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February 3, 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 STATEMENT REGARDING JURISDICTION AND
CLOSING STATEMENT ON MOTION FOR SUMMARY DETERMINATION**


Dear Ms. Washburn:

Pursuant to the directive of Chief ALJ C. Robert Wallis given at the January 27, 2006 hearing on the parties' cross-motions for summary determination in this case, submitted herewith and filed by mail with the WUTC is Stuth and Aqua Test's Statement Regarding Jurisdiction And Closing Statement On Motion For Summary Determination. In addition to the original and five hard copies, I am also e-mailing a *.pdf copy and a MS Word version of this brief to the WUTC records center and to all participating parties.

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: Sally G. Johnston, Senior AAG, Chief, UTC Division (via 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. <u>A-050528</u>
WILLIAM L. STUTH, and AQUA TEST,)	
INC.,)	STUTH AND AQUA TEST STATE-
)	MENT REGARDING JURISDICTION
For Declaratory Order Designating)	AND CLOSING STATEMENT ON
a Public Service Company)	MOTION FOR SUMMARY DETER-
)	MINATION

At the January 27, 2006 hearing on the parties' cross-motions for summary determination, Chief Administrative Law Judge C. Robert Wallis posed the following question to the parties for their consideration and response:

Whether there is any judicial or legislative intent or guidance expressed anywhere as to the WUTC's jurisdiction to regulate enterprises/services not specifically identified in Title 80 RCW?

And as an additional matter, each party was given the opportunity to submit written closing arguments. In response to Chief Wallis' instructions, set forth hereinbelow are Stuth and Aqua Test's (1) Statement Regarding Jurisdiction, and (2) Closing Statement.

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 1 OF 21

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1 **STATEMENT REGARDING JURISDICTION**

2 Wherever one looks for guidance regarding the jurisdiction of
3 public service/utilities commissions, it appears that at one time
4 or another each Commission has in some manner addressed the ques-
5 tion of whether its regulatory reach encompasses a certain enter-
6 prise or service that is not expressly identified or listed in the
7 governing statutes as a public service or utility.¹ In our case,
8 the question boils down simply as follows:

9 Whether because Title 80 RCW does not specifically id-
10 entify as a public service company those persons or cor-
11 porations which own, operate, and manage large on-site
12 sewage systems serving the public for hire and on demand,
13 is WUTC thereby precluded as a matter of law from assert-
ing jurisdiction and making a determination as a question
of fact pursuant to RCW 80.04.015 whether such person or
corporation is nevertheless a public service company sub-
ject to its regulation?

14 WUTC staff contends that the Supreme Court in Cole v. Wash-
15 ington Utilities and Transportation Commission, 79 Wn.2d 302, 485
16 P.2d 71 (1971), has answered this query concretely in the affirma-
17 tive -- i.e., WUTC has no jurisdiction. On the other hand, Stuth
18 and Aqua Test assert that Cole is inapposite and the body of public
19 service law is clearly to the contrary, and thus the query must be
20 answered in the negative -- i.e., WUTC indeed has jurisdiction.

21 _____
22 ¹ And past practice is no indicator of jurisdiction, as "whe-
23 ther or not an activity has ever been sanctioned by the commission
24 is not relevant to the determination that such activity is or is
not a public service subject to commission jurisdiction and regula-
tion." In re Southern Public Service Company, 38 PUR 4th 559, 563
(West Virginia Public Service Commission, 1980).

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 2 OF 21

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1 The test to be applied under the public service laws of Wash-
2 ington, and uniformly in other jurisdictions as well, is that "it's
3 not the label that's ascribed the provided service, it's the serv-
4 ice that's in fact provided" which makes a person or corporation a
5 public service company subject to WUTC regulation.² Although it
6 may be expedient and wishful thinking to claim a one-size-fits-all
7 litmus test that says simply "if it's not in, it's out", the public
8 interest is not well served by a regulatory commission ignoring the
9 facts and taking such a short cut.³

10 A public service company, in its broadest sense, is a
11 partnership consisting of the state as an institution, the public as a group of customers, and the company. The
12 state determines the extent to which the company may go and regulates its rates, services, and practices. The
13 company furnishes the facilities with which these rights are exercised and the services rendered. Those members
14 of the public, who constitute the customers, furnish the revenue with which the company is enabled to perform
15 these services. No public service company can exist without customers, and these customers must be treated
16 with fairness, both by the company and by the state or any particular division thereof. . . . [I]mportant func-
17 tions of a Public Service Commission [are] to see that the company and its patrons are treating each other fair-
18 ly [and] that the company and its customers are each accorded full justice by every outside agency.

20 ² And "service is used in [Title 80 RCW] in its broadest and
21 most inclusive sense." RCW 80.04.010.

22 ³ And the explicit charge of the WUTC is to "**regulate in the**
23 **public interest**, as provided by the public service laws, the rates,
24 services, facilities, and practices of all persons engaging within
this state in the business of supplying any utility service or com-
modity to the public for compensation, and related activities; **in-**
cluding, but not limited to, electrical companies, gas companies,
. . . and water companies." RCW 80.01.040(3) (emphasis added).

1 In re Cumberland County Power & Light Company, P.U.R.1920C, 26, 35-
2 36 (Maine Public Utilities Commission, 1920).⁴

3 Simply and very well established as the common thread underly-
4 ing the determination as to the jurisdictional reach of public ser-
5 vice/utilities commissions is the true litmus test that "you're in
6 if you provide a service of consequence as to which the public is
7 entitled to demand and have continued for a reasonable charge, un-
8 less you're specifically exempted out". The reason for this is
9 born not only from necessity, but of pure common sense:

10 It is impossible to define the term "public utilities"
11 in terms that will apply generally to all cases and it is
12 therefore necessary that each case be decided upon its
13 own merits, and the one controlling factor is the charac-
14 ter of the service being rendered, or rather the manner
15 in which they hold themselves out to the public.

16 Pesevanto v. Byrd, 3 P.U.R. Digest 2640 (Illinois, 1922).⁵ In fact,
17 Judge Hicks used strikingly similar language underwriting the mand-
18 ate of the Court remanding to WUTC the Stuth and Aqua Test Petition
19 for Declaratory Order for the required fact-finding hearing.

20 ⁴ "Outside agencies" are individuals, communities, and the
21 State itself from which a regulated company is entitled to "be
22 reasonably protected from unwarranted or unlawful treatment". Id.
23 at p. 36. See also State ex rel. Webster v. Superior Court for
24 King County, 67 Wash. 37, 57-60, 120 Pac. 861 (1912).

⁵ "The point at issue in this case resolves itself into the
one question of whether or not the service being rendered by the
respondent is of such a character as to constitute them public
utilities and bring them under the jurisdiction of the Illinois
Commerce Commission." Pesevanto v. Byrd, Commission Order in No.
11949, at pp. 2-3 (July 12, 1922).

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REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 4 OF 21

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1 And I think that's exactly why the legislature has this
2 all-inclusive language, because they were wise enough to
3 see they couldn't foresee every possible service that may
4 come to be a public service. And the Supreme Court was
5 wise enough to give the test in the Inland Empire case
6 that says it isn't what you call yourself, it's what, in
7 fact, you do that must be determined as to whether or not
8 you qualify and should be regulated by the government.

9 Stuth and Aqua Test Initial Brief, Exhibit "C" at pp. 13-14.⁶

10 As for the application of the foregoing fundamental principles
11 of public service law to actual cases and circumstances in Washing-
12 ton, one only need consider the advent of motorized transportation
13 and the hauling of what one would generally consider as worthless
14 throwaways.

15 In what is without question the seminal case regarding the
16 reach of the WUTC's jurisdiction to persons or companies in fact
17 providing a public service but not specifically identified in the
18 governing statutes, the Supreme Court in State ex rel. Spokane Uni-
19 ted Railways v. Department of Public Service, 191 Wash. 595, 71 P.
20 2d 661 (1937), held that the Department⁷ was required to assume ju-
21 risdiction as to the reasonableness and adequacy of the tariffs for
22 motor busses notwithstanding the fact that such vehicles were not
23 specifically identified in the statutory definition of "common car-

24 ⁶ "The question of the character of a corporation is one 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 Rural Electrification Inc. v. De-
partment of Public Service, 199 Wash. 527, 538, 92 P.2d 258 (1939).

⁷ The Department of Public Service is a WUTC predecessor.

1 rier" in the governing statutes.⁸

2 It thus appears that the question presented is one of
3 jurisdiction of the department of public service, and the
4 answer to this question must be found in chapter 117 of
5 the Laws of 1911, p. 538 That chapter contains
6 an act of the legislature relating to public service prop-
7 erties and utilities within the state and providing for
8 the regulation of the same. It is a comprehensive act,
9 and in § 8, p. 541, thereof . . . there are a large num-
10 ber of persons and things defined [including] the term
11 "common carrier" It will be observed that there
12 is no mention within this definition of motor busses for
13 the carriage of persons or property.

14 The question then is reduced to whether, motor busses
15 not having been specially mentioned and other things be-
16 ing mentioned, the motor busses are excluded from the op-
17 eration of the statute. . . . The act, as suggested, is
18 a long and comprehensive one, and it was the evident pur-
19 pose of the legislature to confer upon the then public
20 service commission, now the department of public service,
21 authority which would include "within its reach all pub-
22 lic service corporations." State ex rel. Webster v. Su-
23 perior Court, 67 Wash. 37, 120 Pac. 861 [1912]

24 From the fact that, in defining common carriers, the
statute mentioned street railroads and street railway
companies, but did not mention motor busses, it does not
necessarily follow that it was the legislative intent
that motor busses should not come under the operation of
the law. The rule that the expression of one thing will,
under certain circumstances, exclude others, should be
applied as a means of discovering the legislative intent,
and its application should not be permitted to defeat the
plainly indicated purpose of the legislature. . . .

In determining the legislative intent, the purpose for
which a law was enacted is a matter of prime importance
in arriving at a correct interpretation of its parts, and

22 ⁸ Eerily similar to our case, "the department, acting on the
23 opinion of the attorney general, dismissed the application [submit-
24 ted by United Railways to approve tariffs] on the ground that the
department did not have jurisdiction over the operation of the mot-
or busses." Spokane United Railways, 191 Wash. at 596.

1 "A thing which is within the object, spirit and the
2 meaning of the statute is as much within the statute as
3 if it were within the letter." 2 Lewis' Sutherland Sta-
4 tutory Construction (2d ed.), §§ 369 and 379.

5 When the extent and scope of the statute are consider-
6 ed, it becomes perfectly plain that it was the intention
7 of the legislature, as above pointed out, to include
8 within its reach all public service corporations, except
9 where there was a special exemption

10 Spokane United Railways, 191 Wash. at 597-99. It should be noted
11 that the same Chapter 117, Laws of 1911, is the comprehensive sta-
12 tutory scheme for the then Public Service Commission⁹ to take ju-
13 risdiction over and regulate public service companies.¹⁰

14 Thus it is that the courts have weighed in strongly in favor
15 of the WUTC's right and duty in serving and protecting the public
16 interest to assert jurisdiction over companies that, although not
17 specifically identified in the governing statutes, are nevertheless
18 public service companies in fact and thus subject to regulation.

19 The other relevant case of equal importance to the issue at
20 hand is that of State v. Diamond Tank Transport, Inc., 2 Wn.2d 13,
21 97 P.2d 145 (1939). The issue in that case presented the affirma-
22 tion of the Department of Public Service's claim of jurisdiction
23 over garbage and refuse haulers in the 1930's as contract carriers
24 in the absence of specific legislative authority identifying such
companies in the governing statutes.

⁹ Again, a predecessor agency of the WUTC.

¹⁰ Laws of 1911, ch. 117 § 8, at pp. 544-46.

1 Prior to the effective date (July 1, 1961) of Laws of
2 1961, chapter 295, carriers of garbage and refuse were
3 governed and regulated by the commission upon the basis
of its general regulatory powers over common and contract
carriers.

4 City Sanitary Service, Inc. v. Washington Utilities and Transpor-
5 tation Commission, 64 Wn.2d 739, 742, 393 P.2d 952 (1964).

6 Under the governing statutes passed in 1937, a "contract car-
7 rier" was generally described to "include any person who under spe-
8 cial and individual contracts or agreements transports property by
9 motor vehicle for compensation."¹¹ The question then arose whether
10 garbage "had a property value" thus requiring a permit to transport
11 such from the department of public service as it had previously as-
12 serted under its general regulatory powers.¹² In Diamond Tank Tran-
13 sport, the Supreme Court affirmed that garbage indeed had a proper-
14 ty value, at least as to some of it being hauled, and the contract
15 carriers of which were subject to regulation by the department.¹³

16 So it was that with the affirmation from the Supreme Court the
17 WUTC's predecessors continued to regulate garbage and refuse haul-
18 ers under its general regulatory powers over contract carriers not-
19 withstanding the absence of a governing statute specifically ident-
20

21 ¹¹ Laws of 1937, ch. 166 § 2, at p. 624.

22 ¹² Further history of the WUTC's assertion of jurisdiction
23 over garbage and refuse haulers is presented in 1961-62 Wash. AGO
No. 67, at pp. 7-9.

24 ¹³ 2 Wn.2d at 16.

1 ifying such public service by name. It was not until 1961 that the
2 Legislature specially identified and set apart "garbage and refuse
3 collection companies" from other contract carriers and established
4 a certificate of convenience and necessity manner of authorization
5 in lieu of formerly issued operating permits -- but nonetheless all
6 under the WUTC's jurisdiction as originally asserted in 1937.¹⁴

7 What may be gleaned from the foregoing discussion underscores
8 the judicial and legislative intent and guidance where the WUTC's
9 jurisdiction is asserted as to persons or corporations involved in
10 providing a public service but otherwise not specially identified
11 in the governing statutes; to wit, the assertion of jurisdiction by
12 the WUTC in order to make a determination of fact as to the charac-
13 ter of the company and the public service provided will not be cha-
14 llenged. The WUTC does not fulfill its duty to regulate in the
15 public interest under the public service laws by narrowly constru-
16 ing this charge to limit its jurisdictional reach only to those
17 companies specifically identified by name in Title 80 RCW. It is
18 very clear that the body of public service laws in Washington does
19 not submit to such artificial limitation.

20 _____
21 ¹⁴ As for the Legislature, its affirmation was by silence for
22 over 20 years until the 1961 legislation which retained in WUTC ju-
23 risdiction over garbage and refuse haulers but reorganized certain
24 regulatory aspects. Thus it is that both the judicial and the leg-
islative branches weighed in with affirmation of the WUTC's claim
of jurisdiction over garbage and refuse haulers under its general
regulatory powers notwithstanding such public service not being
specially identified in the governing statutes.

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 9 OF 21

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1 [I]t was the evident purpose of the legislature to con-
2 fer upon the [WUTC] authority which would include "within
3 its reach all public service corporations." . . . [And]
4 a thing which is within the object, spirit and the mean-
5 ing of the statute is as much within the statute as if it
6 were within the letter.

7 Spokane United Railways, 191 Wash. at 598. And therefore the rule
8 of jurisdictional reach is crystal clear; namely, included within
9 the WUTC's jurisdiction are ALL persons or corporations in the bu-
10 siness of supplying ANY utility service or commodity to the public
11 for compensation, except where they are granted a special exemption
12 by the Legislature.¹⁵ This is the reason underlying RCW 80.04.015,
13 in order to make the foregoing determination as a question of fact
14 and not on name only.¹⁶ And so as not to have too sweeping an eff-
15 ect from this very broad and all-inclusive legislative mandate, the
16 judiciary has imposed a set of reasonable constraints that must be
17 taken into consideration by the WUTC in its fact-finding mission.¹⁷

18 ¹⁵ RCW 80.01.040(3); Spokane United Railways, 191 Wash. at
19 599.

20 ¹⁶ Inland Empire Rural Electrification, 199 Wash. at 538.

21 ¹⁷ See State ex rel. Addy v. Department of Public Works, 158
22 Wash. 462, 464-65, 291 Pac. 346 (1930) (service available to all
23 who can be served and not limited only to members or stockholders);
24 Clark v. Olson, 177 Wash. 237, 246, 31 P.2d 534 (1934) (company de-
25 dicated to serve the public with facilities devoted to a public use
26 to meet certain public expectations); West Valley Land Company,
27 Inc. v. Nob Hill Water Association, 107 Wn.2d 359, 366, 729 P.2d 42
28 (1986) (distinguishing factors include whether the company is an
29 independent corporation engaged in business for profit to itself at
30 the expense of a consuming public which has no voice in the manage-
31 ment of its affairs and no interest in the financial returns).

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 10 OF 21

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1 In conclusion, the answer to the Chief ALJ's query lies very
2 clearly within and is very well settled under the body of Washing-
3 ton public service laws, with guidance set forth both in the gov-
4 erning statutes and in the interpretive caselaw. The jurisdiction-
5 al reach of the WUTC extends to any and all public service compan-
6 ies regardless of whether or not such may be specially identified
7 in the governing statutes, and the essence of the WUTC's jurisdic-
8 tion is its fundamental power and authority to make the determina-
9 tion as to whether any person or corporation is a public service
10 company subject to its regulatory control as a question of fact --
11 i.e., what it in fact does, not what it's called.

12 CLOSING STATEMENT

13 A person or corporation dedicated to serve a public need with
14 facilities devoted to a public use. In distilled form, that is the
15 essence of a public service company subject to regulation by the
16 WUTC. Why? Because it's in the public interest to ensure the pro-
17 vision of essential utility services by competent entities and it's
18 in the best interest of the public to ensure those services are
19 available to those who require it to receive service upon demand,
20 continuously for a reasonable charge. This is why Stuth and Aqua
21 Test are here today and why they petitioned WUTC for a Declaratory
22 Order determining as a matter of fact under the body of Washington
23 public service laws that a person or corporation owning, operating
24 and managing large on-site sewage systems for hire on demand for

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 11 OF 21

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1 the public served thereby and dependent thereon for an essential
2 part of their everyday life, is a public service company subject to
3 regulation by the WUTC.

4 The public record for this proceeding is replete with state-
5 ments explaining in detail the public need and interests served by
6 a private company impressed with this public service to be regulat-
7 ed by the WUTC. In order to provide stable and reasonable delivery
8 of services of great consequence to the public connected to decen-
9 tralized wastewater systems, and in order to meet the needs for fa-
10 cilities replacement, upgrades, and growth, the US EPA, the NRRI,
11 and the Puget Sound Action Team indorse and recommend the attri-
12 butes proposed by the business model as outlined by Stuth and Aqua
13 Test. The key to success under the business model is facility own-
14 ership; and the key to successful ownership is a tariff and busin-
15 ess system fair to the service provider and to the consuming pub-
16 lic. The Washington Department of Health requires backup or guar-
17 antees by public entities for large on-site sewage systems serving
18 residential developments as part of its legitimate mandate to prot-
19 ect public health and the environment. Performing such service in
20 the past have been municipalities and special public districts. As
21 the record here demonstrates, however, municipalities and special
22 public districts are failing to provide the necessary and essential
23 service to the public because they have neither the time, staff,
24 resources, nor expertise to in fact effectively and efficiently op-

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 12 OF 21

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1 erate and manage large on-site sewage systems. These systems are,
2 in reality, complex mini-public sewerage systems requiring special-
3 ized knowledge, skills and expertise to properly manage. Another
4 form of public entity must step up, step in, and accept the respon-
5 sibilities currently and reluctantly undertaken by governmental ag-
6 encies. The Department of Health recognizes this problem and has
7 determined to resolve it as a top priority. A WUTC-regulated public
8 service company that owns, operates, and manages large on-site sew-
9 age systems will not only meet the Department's need; but more imp-
10 ortantly, a regulated public service company will meet the public's
11 expectations, needs, and interests in performing and providing to
12 them a utility service of great consequence continuously, cost-eff-
13 ectively, and with accountability to a known and respected regula-
14 tory authority -- the WUTC.

15 The public record here is also replete with competent proof
16 that Stuth and Aqua Test have the specialized knowledge, skill and
17 expertise to efficiently and effectively operate and manage large
18 on-site sewage systems. They also have the expertise, background
19 and fundamental capabilities to develop and implement a sound busi-
20 ness plan to ensure financial stability and success as to not only
21 the operation and management of large on-site sewage systems, but
22 the ownership of such facilities as well. They are certain they
23 can do the job expected and demanded of them. But what of the pub-
24 lic's interests and expectations -- those served by such systems

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 13 OF 21

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1 are entitled to demand continuous service at a fair and reasonable
2 price. They expect and deserve a fair and impartial forum designed
3 and staffed with experts to ensure efficient delivery of promised
4 services at a fair price to those paying and for those performing
5 such services. As NRRI recognizes and as WUTC's own staff admits,
6 there is a need for a team approach by environmental and regulatory
7 agencies in the business of wastewater, with the utility regulators
8 bringing the economic regulation expertise into the picture to help
9 put the wastewater companies on a more sound management and finan-
10 cial footing.

11 The service provided by the proposed wastewater companies is
12 of great consequence to the public and to the environment - just
13 ask the Puget Sound Action Team regarding its statutory charge to
14 address and clean up the waters of Puget Sound and its identifica-
15 tion of on-site sewage systems as a critical contributor and costs
16 for cleanup that will greatly impact the public pocketbook. But a
17 better system for management of existing facilities by those with
18 the expertise and the stability of operations, subject to regulato-
19 ry oversight with ownership of such facilities to provide immediate
20 response to taking corrective actions, will give the PSAT, in a
21 team approach, a powerful ally with which to succeed where previous
22 efforts have stumbled and failed. Again, the public record here is
23 replete with competent proof that it is very much in the public in-
24 terest to grant the Stuth and Aqua Test Petition.

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 14 OF 21

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1 Judge Richard Hicks ruled that Stuth and Aqua Test have met
2 their initial burden of production and have set out a *prima facie*
3 case for regulation. Judge Hicks mandated that the WUTC hold a
4 fact finding hearing as required by law, the purpose of which is to
5 put such *prima facie* case to the test by allowing staff and the
6 public to counter the overwhelming evidentiary case with competent
7 evidence of their own. The public, as represented by the Attorney
8 General's Office, has offered nothing to rebut or refute the evid-
9 ence supporting the public need, necessity and interest in regulat-
10 ing wastewater companies as public service companies. WUTC staff
11 has likewise offered nothing factually to rebut or refute the evid-
12 ence produced by Stuth and Aqua Test in support of regulation. As
13 a factual determination, there are, as WUTC staff candidly admits,
14 no genuine issues of any material fact. Based on what it is that
15 a wastewater company will in fact perform and provide as being de-
16 dicated to serve a public need with facilities devoted to a public
17 use, there is no dispute, there is no contravening evidence, and
18 there is no doubt whatsoever. In a summary determination proceed-
19 ing, considered under the law applicable to CR 56 summary judgment
20 proceedings, now is the time and the only time to make an eviden-
21 tiary offer of proof to pose any genuine issues as to the material
22 facts. WUTC staff cannot sit back and take a wait-and-see posture,
23 they must play their evidentiary cards now if they have any. Based
24 on the complete absence of any offer of proof, there simply are no

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 15 OF 21

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1 evidentiary cards in their deck to play.

2 So what's left to put into play where the facts are undisputed
3 and are against you? You play the law card. But WUTC staff has al-
4 ready argued in a most vigorous and competent fashion to a court of
5 law that the WUTC has no jurisdiction in this case as a matter of
6 law. Someone should remind staff that they lost that battle and do
7 not have a right to resurrect those same arguments in this adminis-
8 trative proceeding. Under whichever name or doctrine one wishes to
9 choose and apply, be it *res judicata*, collateral estoppel, law of
10 the case, or just plain simply -- you've already had your one fair
11 bite of the apple and you don't get another --, the attempt to rel-
12 itigate the jurisdictional issue of law is barred in this forum as
13 a matter of law. When Judge Hicks remanded this matter to the WUTC
14 for a fact finding hearing testing Stuth and Aqua Test's *prima fac-*
15 *ie* case, he intended only for WUTC to apply the body of Washington
16 public service law to such facts -- he certainly did not sanction
17 the WUTC reopening the basic jurisdictional issue that was fully,
18 fairly and vigorously argued to him and decided by him against the
19 WUTC staff's position. The door is not open even one iota -- it is
20 closed and locked.

21 What the WUTC is to do in this proceeding is to apply the body
22 of Washington public service laws to the uncontested facts and make
23 the determination that a person or corporation owning, operating
24 and managing large on-site sewage systems under the model proposed

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 16 OF 21

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1 by Stuth and Aqua Test qualifies as and is a public service company
2 subject to regulation by the WUTC. The body of Washington public
3 service laws is well-defined and is well-described by both Judge
4 Hicks in his decision as well as in Petitioners' briefs in this
5 proceeding. The question of fact to be determined is what the com-
6 pany does as a public service, and not what it is or is not called
7 and not whether it is expressly listed by name in Title 80 RCW.

8 Stuth and Aqua Test have done much more than merely "suggest"
9 that a wastewater company is a public service company under the
10 public service laws of Washington -- they have set forth an unre-
11 butted *prima facie* case, they have carried the burden of production
12 and persuasion by presenting substantial and convincing competent
13 evidence as to the public need served and the public interest in
14 WUTC regulation, and they have squarely faced and rebutted all WUTC
15 staff legal arguments trying to deny the public this essential ser-
16 vice and regulatory oversight. Where the business of a person or
17 corporation is indeed factually dedicated to serving a public need
18 with facilities devoted for a public use, the legal standards to be
19 applied for making the determination that, as a matter of law, such
20 business is a public utility impressed with a public duty to prov-
21 ide nondiscriminatory service to all those in the public demanding
22 to be served subject to government oversight to ensure fair rates
23 and financially sound operations are equally clear and very well-
24 established.

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 17 OF 21

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1 Under the public service laws, to be a public service company
2 the business must hold itself out to supply its service on demand
3 and as a matter of right to that segment of the public for which
4 such service is of consequence and needed. This is precisely the
5 service that Stuth and Aqua Test will provide to the public depen-
6 dent upon large on-site sewage systems for wastewater collection
7 and treatment and disposal on a permanent basis, wherever located
8 in the State of Washington. The consuming public will not be mem-
9 bers or subscribers, or shareholder or stockholders in the private
10 business affairs of the provider service company, the public's only
11 assurance as to being subjected to fair and reasonable rates, and
12 in return sound fundamental financial management and stability of
13 the provider company, will be the approved tariffs and regulatory
14 control by the WUTC. The service is for hire and for profit, with
15 facilities owned by the private business but impressed with a pub-
16 lic use. These are all attributes of a public service company, not
17 the attributes of a private business serving only select members of
18 the public of its own choosing and on its own terms and who can de-
19 ny anyone within its sphere of operations from receiving its serv-
20 ice because they're not wearing shoes, a shirt, or a suit coat and
21 tie. Moreover, it is unquestioned that it is in the public interest
22 to, and the best interest of the public is served by, the WUTC reg-
23 ulating wastewater companies as public service companies. We cannot
24 say it any better than as so clearly stated in the letters of supp-

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 18 OF 21

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1 ort for our Petition submitted by developers, design professionals,
2 system operators, educators, health agencies and even those likely
3 to become regulated public service companies. As these individuals
4 state so clearly and as uncontroverted in the public record, the
5 need for such service is great and the public interest served by
6 WUTC regulation is equally great. Under the body of public service
7 laws in the State of Washington, as defined in both statute and in
8 caselaw, a person or corporation owning, operating and managing on
9 a continuous basis large on-site sewage systems for hire, on demand
10 and for profit wherever located in this State qualifies both factu-
11 ally and legally as a public service company that is subject to re-
12 gulation by the WUTC.

13 Wastewater collection, treatment and disposal is a public ser-
14 vice of immense consequence. Just ask the PSAT or the public served
15 by underperforming or failed on-site systems. One thing is for cer-
16 tain, we the people can and must demand from our government agenci-
17 es that they work together under the laws to correct past problems
18 and ensure that history does not repeat. The Health Department will
19 do its part and regulate facility design and performance to protect
20 public health, safety and environment. Stuth and Aqua Test are rea-
21 dy, willing and able to do their part and own, operate and manage
22 large on-site sewage systems to serve the public need. WUTC is res-
23 pectfully implored to step up and do its part and regulate wastewa-
24 ter companies as public service companies in the public interest.

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 19 OF 21

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1 CONCLUSIONS

2 Under the governing statutes and caselaw, WUTC has in its jur-
3 isdiction the power, the authority, and the duty to make a determi-
4 nation as to whether a person or corporation which owns, operates
5 and manages large on-site sewage systems for hire for the public
6 served thereby on demand wherever located in the State of Washing-
7 ton is a public service company subject to its regulatory control
8 as a question of fact based on the public service provided, not-
9 withstanding the absence of wastewater companies being specially
10 identified under Title 80 RCW. The WUTC would have to rewrite the
11 history of public service laws in this State to bypass its fact-
12 finding obligation in favor of a simple recusal as a matter of law,
13 and in so doing commit a grave injustice and disservice upon the
14 public and patently disregard the important interests to be served
15 by the assertion in this case of regulatory control by WUTC.

16 The authority of the public service commission [now
17 WUTC] was, by the legislature in 1911, extended so as to
18 include within its reach *all* public service corporations.
Laws 1911, p. 538, § 1.

19 State ex rel. Webster v. Superior Court for King County, 67 Wash.
20 37, 41, 120 Pac. 861 (1912) (emphasis added). And that legislative
21 mandate remains the same today.¹⁸

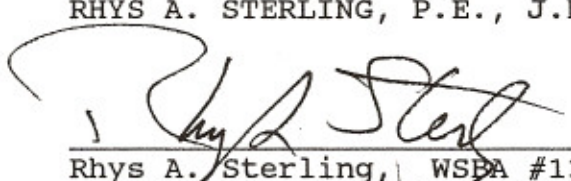
22 ¹⁸ Furthermore, as previously discussed in the Petitioners'
23 initial and reply briefs, the NRRI, the PSAT, and the US EPA have
24 all underscored the public interest that will be served by the eff-
effective regulation of those persons and companies owning, operating
(continued...)

1 Based on the foregoing and (1) in light of the factual record
2 as to which WUTC staff admits there is no genuine issue as to any
3 material fact, and (2) Judge Hicks' ruling that a *prima facie* case
4 for regulation has been made that necessitates a fact-finding hear-
5 ing for the proffer of any rebuttal evidence and as to which absol-
6 utely none has been offered by the WUTC staff, the public, or any
7 other interest group; Petitioners Stuth and Aqua Test respectfully
8 ask the Chief ALJ to grant their Motion For Summary Determination
9 and Petition for Declaratory Order, and to enter an Order setting
10 forth the determination that a person or corporation which owns,
11 operates, and manages large on-site sewage systems for hire for the
12 public served thereby on demand and wherever located in this State,
13 is a public service company subject to regulation by the WUTC.

14
15 DATED this 3rd day of February, 2006.

16 Respectfully submitted,

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

18
19 
20 Rhys A. Sterling, WSPA #13846
21 Attorney for Petitioners Stuth and
22 Aqua Test, Inc.

22 ¹⁸(...continued)
23 and managing large on-site sewage systems. The financial and busi-
24 ness side of the equation is not addressed by the Washington Dep-
artment of Health or by local health agencies, whereas such aspects
very much lie within the expertise and jurisdiction of the WUTC.

STUTH AND AQUA TEST'S STATEMENT
REGARDING JURISDICTION AND CLOSING
STATEMENT -- PAGE 21 OF 21

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CERTIFICATION OF SERVICE

I certify under penalty of perjury
under the laws of the State of Washington
that on the 3rd day of February
~~2006~~ I mailed a copy of this document
to all parties.

DATED at Tirreash, Washington

[Signature]