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1 P R O C E E D I N G S

2 JUDGE WALLIS: This hearing will please come  
3 to order. This is a hearing of the Washington  
4 Utilities and Transportation Commission in Docket No.  
5 A-050528, which is a petition by William L. Stuth and  
6 Aqua Test, Inc., for a declaratory order.

7 This matter has been scheduled for hearing  
8 today in the form of an oral argument and statements or  
9 facts presented by the parties on questions relating to  
10 the Commission's jurisdiction over large on-site sewage  
11 system operations as described in the facts that have  
12 been presented.

13 I would like to ask the parties for  
14 appearances at this time, beginning with the  
15 petitioner.

16 MR. STERLING: My name is Rhys Sterling. I'm  
17 the attorney representing Stuth and Aqua Test, the  
18 petitioners. My address is PO Box 218, Hobart,  
19 Washington, 98025; phone number, (425) 391-6650, and  
20 fax, (425) 391-6689, and e-mail rhyshobart@aol.com.

21 JUDGE WALLIS: Thank you. Commission staff?

22 MR. SWANSON: For Commission staff,  
23 Christopher G. Swanson, special assistant attorney  
24 general for this proceeding, and Your Honor, I'm going  
25 to provide you the contact information for Sally

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1 Johnston since she will be receiving the decisions in  
2 this proceeding following this, because I will stepping  
3 out as representing the Commission staff in this  
4 proceeding following this oral argument.

5 Sally Johnston, 1400 South Evergreen Park  
6 Drive Southwest, PO Box 40128. Unfortunately, I don't  
7 have her e-mail information and phone information in  
8 front of me, but I believe the Commission has that  
9 information.

10 JUDGE WALLIS: Very well. Let me note for  
11 the record this proceeding is being held on January 27  
12 of the year 2006 in the Commission offices in Olympia,  
13 Washington.

14 The written material that has been filed in  
15 this docket is extensive, and the parties have  
16 presented statements of position in which they brief  
17 the positions that they have. I'm going to ask first  
18 if any of the parties have anything additional that you  
19 would like to state for the record at this time that  
20 you believe has not been previously covered in the  
21 materials that you have submitted.

22 Following that, I have some questions that I  
23 would like to address to counsel, and I want to make it  
24 clear that I understand the differences in perspective  
25 that the parties have on the interpretation of Judge

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1 Hicks' order, and I don't mean by these questions to  
2 prejudge anything, but I want to allow the parties to  
3 make clear their responses to questions that I have.

4           So let me ask first if there is something  
5 additional that either of you would like to present at  
6 this time.

7           MR. STERLING: I have nothing additional at  
8 this time, Your Honor.

9           MR. SWANSON: Briefly, Your Honor, I guess I  
10 will like to mention, Commission staff was a little  
11 surprised how much the procedural issues with regard to  
12 Judge Hicks' order came up in this proceeding in terms  
13 of interpretation, and Staff would simply like to point  
14 out that in the order granting Stuth and Aqua Test's  
15 petition for waiver of the Superior Court order, the  
16 language in this, I believe it was drafted by  
17 Mr. Sterling, talks about the order, including the  
18 transcript from Page 3, Line 9, through Page 13, Lines  
19 one 1 through 4 inclusive, and that's Page 2 of 4 of  
20 the Order, and just to point out to the Commission and  
21 to yourself, Your Honor, that indeed Mr. Sterling was  
22 the one who came up with this language and he was the  
23 one who drafted the order for the Court's review, and  
24 to the extent that that bears on interpretation I'm not  
25 sure, but to the extent there is a question about what

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1 the Order means, the Order has been set out and was  
2 signed by the judge, and to the extent we are relying  
3 on information outside of that order, Staff believes  
4 that's improper, and that's the only additional point I  
5 wanted to make. Thank you.

6 JUDGE WALLIS: Mr. Sterling?

7 MR. STERLING: I won't get into the  
8 negotiations with counsel, but basically, this is kind  
9 of an agreed order that was entered into, but  
10 nonetheless, we decided to take the transcript of Judge  
11 Hicks' decision, and for purposes of the formal order  
12 of mandate, and remand is to take out the first dozen  
13 pages or whatever down to a certain line. I think that  
14 covers all the essential features.

15 There was one issue in particular that  
16 counsel for UTC did not want to have in, and that was  
17 basically Judge Hicks' waxing poetic about the use of  
18 outhouses in days gone by. I didn't have a problem  
19 with that. Although, I did use an outhouse in days  
20 gone by, so I'm well aware of its existence.

21 The other thing is that the full transcript  
22 is relevant just as a statement of the decision that  
23 Judge Hicks rendered from the Bench in September, and  
24 it is presented in total as part of our offering to the  
25 Commission for its consideration.

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1 JUDGE WALLIS: Anything further?

2 MR. SWANSON: No, Your Honor.

3 JUDGE WALLIS: Mr. Sterling, Commission staff  
4 contends that the Cole case controls the result in this  
5 proceeding, and there is language in that decision that  
6 appears on its face to state clearly that there must be  
7 specific legislative authority for regulation before  
8 the Commission can engage in regulation. Why do you  
9 believe that the Cole case does not control the result  
10 in this matter?

11 MR. STERLING: First of all, the issues of  
12 Cole and WITA, Washington Independent  
13 Telecommunications Association, cases were fully argued  
14 and briefed to Judge Hicks as part of our lawsuit in  
15 Thurston County Superior Court. Cole, first of all, is  
16 distinguishable on its face because it's not a  
17 declaratory order type of proceeding. What Cole is  
18 about was an intervention request where the intervenor,  
19 a nonregulated business, wanted to intervene in a  
20 regulatory proceeding before the Commission in order to  
21 secure protection from a regulated business.

22 Basically what Cole was all about was whether  
23 or not the intervenor, this nonregulated business,  
24 could demonstrate anything under the public service  
25 laws that would give the Commission some basic reason

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1 or justification for saying to a regulated business,  
2 You have to change your practices in order to protect  
3 nonregulated businesses. It just wasn't there. It's  
4 not as broad-based or wide a spectrum or concrete a  
5 type of holding that the Commission staff wishes to  
6 portray to Your Honor.

7           What we have demonstrated to distinguish Cole  
8 from is that we have pointed out very specifically the  
9 scope of not, number one, the public interest in  
10 regulating the type of company that we are dealing with  
11 here, and we've coined it waste water companies for  
12 lack of a better terminology, but basically, the  
13 owners, operators, and managers of larger on-site  
14 sewage systems, that there is demonstrated public  
15 interest for Commission regulation of this industry.

16           Secondly, that the public service laws are  
17 not just solely statutory. 80.04.015 says it's a  
18 question of fact. The Inland Empire case cited by  
19 Judge Hicks and the State Supreme Court case has been  
20 around for awhile, and it comes up time and again I've  
21 seen in previous briefs submitted to the Commission by  
22 people seeking different types of orders, basically  
23 says it's what the business does. That's the important  
24 question. What it is, what it does, not what it's  
25 called.

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1           What the Commission staff wants us to do is  
2 play the name game. In other words, if you are not  
3 specifically identified by name in Title 80; therefore,  
4 if you are not in, you are out, and that's not the law,  
5 and Judge Hicks was very clear on that as far as the  
6 jurisdictional question. He felt that the legislature  
7 was very wise in using terminology such as "including  
8 but not limited to," as a phrase of enlargement, not  
9 "limitation," because there is simply no way, and Judge  
10 Hicks got into that as well, that the legislature or  
11 anyone at any point in time can ascertain what the  
12 future holds. Things change, times change.

13           So a public service company is defined as a  
14 question of fact, and the fact question before the  
15 Commission and Your Honor is what that company does  
16 that serves a public need and with facilities devoted  
17 to a public use, and those are the key fact questions,  
18 and that's what the law provides for.

19           So Cole, the WITA case, do not stand for a  
20 limitation or a narrowing of the Commission's  
21 jurisdiction. Not at all, and Judge Hicks was, I  
22 think, very clear in his decision that the Commission  
23 does have jurisdiction in this matter to make this as a  
24 finding and a question of fact.

25           JUDGE WALLIS: Mr. Swanson?



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1           MR. SWANSON: From Commission staff's  
2 perspective, it's important to remember the procedural  
3 posture that this case was in when it went to the  
4 Superior Court. This was a review of an agency action  
5 under the APA, and the APA specifically dictates how an  
6 agency is to treat a petition for a declaratory order,  
7 and this agency followed that statute; that is, to  
8 accept the petition and to determine whether or not  
9 they were going to hold the proceeding, and in deciding  
10 not to hold the proceeding, they provided the reason  
11 for that, which was that the Commission at that time  
12 believed it was a matter of law. It did not have  
13 jurisdiction over these large on-site sewage systems.

14           So that was the issue before the Court,  
15 whether that agency action was proper or improper. The  
16 Court determined that it would be proper to remand it;  
17 that is, remand the case back to the Commission,  
18 because the Commission was required to hold a hearing  
19 according to the Court. The Court did not rule on the  
20 issue of whether or not the Commission had jurisdiction  
21 over these particular entities; that is, large on-site  
22 sewage systems, and that is exactly what the procedure  
23 would be under the APA and this review of the agency  
24 action.

25           In fact, what the Court did was that it said

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1 that the agency was to hold a proceeding and apply the  
2 facts and the law. That is, it gave the agency  
3 properly the right to look at the facts in the  
4 proceeding and apply the law as it sees the law. So to  
5 say that the Court made a determination that the UTC  
6 had jurisdiction over these entities is incorrect from  
7 Staff's point of view.

8           As for the issues of whether or not it's a  
9 question of fact, I won't go through the analysis  
10 again, as I think we have done both on the record in  
11 paper and at the prehearing, that that application of  
12 fact necessarily requires an application of the law. I  
13 believe that that's something that is not unfamiliar to  
14 the practice of law. Anytime you ascertain the facts  
15 necessarily, you must look at the law and see whether  
16 or not the facts dated the law. So I think the process  
17 that Staff is requesting that the Commission do in this  
18 proceeding is entirely consistent with the statute that  
19 requires this Commission to look at whether or not it  
20 has jurisdiction as a factual matter.

21           Finally, Staff is not contending that it's  
22 simply enough to look at the name of the entity or what  
23 it is that they do in order to determine whether it has  
24 jurisdiction. In fact, what this staff is asking is  
25 for this court to look at the Cole decision and the

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1 WITA decision and to look at the statutes under which  
2 the Commission has authority, and as it's noted in  
3 Staff's pleadings in this proceeding, for the other  
4 utilities that the Commission regulates there is  
5 extensive statutory authority to regulate those  
6 utilities -- water, electric, gas, telephone, and I may  
7 be leaving some out, but the point is that the  
8 legislature has set out a great amount of statutory  
9 authority to guide the Commission in deciding what  
10 authority it has and what authority it hasn't. In  
11 fact, that's why the Court in Cole decided that the  
12 Commission needed to have the authority under the  
13 statutes to do what it does.

14           Additionally, it should be noted as we have  
15 noted in our pleadings that there is an agency that  
16 does have authority over these systems, and that is the  
17 Department of Health, and that specific statutory  
18 authority to regulate these entities, and it's quite  
19 broad authority in looking at the statute allowing the  
20 Department of Health to regulate, and indeed, Staff  
21 believes that the petitioner in this case has the  
22 process backwards; that is, the agency, Department of  
23 Health, should not be pushing a policy determination  
24 that requires statutory authority on the Commission.  
25 Rather, the Commission should take its lead from the

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1 legislature to determine what it can and can't do.

2 Thank you.

3 JUDGE WALLIS: Mr. Sterling, any response?

4 MR. STERLING: Sometimes I really wonder if  
5 we are talking about the same procedure, the same  
6 arguments that we were both involved in for so long  
7 because the argument initially was the Commission  
8 decided just summarily to deny our petition for  
9 declaratory order, because nowhere in Title 80 did it  
10 say that those persons or corporations owning or  
11 operating or managing larger on-site sewage systems is  
12 a public service company. This is the same argument  
13 they argued in Cole, Cole and WITA to Judge Hicks.

14 The whole process is as follows: Whether  
15 it's in the public interest to regulate as a public  
16 service company those persons and corporations -- we  
17 are not talking about facility design. That's covered  
18 by the Department of Health, but the person or  
19 corporation, the company itself, the business  
20 practices, the rates, that's not regulated by the  
21 Department of Health. That's regulated as a public  
22 utility service, as a public interest service to the  
23 consumers, the customers who depend on these type of  
24 services for an actual utility services of consequence.  
25 If it's regulated coming through the front door --

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1 that's one of Judge Hicks' perspectives -- this is  
2 perhaps a branch of the water, if you wanted to take a  
3 look at it.

4           Otherwise, why did the legislature use the  
5 words "including but not limited to" if they did not  
6 intend that as progress is made, as businesses are  
7 formed and created, as new horizons are met in  
8 delivering necessary services to the public, that these  
9 new businesses and types of companies would not also be  
10 considered to be public service companies and regulated  
11 by the Commission.

12           That's what we are talking about. It's a  
13 question of fact. We are not opening up Pandora's box,  
14 and I've gotten into that in the past. The Commission  
15 in the past has said, Gee, if we regulate this, then  
16 mom-and-pop grocery stores, gas stations, everything is  
17 going to be regulated. That's not the case, and Judge  
18 Hicks was very clear on that. That's not the case.

19           That basically is a question of fact, what it  
20 is that is being provided, the service, the right of  
21 the public to expect service on demand at a reasonable  
22 price, so there basically is that, I think, essential  
23 integral aspect of UTC's jurisdiction. You simply  
24 can't say it's essentially black and white. It's cast  
25 in concrete. If Cole said it's not in, it's out. No.

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1 It did not say that. It does not stand for that, and  
2 Judge Hicks was very clear on that. If you take a look  
3 at his decision, the reason why he went into giving his  
4 decision in such an enlarged manner is because he did  
5 see the significance of what it is we are proposing to  
6 do.

7           99.9 percent of the businesses that probably  
8 come in here are seeking not to be regulated by the  
9 Commission, and they are arguing why they shouldn't be.  
10 We are here basically as individuals and companies  
11 wanting to be regulated, and basically, the public  
12 needs this regulation, because municipalities and  
13 special sewer districts and those type of actual public  
14 agencies are falling short. They are falling down, and  
15 we need people and companies with the expertise and  
16 with the wherewithal to provide this type of necessary  
17 service, and it's definitely within the Commission's  
18 jurisdiction to make a determination as a question of  
19 fact as to whether or not the person or corporation  
20 providing these services to the public is a public  
21 service company. We feel very strongly that it is, and  
22 there is nothing in the law, in Title 80 or in Cole or  
23 in WITA that says otherwise. Thank you.

24           JUDGE WALLIS: Mr. Sterling, can you cite any  
25 examples of industries that are regulated in Washington

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1 without specific statutory authority either by the  
2 Commission or by other agencies?

3 MR. STERLING: I think way back when garbage  
4 and refuse, which it first started to be regulated by  
5 the state utilities back in the '20's and '30's or  
6 whatever. I'm not exactly sure, but my understanding  
7 is that the Commission felt that that was part of the  
8 common carrier. Common carrier had a certain  
9 definition, and the Commission applied that definition  
10 and found that the haulers of garbage and refuse fit  
11 that definition. Just like a public service company,  
12 it fits that definition, then it should be regulated.

13 As far as anything new, I can't think of  
14 anything off the top of my head except that those  
15 companies or businesses that may also desire to be  
16 regulated as a public service where there is a public  
17 need, where there is a service and facilities being  
18 used and devoted for that purpose, I think that they  
19 may very well qualify as public service companies  
20 subject to UTC regulation.

21 And again, Title 80 doesn't say you are in.  
22 It doesn't mean that you are out. The law doesn't say  
23 that the definitions mean or public service company  
24 means, which is a term of limitation, it's including  
25 but not limited to, or including, and those are very

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1 definitely words of enlargement.

2           It doesn't open up the world. It's still a  
3 question of fact, and I think it's very important to  
4 note that we have made out in Judge Hicks' decision a  
5 prima facia case that we are a public service company,  
6 and as such, the fact-finding hearing must be held by  
7 the Commission in order to give any countervailing  
8 views as a question of fact.

9           But as far as off the top of my head, Your  
10 Honor, right now, there is a definite need and an  
11 interest and a desire and a willingness to have this  
12 type of business regulated as a public service company  
13 to protect the public interest and to provide a very  
14 valuable public service and facilities for the  
15 protection of the environment and the people using  
16 these services, and we ask that the Commission do what  
17 really Judge Hicks viewed the law to give them the  
18 power to do, and that is to make that determination as  
19 a question of fact and not be held or constrained by  
20 some artificial that if it's not in, then it's out type  
21 of mentality. That's not what the law says, and that's  
22 not the body of public service laws in the State of  
23 Washington.

24           JUDGE WALLIS: Mr. Swanson, can you cite any  
25 examples of regulation by this agency or any other that



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1 has been struck down by the courts because of a lack of  
2 statutory authority?

3 MR. SWANSON: Your Honor, off the top of my  
4 head, I can't, but I guess what I would say is in  
5 general and in terms of my practice as a government  
6 lawyer for five years, what I've seen, and I think Cole  
7 is part of this, is that the courts and the legislature  
8 these days is very concerned about agencies going  
9 beyond their authority.

10 That is, the Court of Appeals and Supreme  
11 Court seem to be going the direction of requiring that  
12 agencies be more loyal, so to speak, to their statutes  
13 and their authority rather than going the direction of  
14 -- one of the things I think that Mr. Sterling has been  
15 saying in some of the pleadings in this proceeding is  
16 if it doesn't say you can't, then you can, and that's  
17 certainly not the tenor of the recent decisions, and in  
18 fact, not so recent decisions from the courts in this  
19 state, and because of that, agencies have, including  
20 the UTC, have been very careful to make sure that they  
21 have statutory authority before they undertake  
22 regulation.

23 In fact, I guess in terms of authority, one  
24 thing I can point to, and this isn't an issue of  
25 striking down, but I would point back to the Department

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1 of Health's authority to regulate large on-site sewage  
2 systems and just indicate that there is an example  
3 where the legislature gave some relatively broad  
4 authority to come up with rules and how the agency was  
5 going to put together their program, and that seems to  
6 show some intent on the part of the legislature to  
7 allow that agency to do what it needs to do to protect  
8 the health.

9           And I think that's really what this case  
10 comes backs to is that its the Department of Health's  
11 authority, and the legislature has been pretty clear  
12 about that, and that they have broad authority, at  
13 least from all appearances of the statute. Although, I  
14 do note I don't speak for the Department of Health in  
15 this proceeding.

16           So I guess what I would say is that my sense,  
17 and although I don't have authority off the top of my  
18 head, I would say that the cases that have come out of  
19 the courts recently have tended to direct agencies to  
20 be very careful about what programs they undertake and  
21 to make sure they do have statutory authority to  
22 regulate something, an entity, a business, a  
23 profession. Thank you.

24           JUDGE WALLIS: Do you have any citations of  
25 authority to any such decisions or legislative action

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1 to support your argument?

2 MR. SWANSON: Your Honor, as I said, I don't  
3 have it off the top of my head, but if you would like  
4 me to provide some of that information, I could do  
5 that.

6 JUDGE WALLIS: Very well. Apart from the  
7 language that you have cited, Mr. Sterling, in the  
8 Commission's enabling law, do you have any indications  
9 of legislative intention with regard to agencies  
10 establishing regulatory programs without specific  
11 statutory authority.

12 MR. STERLING: What you have to look at  
13 though, Your Honor, is the specific language of the  
14 statute --

15 JUDGE WALLIS: I understand that you cited  
16 that already. I'm asking if you have any other  
17 indications of legislative intention?

18 MR. STERLING: As far as legislative or  
19 judicial intention, basically, as far as limiting, no,  
20 I don't, I really don't, and it really does depend upon  
21 the language of the statute and what it is the agency  
22 is doing.

23 Just a couple of brief things also, Your  
24 Honor. First of all, if Commission staff really felt  
25 that, because the jurisdictional issue was the primary

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1 issue in our appeal and in the defense to Judge Hicks.  
2 If there is a problem with that or a controversy  
3 regarding that decision, it should have been appealed.  
4 It was not appealed. The remand stayed, and basically,  
5 we are back here for a hearing. That's why I'm just  
6 kind of trying to keep my focus here, because we  
7 basically have been down this road and exhaustively,  
8 and we are back here now to apply the law, the body of  
9 public service laws as a fact-finding type of hearing.

10           The other thing too that Judge Hicks also  
11 felt fairly instructive was the Tennessee experience,  
12 and Tennessee's law did not mention waste water, still  
13 does not mention waste water. Yet in 1994, a petition  
14 was submitted by on-site sewage systems to be regulated  
15 as a public utility in Tennessee --

16           JUDGE WALLIS: I don't want to foreclose you  
17 from making a statement, but I do want to let you know  
18 I do have your written arguments in mind.

19           MR. STERLING: The other thing too that was  
20 submitted and we discovered during discovery is the  
21 National Regulatory Research Institute, NRRI, which I  
22 think is a think tank for the public utility  
23 regulators, in something that very recently came out,  
24 so this is a very apropos and a very timely topic as  
25 far as the team approach.

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1           The Department of Health doesn't have full  
2 regulatory power jurisdiction over what we are  
3 proposing, and that is is the public utility itself,  
4 the service provider to regulate the charges, to  
5 regulate the business practices, to provide a forum for  
6 the customer, for the consumer.

7           Basically, your expertise is needed to make  
8 this program work, and that's what NRRI was talking  
9 about was a team approach between the regulatory and  
10 the environmental fields. Something new, something  
11 different the law provides for is a question of fact,  
12 and that's what we are trying to focus on today.

13           MR. SWANSON: Your Honor, may I respond to  
14 Mr. Sterling?

15           JUDGE WALLIS: Yes.

16           MR. SWANSON: I apologize for interrupting  
17 you. Staff would just like to note, because  
18 Mr. Sterling is raising this procedural issue again, I  
19 believe that the Order does talk about negotiating an  
20 order of remand, and I think that's what was done, and  
21 I won't go into a lot of detail about that, but  
22 certainly, the Commission relied on the procedures set  
23 out on the APA and also relied on Mr. Sterling and his  
24 clients to abide by the order that was signed by the  
25 judge, and I think it's important to remember that.

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1           Certainly, an order could have been drafted  
2 that could have had more extensive findings and more  
3 extensive conclusions of law about the Commission's  
4 jurisdiction, but I believe consistent with the judge's  
5 decision, that didn't happen.

6           On the issue of expertise, I think it's  
7 important to remember that expertise certainly is  
8 available out there, but that's not a reason to provide  
9 statutory authority. The Department of Health has  
10 authority to undertake an activity. Lacking expertise  
11 certainly isn't a justification, legal or otherwise,  
12 for them not to undertake the use of that authority to  
13 put together a program that they think would do the  
14 job. Thank you, Your Honor.

15           JUDGE WALLIS: Mr. Sterling, are there any  
16 facts presented in the record that we have before us  
17 that would bring the large on-site sewage system  
18 operations within any of the definitions of an industry  
19 that is now specifically regulated?

20           MR. STERLING: Well, I know Judge Hicks  
21 opined that this is another branch of the tree and  
22 could be simply part of the water type of program, but  
23 that really misses the point.

24           Whether or not it's specifically named or  
25 regulated at this time is irrelevant and immaterial,

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1 and it really is because it's very clear that the  
2 legislature and the Supreme Court in the decisions and  
3 in the statutes have broadened the scope of coverage.  
4 They have not limited the Commission's jurisdiction to  
5 only those named types of companies in the statute.

6           Otherwise, there are portions of the statute  
7 in Title 80 that are mere surplusage and would be held  
8 for naught. They did not do that. It's not to be  
9 taken lightly as far as the legislature or the Supreme  
10 Court's rulings in these areas, and the legislature,  
11 rather than saying, Public service company means  
12 electric, gas, telecommunications, water, whatever, as  
13 a laundry list and nothing else until and unless we  
14 amend Title 80 to put another name in, they didn't say  
15 that.

16           "Including but not limited to" is basically a  
17 phrase of enlargement, because they recognize that not  
18 everything that could be envisioned at one point in  
19 time limits or boxes or sets the boundaries for what a  
20 public utility or what a public service company is and  
21 should be and should be regulated by UTC.

22           So therefore, as Judge Hicks said, the  
23 legislature was very wise in its choice of words. So  
24 just because what we propose to do that does not  
25 precisely fit within any of the named entities right

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1 now in Title 80 really doesn't make a difference. It  
2 really doesn't. That's not the question. It's a  
3 question of fact, what that person does, what the  
4 service will be, how the public's interest is going to  
5 be protected and benefitted by regulation.

6 I think our fact record is replete with many  
7 instances, statements, and support, including from the  
8 Puget Sound Action Team, another piece of documentation  
9 that was discovered that was submitted to UTC staff  
10 that I think we put in Exhibit J or something like  
11 that, I or J, whatever, in our briefing materials, but  
12 they too recognize that these types of companies  
13 regulated by UTC would provide a very definite public  
14 benefit.

15 The public interest would be served. The  
16 interests of the public is served by regulation by the  
17 Commission. Just because we are not named, just  
18 because we don't nicely fit into one of the cubbyholes,  
19 just because you might have to put another name on the  
20 placard downstairs shouldn't be a consideration at all.

21 It's what we are proposing to do and how that  
22 interest is going to be served and how the need will be  
23 met and how the interest will then be protected by UTC  
24 regulation, those are the questions that have to be  
25 addressed, and that's the focus of the Commission in



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1 this proceeding.

2 JUDGE WALLIS: Mr. Sterling, early in your  
3 response to this question, you indicated that you  
4 believe that the Supreme Court has given indications of  
5 broadened jurisdiction beyond a specific statutory  
6 authority. Do you have any citations for that  
7 conclusion?

8 MR. STERLING: I think the indications are in  
9 the Inland Empire case and some other cases in which  
10 the language basically, and it's all in the briefing  
11 materials, and I've cited this material, but basically,  
12 the test the Supreme Court set out, the test is what  
13 the company or person does, not what it calls itself or  
14 what the state might call it. It's basically what  
15 service is being provided. That's the test that's set  
16 out.

17 In those cases, I think the question there  
18 was -- and maybe this is where the problem is is  
19 because to date, granted, I think probably most, if not  
20 all, the cases have come up where companies that fit in  
21 one of those cubbyholes say, We don't, and this is why  
22 we don't, and so you get that.

23 You get water purveyors or electric purveyors  
24 or whatever or distributors that come to the Commission  
25 with a petition for declaratory order. One happened

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1 within the last four months. An electric distribution  
2 company came in and had a petition for declaratory  
3 order saying, Although we are called and might be an  
4 electric company, what we do, what we do, citing Inland  
5 Empire, is not a public service company, and in three  
6 months, the Commission said, You are right, and there  
7 wasn't even a contest. There was no statement in  
8 rebuttal or anything like that.

9           So that's what we've been dealing with in the  
10 past with water purveyors that basically have limited  
11 service just to its own members. So that's part of the  
12 test as well. Is it open to the public, as far as the  
13 public that can be served, and do they have the right  
14 to demand? Do they have a voice in the company? Are  
15 they sharing in the profits?

16           All these are part of the test that basically  
17 distinguish between, I think, someone who provides a  
18 service to their members and someone who actually is a  
19 public utility providing a necessary utility service of  
20 consequence to the public on demand wherever they may  
21 be located on a continuous basis where the public is  
22 not a part of the company. They don't have a say in  
23 this operation. They need the Commission's protection.  
24 That's what it's all about, and I think that's the  
25 message, and that's the body of public service laws

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1 that need to be applied, and we set out in our briefing  
2 exactly what this body of law is.

3           But maybe that's what the problem is. Maybe  
4 that's why I'm going crazy about this whole thing is  
5 because the context. Here we are, perhaps one of the  
6 few, if not far between, individuals who actually come  
7 in here seeking to be regulated, and maybe that's what  
8 the issue is. Maybe we have to get a different  
9 mind-set going, because typically, people are coming in  
10 begging not be regulated. We are coming in ready,  
11 willing, and able to be regulated in the public  
12 interest. Thank you.

13           JUDGE WALLIS: This concludes the discussion  
14 of questions I have. In light of the arguments that  
15 have been presented, do either of you have any  
16 additional thoughts you would like to present at this  
17 time? Mr. Sterling?

18           MR. STERLING: I do have, and actually, with  
19 the briefing and with Your Honor's questions and our  
20 responses, that's basically covered a lot of the  
21 information materials. I did have, naturally, a  
22 prepared statement. It's only six pages, but I would  
23 like to go through it, but just to get it on the  
24 record, or I suppose I could, just to save the court  
25 reporter, simply submit it, and I would be more than

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1 willing to submitting it to the court reporter and Your  
2 Honor for entering into the record.

3 JUDGE WALLIS: Very well. Mr. Swanson, do  
4 you have anything?

5 MR. SWANSON: Your Honor, if I could just  
6 have a moment. My client wanted to mention something  
7 to me, and it won't take more than a couple of seconds.

8 JUDGE WALLIS: Let's take a five-minute  
9 recess.

10 (Recess)

11 JUDGE WALLIS: During a brief recess, the  
12 Commission staff consulted with counsel, and there was  
13 a discussion about the presentation of a brief.  
14 Mr. Sterling, may we call it a statement of position?

15 MR. STERLING: Certainly.

16 JUDGE WALLIS: On behalf of the petitioner,  
17 as a result of those discussions, we've determined that  
18 the parties may present concluding statements and  
19 authority to support their assertions during the  
20 argument regarding judicial and legislative intention  
21 with regard to regulation of matters that are not  
22 specifically identified in statute as subjects of  
23 regulation.

24 Mr. Swanson, you wanted a moment or two to  
25 follow-up on the consultation you had with staff?

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1                   MR. SWANSON: Your Honor, if it would be okay  
2 with Your Honor, we could just put that information  
3 into our final statement.

4                   JUDGE WALLIS: Very well. What schedule  
5 would be appropriate? Mr. Sterling, you already have  
6 your statement prepared. Mr. Swanson?

7                   MR. SWANSON: In terms of a written  
8 statement?

9                   JUDGE WALLIS: Yes.

10                  MR. SWANSON: You know, I think a week would  
11 be fine. I don't anticipate that there -- as I said  
12 before, I think we've covered many of the issues in  
13 this proceeding.

14                  JUDGE WALLIS: I am interested in any  
15 authority that you are able to provide, either of you,  
16 in terms of legislative intention or judicial intention  
17 with regard to agency's jurisdiction. We are looking  
18 for whatever guidance is available from either of those  
19 sources to guide our interpretation and the consequence  
20 of the facts that are determined as a result of this  
21 proceeding. Would one week be sufficient?

22                  MR. STERLING: That's fine with me, Your  
23 Honor.

24                  MR. SWANSON: Since I suppose at this point I  
25 may be speaking for another assistant attorney general,

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1 if possible, it might be good to set for two weeks if  
2 that's possible. If not, I'm sure we could arrange for  
3 it in one week.

4 JUDGE WALLIS: Rather than run the risk of  
5 the need for an extension of time, I would suggest that  
6 we ask for your submissions two weeks from today, and  
7 then if you have response, if you file that within one  
8 week thereafter.

9 MR. SWANSON: Thank you, Your Honor.

10 JUDGE WALLIS: Thank you both. You both have  
11 indicated a thorough knowledge of your subject. We  
12 understand as we indicated at the outset that you have  
13 different views on some matters, and certainly as an  
14 agency, we will do our best to exercise the wisdom of  
15 Solomon and come up with a result that makes sense.  
16 Your further support in that with your posthearing  
17 submissions will, I'm sure, be very helpful. Unless  
18 there is anything further, this matter is adjourned.

19 MR. STERLING: This is something other than  
20 that jurisdictional or authority question. This is  
21 basically the oral presentation of the oral argument  
22 that I had intended to make to Your Honor today.

23 JUDGE WALLIS: I'm sorry. If I did not make  
24 it clear, I would contemplate that you may submit that  
25 as a part of your written submission within two weeks,

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1 and that way, it is clearly a part of the record, and  
2 staff will have the opportunity to respond to it.  
3 Similarly, any submission of their's, you will have the  
4 opportunity to respond to. Does that satisfy your  
5 interests, Mr. Sterling?

6 MR. STERLING: As long as it gets on the  
7 record, that satisfies, Your Honor. I wanted to  
8 present it today because in summary judgment, summary  
9 determination, this is a chance to make oral arguments  
10 as well as address questions from the Bench. This was  
11 going to be my oral presentation that I thought that  
12 would generate some questions, so I had it a little bit  
13 backwards, but I appreciate the opportunity. We will  
14 make this statement as part of our presentation we will  
15 submit to Your Honor.

16 JUDGE WALLIS: Thank you very much.

17 (Oral argument concluded at 10:26 a.m.)

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