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February 16, 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 TO COMMISSION STAFF'S CLOSING  
BRIEF***

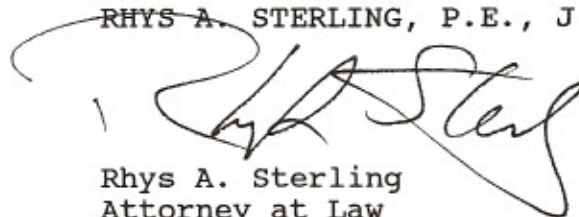
Dear Ms. Washburn:

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 Reply To Commission Staff's Closing Brief. 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  
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,	)	STUTH AND AQUA TEST'S REPLY
INC.,	)	TO COMMISSION STAFF'S CLOS-
	)	ING BRIEF
For Declaratory Order Designating	)	
a Public Service Company	)	
_____	)	

Lawrence (Yogi) Berra's gift with words could find no better application than in the Commission Staff's Closing Brief, as such is truly "déjà vu all over again."

Notable by its total absence from Staff's Brief is any case law or legislative guidance supporting its steadfast and erroneous position that "if you're not identified by name in Title 80 RCW as a public service company, then you're out and cannot be a public service company as a matter of law." Support for this proposition is missing very simply because such support does not exist.

Instead, Staff once again hammers on legal issues that were raised, presented, argued, considered and rejected by Judge Richard Hicks of the Thurston County Superior Court.

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1 All one need is to spend a few minutes and review Judge Hicks'  
2 oral decision to ascertain that, upon his most thorough review of  
3 the issues, briefs, case law, and statutes, Judge Hicks found and  
4 concluded that Stuth and Aqua Test had presented a *prima facie* case  
5 supporting their Petition for Declaratory Order; ordered the WUTC  
6 hold the statutory fact finding hearing; and as a question of fact,  
7 determine whether a wastewater company proposed by Stuth and Aqua  
8 Test is a public service company subject to regulation by the WUTC.

9 Judge Hicks was presented with the issues still clamored by  
10 Staff regarding the WUTC's jurisdiction, purported lack of a justi-  
11 fiable controversy to issue other than a mere advisory opinion, ba-  
12 lance of adverse effects as to the company and the public, the Cole  
13 case, overextending regulation into businesses not named in Title  
14 80 RCW, etc etc etc. Had Judge Hicks agreed with Staff as to any  
15 one of these issues raised, briefed and vigorously argued before  
16 him, he would have found for the WUTC and dismissed the Stuth and  
17 Aqua Test appeal. However and most obviously, he did not, the WUTC  
18 did not appeal, the remand became effective, and we are now in the  
19 midst of the statutorily mandated fact finding hearing -- so end of  
20 discussion.

21 As for the Staff's assertion that the WUTC never, ever enter-  
22 tains a petition for declaratory order as to whether a person or  
23 company not currently organized and not yet in the business of pro-  
24 viding an existing service to the public will be subject to WUTC's

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1 jurisdiction under its proposed service plan, such contention bald-  
2 ly ignores the historical usage of the declaratory order proceeding  
3 for just such purposes. *The following discussion is presented sim-*  
4 *ply to illustrate the use of the Declaratory Order procedure as it*  
5 *applies to future proposed business enterprises and/or undertakings*  
6 *for the express purpose of obtaining a present determination, as a*  
7 *question of fact, whether such future service and/or provider would*  
8 *or would not be subject to WUTC's jurisdiction as a public service*  
9 *company, and for no other purpose.*

10 For example, in WUTC Order No. 1 filed in Docket No. UE-051439  
11 the WUTC Commissioners noted the procedural background of that mat-  
12 ter as follows:

13 On September 26, 2005, Sea Breeze Pacific Juan de Fuca  
14 Cable, LP, Olympic Converter Corporation, and Victoria  
15 Converter, NSULC ("Petitioners"), filed with the Washing-  
16 ton Utilities and Transportation Commission ("Commis-  
17 sion") a petition for declaratory order, seeking a determi-  
18 nation that the Petitioners, who plan to construct elect-  
19 rical transmission facilities between Port Angeles, Wash-  
20 ington, and Victoria, British Columbia, would not be sub-  
21 ject to Commission regulation, and asking the Commission  
22 to disclaim jurisdiction.

23 In re Sea Breeze Pacific Juan de Fuca Cable, Docket No. UE-051439,  
24 Order No. 01 p. 1 ¶ 2. Under Part II, "The Facts Presented", WUTC  
notes as fact that "Petitioners *plan to construct*" a cable project  
consisting of a "22-mile long 540-MW, direct-current submarine cab-  
le" and that "Petitioners assert that the Project *may help solve*  
*existing transmission constraints* BPA faces on the Olympic Peninsu-

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1 la". Id. at p. 2 ¶¶ 5-6 (emphasis added).<sup>1</sup> In Part III, "Discus-  
2 sion", the Commissioners note that the first issue presented to the  
3 WUTC in this particular matter was a determination as to whether it  
4 "should enter a declaratory order disclaiming jurisdiction over the  
5 Petitioners and the JdF Project facilities, operations and services  
6 under Title 80 RCW where, under Washington law, none of the Petiti-  
7 oners is, or *will become*, a 'public service company.'" Id. at p. 4  
8 ¶ 14 (emphasis added).<sup>2</sup> Accordingly, the WUTC concluded that:

9 [T]he Commission is authorized by RCW 80.04.015 to make  
10 the determinations of fact, and to enter the appropriate  
11 orders, necessary to *answer the question of whether the  
12 Petitioners would be conducting business* subject to regu-  
13 lation under Title 80 RCW.

12 In re Sea Breeze Pacific Juan de Fuca Cable, Docket No. UE-051439,  
13 Order No. 01 p. 6 ¶ 20. Not surprisingly and as cited by Stuth and  
14 Aqua Test as an integral part of the body of "public services laws"  
15 of Washington, in making its determination based on the facts prov-  
16 ided by the Petitioners, WUTC based its decision on the Inland Emp-  
17 ire and the West Valley Land Co. cases. Id. at pp. 6-7 ¶¶ 21-22.

18 \_\_\_\_\_  
19 <sup>1</sup> It is further stated as fact that "Petitioners intend to  
20 own the JdF Project, but do not intend to operate or maintain the  
21 JdF Project after it is completed." Id. at p. 3, para. 8.

22 <sup>2</sup> Thus, there is no artificial limitation imposed by the WUTC  
23 that the petitioner for a declaratory order must be a person or  
24 company currently providing an existing service to the public. As  
long as the proposed services may be expressed in concrete terms,  
it is the duty of WUTC to make a determination based on such facts  
as to its jurisdiction over the provider of such future service to  
the public. Judge Hicks found and concluded there is a justiciable  
controversy present, and ordered WUTC to conduct this hearing.

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1           On the facts presented, neither the Petitioners *nor a*  
2           future third-party operator will offer electrical service  
3           directly to the public. The Petitioners and the future  
          third-party operator, in those circumstances, are not  
          public service companies.

4           In re Sea Breeze Pacific Juan de Fuca Cable, Docket No. UE-051439,  
5           Order No. 01 p. 10 ¶ 33 (emphasis added).

6           Another case illustrating the same use of the declaratory or-  
7           der procedure for presently determining the status of a future bus-  
8           iness or service is that in Docket No. UE-991993, In re TECWA Pow-  
9           er, Inc. For A Declaratory Order. As a finding, the Commissioners  
10          noted that "Petitioner (TECWA) . . . is the contract purchaser of  
11          the Centralia Generating Plant pursuant to . . . [a] Purchase and  
12          Sale Agreement . . . [and that] under the terms of the purchase  
13          contract, Petitioner will acquire the [plant and associated trans-  
14          mission lines] by acquiring TransAlta Centralia Generation LLC . .  
15          . which, at time of closing, will own the Electric Facilities."  
16          Docket No. UE-991993, Declaratory Order at p. 2 ¶¶ 7-8. TECWA pet-  
17          itioned the WUTC for a declaratory order "that the LLC, *under the*  
18          *circumstances pleaded, will not be subject to* regulation as a pub-  
19          lic service company by the Commission." *Id.* at p. 3 ¶ 12 (emphasis  
20          added). WUTC further concluded that "*based on the facts stated in*  
21          *the Petition for Declaratory Order, . . . it does not have juris-*  
22          diction over the operations of TransAlta Centralia *should the sale*  
23          of the Electric Facilities *close.*" *Id.* at p. 4 ¶ 15 (emphasis add-  
24          ed). At that time it was not even certain the sale would close.

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1           Based on the foregoing it is very clear that falling within  
2 the WUTC's authority is the entry of declaratory orders for the  
3 express purpose of presently determining, as a question of fact,  
4 whether or not a future provider of proposed services is subject to  
5 regulation as a public service company.<sup>3</sup> And it must be noted that  
6 just because the petitions for declaratory order in the above cases  
7 address types of services that would ostensibly be provided by a  
8 public service company identified by "name" under Title 80 RCW that  
9 such facial nexus is not at all determinative or dispositive as to  
10 whether or not an "unnamed" person or corporation providing utility  
11 service to the public will in fact be subject to regulation by WUTC  
12 as a public service company. Hence the fundamental reason for the  
13 Legislature to use words such as "includes" or "including, but not  
14 limited to" so as to enlarge, rather than limit, the universe of  
15 public service companies. Once more recall the sage words of Judge  
16 Richard Hicks, echoing other utility commissions' observations:

17           And I think that's exactly why the legislature has this  
18 all-inclusive language, because they were wise enough to  
19 see they couldn't foresee every possible service that may  
20 come to be a public service.

21           <sup>3</sup> It is interesting that the Staff would be heard to assert  
22 that the declaratory orders entered by the Commissioners in the  
23 foregoing cases are an "unlawful academic exercise." Staff Closing  
24 Brief at p. 9. Obviously, it must be that the entry of declaratory  
orders for the purpose of **disclaiming** jurisdiction as to a provider  
of a future service is materially different from, and is therefore  
lawful vis-à-vis, the entry of declaratory orders for the purpose  
of **claiming** jurisdiction over such providers (note the tongue in  
cheek).

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1 Stuth and Aqua Test Initial Brief, Exhibit "C" at p. 13.<sup>4</sup> The body  
2 of Washington public service law is clear and unequivocal that the  
3 WUTC's jurisdiction extends and applies to **ANY** person or corpora-  
4 tion that will qualify as a public service company as a matter of  
5 fact -- and this is precisely why Judge Hicks ordered WUTC to con-  
6 duct a fact-finding hearing for making such determination, subject  
7 also to the additional underlying *ruling* by Judge Hicks that Stuth  
8 and Aqua Test have in fact legally made out a *prima facie* case.

9 Finally, it must be observed that the Supreme Court decision  
10 in State ex rel. Spokane United Railways v. Department of Public  
11 Service, 191 Wash. 595, 71 P. 2d 661 (1937) may be old, *but it is*  
12 *still good and reliable law*, and that it is clear thereunder that:

13 "A thing which is within the object, spirit and the  
14 meaning of the statute is as much within the statute as  
15 if it were within the letter." [citation omitted] . . .  
16 When the extent and scope of the statute are considered,  
17 . . . it was the intention of the legislature . . . to  
18 include within its reach *all* public service corporations,  
19 *except where there was a special exemption* . . . .

20 <sup>4</sup> It is held that "the **expressio unius [est exclusio alteri-**  
21 **us]** maxim has no force in the face of directly contradictory lang-  
22 uage in the contract [or statute], such as the clause 'including  
23 but not limited to'." Society for the Advancement of Education,  
24 Inc. v. Gannett Co., Inc., 1999 WL 33023, \*7 (S.D.N.Y. 1999) (con-  
struing contract); State v. Engler, 259 N.W.2d 97, 100 (Wis. 1977)  
(statutory construction). In the absence of substantial factual  
evidence that the Legislature intended the **expressio unius** rule to  
apply, its usage of the terms "includes" and "including, but not  
limited to" in Title 80 RCW evinces the clear and unambiguous in-  
tent to negate any effect of the maxim and to ensure that the uni-  
verse of public service companies subject to WUTC regulation is not  
limited to only those subsequently identified by name. Cf. Engler,  
259 N.W.2d at 100.

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1 Spokane United Railways, 191 Wash. at 598-99 (emphasis added).<sup>5</sup>

2 There is no special exemption under Title 80 RCW regarding the  
3 regulation of persons or corporations owning, operating and manag-  
4 ing large on-site sewage systems for hire for the public as public  
5 service companies -- and thus if the facts fit, they're in.

6 And neither is there any special exemption created under HB  
7 3056 (1998 Laws of Washington, Ch. 34). It is interesting to note  
8 that the codification of this session law resulted only in its § 3  
9 being incorporated into statutory law as RCW 70.05.077.<sup>6</sup> Section  
10 2 of HB 3056<sup>7</sup> has in essence been supplanted by Chapter 18.210 RCW  
11 which placed the licensure of designers of on-site sewage systems

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13 <sup>5</sup> And it should be noted that the statutory definition given  
14 public service company is just as broad and inclusive as the statu-  
15 tory definition given common carrier.

16 <sup>6</sup> And this has only to do with "the department of health, in  
17 consultation and cooperation with local environmental health offi-  
18 cers, shall develop a one-day course to train local environmental  
19 health officers, health officers, and environmental health special-  
20 ists and technicians to address the application of the waiver auth-  
21 ority granted under RCW 70.05.072 as well as other existing statuto-  
22 ry or regulatory flexibility for siting on-site sewage systems."  
23 RCW 70.05.077(1). The directive set forth in Section 1 of HB 3056  
24 resulted only in the production of a Work Group Report to the DOL  
Director dated December 1, 1999, that focused only on financial re-  
quirements for on-site system designers and inspectors.

<sup>7</sup> This section is not codified and only called for "the dep-  
artment of licensing and the department of health shall jointly  
convene an advisory committee for the purpose of developing legis-  
lation that will establish licensing requirements for the designers  
of on-site septic systems, and a proposed certification program for  
inspectors of on-site septic systems . . . ." Ch. 34 § 2, Laws of  
1998.

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1 under the regulatory authority of the Department of Licensing and  
2 the Board of Registration for Professional Engineers and Land Surv-  
3 eyors.<sup>8</sup> Respectfully, Stuth and Aqua Test have absolutely no idea  
4 as to the purported relevancy of Ch. 34, Laws of 1998 in addressing  
5 the question posed by the Chief ALJ. If anything, perhaps it does  
6 demonstrate that the Department of Health is not the one-stop shop-  
7 ping mart for all purposes regarding and relating to the on-site  
8 sewage program as Staff would like the Chief ALJ to believe.<sup>9</sup> Ag-  
9 ain, the Department of Health's expertise and jurisdiction lie in  
10 the design and operational criteria for on-site sewage systems to  
11 ensure system performance for the protection of public health; but  
12 the expertise and jurisdiction over those persons or corporations  
13 owning, operating and managing large on-site sewage systems for  
14 hire for the public on demand wherever located in the State lie in

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16 <sup>8</sup> And this was all preceded by a lawsuit brought in Thurston  
17 County Superior Court against the State and local Boards of Health  
18 and the Board of Registration in which judgment was entered declar-  
19 ing that the design of on-site sewage systems constituted the prac-  
20 tice of engineering and, accordingly, those persons designing such  
21 systems were subject to licensure and regulation by the Board of  
22 Registration -- not the Board of Health. Sterling, et al. v. Board  
of Registration, et al., Thurston County Superior Court No. 89-2-  
01838-9. It was made clear in that lawsuit that whereas the DOH  
had jurisdiction over the design criteria for on-site systems, the  
persons who designed such systems were under the jurisdiction of  
the Board of Registration.

23 <sup>9</sup> As, for example, while the DOH has within its jurisdiction  
24 setting the design criteria for on-site systems that designers must  
follow, it is the DOL through the Board of Registration that has  
jurisdiction over those persons who actually design such on-site  
systems. **DOH's authority is neither all-inclusive nor exclusive.**

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1 the WUTC for regulation of such person or corporation as a public  
2 service company in the public interest as to business practices,  
3 reasonable rates, and stability of essential services. As so ap-  
4 propriately and cogently discussed by WUTC Staff:

5 [The NRRI Briefing Paper] points out the rationale for  
6 developing a team approach by environmental and regulato-  
7 ry agencies . . . and the utility regulators bring the  
8 "economic regulation" expertise into the picture to help  
9 put the companies on a more sound management and financi-  
10 al footing.

11 Chris Rose to David Danner Memo dated October 26, 2005.<sup>10</sup>

#### 12 CONCLUSIONS

13 Albeit in a shroud of secrecy behind closed doors, WUTC Staff  
14 recognize the rationale for WUTC to step up to the plate and assert  
15 its jurisdiction over persons and corporations owning, operating  
16 and managing large on-site sewage systems for hire for the public  
17 on demand wherever located in the State as a public service company  
18 under Title 80 RCW. The existing body of public service laws that  
19 apply in this State is broad and inclusive enough to charge WUTC  
20 with the responsibility and duty to regulate wastewater companies  
21 in the public interest. There is no special exemption given under

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22 <sup>10</sup> The October 2005 NRRI Briefing Paper clearly recognizes and  
23 promotes this symbiotic relationship among the respective state ag-  
24 encies as to actively involving and applying their areas of expert-  
ise, and Staff admits that it just may be the time for WUTC to as-  
sert itself and bring its regulatory powers to bear. The Puget Sound  
Action Team has expressed its concurrence and support as well. See  
PSAT Position Paper titled "WUTC Regulation of Large Onsite Sewage  
Systems," Terry Hull (October 25, 2005).

1 this body of law to exclude the regulation of wastewater companies  
2 by the WUTC as a public service company, and therefore, they're in  
3 as Staff has presented absolutely no facts to rebut or refute the  
4 more than *prima facie* case established by Stuth and Aqua Test in  
5 support of WUTC regulation.<sup>11</sup>

6 Based on the existing body of public service laws, the public  
7 interest, and the undisputed facts in the record, the WUTC has not  
8 only the responsibility but the duty to make the determination as  
9 a question of fact that a person or corporation owning, operating  
10 and managing large on-site sewage systems for hire for the public  
11 on demand and wherever located in the State of Washington, under  
12 the business model set forth by Stuth and Aqua Test, is a public  
13 service company subject to WUTC regulation under Title 80 RCW.

14 Accordingly, the Chief ALJ should grant Stuth and Aqua Test's  
15 Petition for Declaratory Order and order the WUTC to regulate such  
16 persons and corporations dedicated to providing this essential pub-  
17 lic service with facilities devoted to public use as public service  
18 companies.

19  
20  
21 <sup>11</sup> Thus, unlike and distinguishable from Cole wherein not even  
22 any facts or law in support of a regulatory basis for intervention  
23 was made, Stuth and Aqua Test have here more than merely suggested  
24 the legal and factual grounds supporting regulation, they have fac-  
tually and legally made out a **prima facie** case for such regulation  
as a public service company that has been made even stronger and  
conclusive in this fact-finding hearing, as WUTC Staff has offered  
absolutely no facts or evidence to rebut or refute their case for  
regulation in the public interest under the public service laws.

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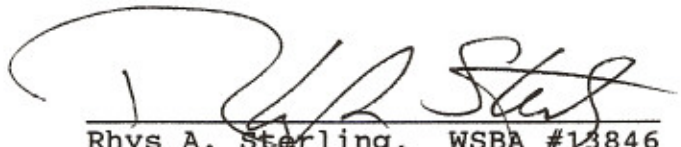


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DATED this 16<sup>th</sup> day of February, 2006.

Respectfully submitted,

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



Rhys A. Sterling, WSBA #13846  
Attorney for Petitioners Stuth and  
Aqua Test, Inc.

CERTIFICATION OF SERVICE

I certify under penalty of perjury  
under the laws of the State of Washington  
that on the 16<sup>th</sup> day of February  
~~16, 2006~~, I mailed a copy of this document  
to all parties.

DATED at Port Angeles, Washington

