision and mandate on remand that WUTC Staff so
22 carefully excised -- and with very good reason as such a ruling is

23 ⁷ Stuth and Aqua Test Initial Brief, Exhibit "C" at p. 12
24 (lines 19-21).

⁸ Stuth and Aqua Test Initial Brief, Exhibit "C" at p. 12
(lines 22-25).

⁹ Stuth and Aqua Test Initial Brief, Exhibit "C" at pp. 12-13
(emphasis added).

1 not at all favorable to the WUTC Staff's position to narrowly focus
2 the ALJ's attention in a bold attempt to garner yet another bite of
3 the apple. However, a bite from the jurisdictional apple must be
4 resisted under the well-established jurisprudence considering the
5 legal effect stemming from the establishment of a prima facie case.

6 A prima facie case . . . means not only that plaintiff's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it.

9 Black's Law Dictionary, at p. 1071 (5th ed. 1979).¹⁰ And where stated in terms of a party's duty to carry the "burden of production" to support the relief sought in an action, Washington courts hold that the burden of production is to "produce evidence sufficient to support" the needed findings,¹¹ that the "burden of production [requires evidence] sufficient to meet the prima facie case,"¹² and

17 ¹⁰ A "prima facie case means the production by the plaintiff of such evidence which, although not compelling a verdict on the issue for the party whose contention it supports, is sufficient to satisfy the burden of proof to support a verdict in favor of the party by whom it is introduced when the trier of fact finds the prima facie case is not rebutted by other evidence." State ex rel. Fitzgerald v. District Court, 703 P.2d 148, 156-57 (Mont. 1985) (citing State ex rel. Department of Public Health v. Hogg, 466 S.W.2d 167, 170 (Mo.App. 1971), and State ex rel. Department of Public Health v. Ruble, 461 S.W.2d 909, 912-13 (Mo.App. 1970)).

23 ¹¹ State v. Pineda, 99 Wn. App. 65, 77, 992 P.2d 525 (2000).

24 ¹² Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 364, 753 P.2d 517 (1988).

1 the "burden of production is met by proving a prima facie case".¹³

2 Stuth and Aqua Test have thus produced sufficient evidence to
3 support a finding that a person or corporation dedicating its ser-
4 vice to ownership, operation and maintenance of LOSS for hire and
5 devoted to the public served thereby on demand wherever located in
6 the State (a "Wastewater Company") is a public service company sub-
7 ject to regulation by the WUTC. Under the jurisprudence to be app-
8 lied by the ALJ in making such determination,¹⁴ Stuth and Aqua Test
9 have made a sufficient evidentiary showing for the ALJ to find and
10 conclude that Wastewater Companies are subject to regulation by the
11 WUTC as public service companies, *UNLESS* WUTC Staff presents suffi-
12 cient competent evidence to rebut Petitioners' prima facie case.¹⁵
13 And WUTC Staff has pointedly failed to do so as it very candidly
14 admits that in this cross motion proceeding for summary determin-
15 ation, "no issues of material fact exist." WUTC Motion, at p. 2.

17 ¹³ Martini v. State, 121 Wn. App. 150, 162 n.29, 89 P.3d 250
18 (2004), rev. denied, 153 Wn.2d 1023 (2005) (citing Mueller & Kirk-
patrick, Evidence § 3.2, at pp. 130-31 (2d ed. 1995)).

19 ¹⁴ See West Valley Land Company, Inc. v. Nob Hill Water Asso-
20 ciation, 107 Wn.2d 359, 366, 729 P.2d 42 (1986); Inland Empire Rur-
21 al Electrification Inc. v. Department of Public Service, 199 Wash.
22 527, 537-38, 92 P. 2d 258 (1939); Clark v. Olson, 177 Wash. 237,
246, 31 P.2d 534 (1934); State ex rel. Addy v. Department of Public
Works, 158 Wash. 462, 465, 291 Pac. 346 (1930). See also Stuth and
Aqua Test Initial Brief, Exhibit "C" at pp. 13-14.

23 ¹⁵ "[A prima facie case is] such as will prevail until contra-
24 dicted and overcome by other evidence." Black's Law Dictionary, at
p. 1071.

1 In a summary determination proceeding, judged under the same
2 standards as a CR 56 summary judgment proceeding in court,¹⁶ an ab-
3 sence of competent evidence to rebut that quantum of sworn evidence
4 sufficient to establish a prima facie case is a fatal deficiency.

5 When a motion for summary judgment is made and support-
6 ed as provided in this rule, an adverse party may not
7 rest upon the mere allegations or denials of his plead-
8 ing, but his response, by affidavits or as otherwise pro-
9 vided in this rule, must set forth specific facts showing
10 that there is a genuine issue for trial. If he does not
11 so respond, summary judgment, if appropriate, shall be
12 entered against him.

13 CR 56(e).¹⁷

14 ¹⁶ WAC 480-07-380(2)(a).

15 ¹⁷ Summary judgment as sought "shall be rendered forthwith if
16 the pleadings, depositions, answers to interrogatories, and admis-
17 sions on file, together with the affidavits, if any, show that there
18 is no genuine issue as to any material fact and that the moving
19 party is entitled to a judgment as a matter of law." CR 56(c). A
20 material fact is one upon which the outcome of the litigation dep-
21 ends, in whole or in part. Morris v. McNicol, 83 Wn.2d 491, 494,
22 519 P.2d 7 (1974). The burden is on the moving party to demonst-
23 rate that there is no genuine issue as to a material fact and that,
24 as a matter of law, summary judgment is proper. Hartley v. State,
103 Wn.2d 768, 774, 698 P.2d 77 (1985). If the moving party satis-
fies its burden, the nonmoving party must present evidence that de-
monstrates that material facts are in dispute. Baldwin v. Sisters
of Providence in Washington, Inc., 112 Wn.2d 127, 132, 769 P.2d 298
(1989). The nonmoving party may not rely on speculation, argument-
ative assertions that unresolved factual issues remain, or its aff-
idavits being considered at face value. Seven Gables Corporation v.
MGM/UA Entertainment Company, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).
"A party moving for summary judgment is entitled to the benefit of
any relevant presumptions that support the motion." Coca-Cola Com-
pany v. Overland, Inc., 692 F.2d 1250, 1254 (9th Cir. 1982). The
mere existence of some alleged factual dispute between the parties
will not defeat a motion for summary judgment because the require-
ment is that there be no genuine issue of material fact. Factual
(continued...)

1 An essential part of the mandate under which Judge Hicks rem-
2 anded this matter to the WUTC was his ruling that Stuth and Aqua
3 Test "have set out a prima facie case" sufficient on its face to
4 support a determination that a Wastewater Company be designated a
5 public service company subject to regulation by the WUTC; however,
6 that such prima facie case would be subjected to "a fact finding
7 hearing" as required by RCW 80.04.015, thus affording WUTC Staff,
8 the public, and other interested persons and companies an opportun-
9 ity to present competent evidence to rebut such prima facie status.
10 But according to the public record in this case, no member of the
11 public or any other interested company has come forward with any
12 evidence or testimony other than solid support for Stuth and Aqua
13 Test's Petition for Declaratory Order. Public health officials,
14 developers, university professors and, yes, even other persons and
15 companies likely to become Wastewater Companies themselves unanim-
16 ously voice their support for WUTC regulation of Wastewater Compan-
17 ies as a public utility.¹⁸ Not only is there no competent factual

18 _____
19 ¹⁷(...continued)

19 disputes that are irrelevant or unnecessary will not be counted.
20 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-51, 106 S.Ct.
21 2505, 91 L.Ed.2d 202 (1986). **It is therefore now or never for WUTC**
22 **Staff to play all its cards in this summary determination proceed-**
23 **ing; it cannot hold any facts in its vest pocket at this stage,**
24 **hope to defeat the motion, and then present them later. Summary**
judgments don't operate in such manner, and neither should summary
determinations.

¹⁸ See Stuth and Aqua Test Initial Brief, Exhibits "D" and
"I". See also filed statement from Northwest Cascade, Inc.

STUTH AND AQUA TEST'S REPLY
BRIEF FOR SUMMARY DETERMINATION
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1 evidence in the record to controvert that presented in support of
2 the Stuth and Aqua Test Petition for Declaratory Order, we dare say
3 that no facts will be found to exist as the proposed regulation of
4 Wastewater Companies meets an essential public need, necessity and
5 interest, and protects the environment and public health.

6 The only apparent reason why WUTC Staff continues its opposi-
7 tion to Stuth and Aqua Test's Petition for Declaratory Order is the
8 viewpoint that simply because Title 80 RCW does not name Wastewater
9 Companies by name, that such automatically precludes regulation of
10 such persons or corporations as public service companies, notwith-
11 standing WUTC Staff's admission that "no issues of material fact
12 exist" in this summary determination proceeding. But the body of
13 law that applies to the WUTC's determination of whether a person or
14 corporation is in fact a public service company subject to its reg-
15 ulation avoids the name game and focuses on what public service is
16 in fact provided by such person or corporation.

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

21 Inland Empire, 199 Wash. at 538.¹⁹ Separating the wheat from the
22 chaff as the ALJ must in this proceeding, Stuth and Aqua Test have

23 ¹⁹ And as a Wastewater Company is not within the realm of
24 "competitive" utilities, the public has no other effective choice
as to the services and facilities provided thereby and therefore
need and deserve the protection and oversight offered by the WUTC.

STUTH AND AQUA TEST'S REPLY
BRIEF FOR SUMMARY DETERMINATION
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1 sustained their burden of producing substantial competent evidence
2 to support their Petition for Declaratory Order and WUTC has done
3 nothing to rebut such proof. Moreover, the body of law the ALJ is
4 to apply is clear and unambiguous. Stuth and Aqua Test are entitl-
5 ed to prevail on their motion for summary determination.

6 CONCLUSION

7 As a matter and question of fact under the body of laws that
8 apply to public service companies in the State of Washington, Stuth
9 and Aqua Test have more than met their burden of proving their case
10 for a determination that a Wastewater Company is a public service
11 company subject to regulation by the WUTC. On the other hand, WUTC
12 Staff has offered absolutely no factual evidence to rebut such sub-
13 stantial and convincing proof, admits that "no issues of material
14 fact exist" in this proceeding, and its sole mission is to reargue
15 a point of law that was clearly decided against the WUTC and put to
16 rest by a court of law.

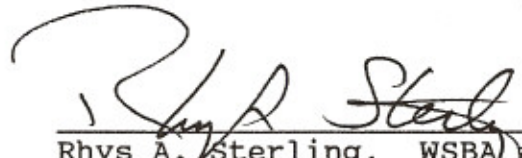
17 As a matter of fact and law, the ALJ should find and conclude
18 that Stuth and Aqua Test's motion for summary determination must be
19 granted; that their Petition for Declaratory Order must be granted;
20 and that WUTC declare that a Wastewater Company as proposed by Pet-
21 itioners²⁰ is a public service company subject to regulation by the
22 WUTC.

23 _____
24 ²⁰ See Stuth and Aqua Test Initial Brief, at p. 21 (Wastewater
Company Proposed Business Model).

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DATED this 10th day of January, 2006.

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


Rhys A. Sterling, WSBA #13846
Attorney for Petitioners

CERTIFICATION OF SERVICE

I certify under penalty of perjury
under the laws of the State of Washington
that on the 10th day of January
~~2006~~, I mailed a copy of this document
to all parties.

DATED at Bremerton, Washington
