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February 22, 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 OPPOSITION TO WUTC STAFF'S MOTION FOR
LEAVE TO FILE REPLY**

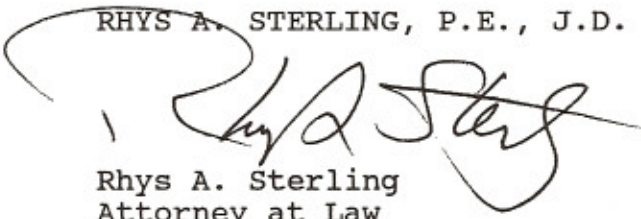
Dear Ms. Washburn:

Enclosed herewith is the original and five (5) copies of Stuth and Aqua Test's Opposition To WUTC Staff's Motion For Leave To File Reply. 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. A-050528
)
WILLIAM L. STUTH, and AQUA TEST,) STUTH AND AQUA TEST'S
INC.,) OPPOSITION TO WUTC STAFF'S
) MOTION FOR LEAVE TO FILE
For Declaratory Order Designating) REPLY
a Public Service Company)
_____)

This time the answer to Staff's request should be and is --
"No". Stuth and Aqua Test respectfully ask the Chief ALJ to deny
WUTC Staff's Motion For Leave To File Reply as the time for serving
and filing a reply brief has long since passed and there is no good
cause for excusing the Staff's neglect.

At the January 27, 2006 hearing on the pending cross-motions
for summary determination, Chief ALJ C. Robert Wallis granted the
parties two weeks therefrom in which to respond with appropriate
briefs to a jurisdictional query posed by him, and also in which to
file written closing statements. At the hearing, the Chief ALJ set
forth the time in which each party was permitted to also file a re-
ply to the opposition's initial brief -- one additional week until
February 17, 2006.

STUTH AND AQUA TEST'S
OPPOSITION TO EXTENSION
OF TIME -- PAGE 1 OF 6

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1 As an accommodation to WUTC Staff because of what now appears
2 to be the permanent exit of former WUTC counsel Chris Swanson and
3 upon personal telephone communication from new WUTC counsel Sally
4 Johnston, Stuth and Aqua Test were courteous and consented to an
5 extension in time for WUTC Staff to file its initial responsive
6 brief to Monday, February 13. This extension in fact shortened the
7 time in which Stuth and Aqua Test had available in which to timely
8 file their reply brief, and also gave WUTC Staff more than ample
9 opportunity to review Stuth and Aqua Test's initial response brief
10 that was served and filed on February 3, 2006, and to incorporate
11 in Staff's responsive brief what in fact was its reply to Stuth and
12 Aqua Test's legal analysis and closing statement.¹

13 There is no excuse and no good cause for WUTC Staff to be giv-
14 en yet another extension in time to file what is in fact an option-
15 al brief as a "reply to a reply" -- especially where such request
16 for permission comes substantially after the date on which the ALJ
17 specifically directed that any reply briefs were due from the part-
18 ies.²

19 _____
20 ¹ And simply reviewing the WUTC Staff's responsive brief and
21 closing statement discloses the fact that such brief indeed replies
22 to the case law and closing statement filed by Stuth and Aqua Test
23 in their responsive brief. Allowing WUTC Staff to now file a tardy
24 "reply to a reply" puts Stuth and Aqua Test at an unfair and undue
disadvantage.

² It should further be noted that WUTC Staff has made its mo-
tion "pursuant to WAC 480-07-395". However, there is nothing in
(continued...)

STUTH AND AQUA TEST'S
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1 An extension in time may be granted "if the requesting party
2 demonstrates good cause for the continuance and the continuance
3 will not prejudice any party or the commission."³ However, a "par-
4 ty must file any written motion for continuance at least five bus-
5 iness days prior to the deadline as to which the continuance is re-
6 quested".⁴ But "the commission may consider requests for continu-
7 ance that are made after the deadlines stated in this rule if the
8 requester demonstrates good cause *that prevented a timely request.*"
9 WAC 480-07-385(3)(c) (emphasis added).

10 The deadline set by the Chief ALJ for the filing of any reply
11 brief by a party was Friday, February 17, 2006.⁵ WUTC Staff's Mo-

12 _____
13 ²(...continued)
14 this section that relates to a motion for an extension of time; as
such is in fact addressed under the provisions of WAC 480-07-385.

15 ³ WAC 480-07-385(2). It should be noted that the Chief ALJ
16 explained to the parties that his ruling on the pending cross-mo-
17 tions for summary determination would be made very soon after the
18 close of time for the submission of the reply briefs. Time is of
19 the essence in these proceedings as not only Stuth and Aqua Test
20 have much time and resources invested in this process to-date, but
21 the public and the DOH are impatiently awaiting a long overdue and
final favorable determination from the WUTC on their Petition for
Declaratory Order filed almost a year ago. The passage of time in
fact constitutes substantial prejudice to Stuth and Aqua Test and
the public, and moreover, WUTC Staff has in fact included in its
responsive brief a reply to the response from Stuth and Aqua Test.
WUTC Staff has had its one fair chance to reply, has taken it, and
is not entitled to yet another bite of the apple.

22 ⁴ WAC 480-07-385(3)(a).

23 ⁵ One week after the deadline set for the submittal of the
24 initial briefs responding to the Chief ALJ's question and includ-
ing any closing arguments.

STUTH AND AQUA TEST'S
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1 tion For Leave To File Reply is dated February 21, 2006, and was
2 filed and served on that date by e-mail. Staff has substantially
3 missed not only the deadline for filing a reply brief, but also the
4 deadline for timely filing a request for extension of time in order
5 to file a tardy reply brief. There is no good cause that has been
6 presented by Staff to excuse such neglect -- and good cause simply
7 does not exist as a matter of fact and law.⁶

8 To determine whether sufficient and appropriate grounds exist
9 for an extension of time, WUTC may refer to the interpretation and
10 application of the Civil Rules of Procedure for Superior Court.⁷
11 The analogous Civil Rule for the extension of time once the time
12 for compliance has passed is CR 6(b)(2) -- requiring a showing of
13 excusable neglect. It is well-established, however, that neither
14 inadvertence, neglect of a case schedule, nor self-imposed or cre-
15 ated hardship constitute adequate and appropriate grounds for an
16 extension of time after a deadline has passed.⁸

17 _____
18 ⁶ Staff's bold and self-serving proclamation that there is
19 good cause for an extension because the "public interest would be
20 served by providing the Commission with an accurate, truthful, cor-
21 rect record upon which to decide this matter" holds no water. First
22 there is no evidence supporting any of these bald contentions. And
23 second, if such were in fact the case, Staff would not have missed
24 all the imposed deadlines and would have assured the timely filing
of its reply brief.

22 ⁷ WAC 480-07-375(2).

23 ⁸ See, e.g., In re Marriage of Olson, 69 Wn. App. 621, 626,
24 850 P.2d 527 (1993); Lane v. Brown & Haley, 81 Wn.App. 102, 107,
(continued...)

1 Based on the foregoing, WUTC Staff has not demonstrated good
2 cause for approving an extension of time where all the deadlines
3 have passed for not only filing a reply brief but also for asking
4 for an extension of time in which to file a reply brief. Although
5 WUTC Staff should not be granted the requested extension, Staff it-
6 self has not been prejudiced and the public interests have been ad-
7 equately served as Staff in fact included within their February 13,
8 2006, responsive brief and closing statement a most thorough reply
9 to Stuth and Aqua Test's response and closing argument that was
10 served and filed on February 3, 2006. The Chief ALJ gave each par-
11 ty one opportunity to file a reply to the opposition's responsive
12 brief and closing statement. Staff did just that in its February
13 13th brief -- a full 10 days after Stuth and Aqua Test filed and
14 served their brief and ample time in which to appropriately reply
15 thereto -- that is all Staff is entitled to submit in this proceed-
16 ing, as no party is entitled to file a "reply to a reply" -- and
17 that is precisely what Staff inappropriately wishes to accomplish
18 at this late date. Rather than demonstrating how it was "prevent-
19 ed" from complying with the time deadlines, WUTC Staff simply wish-
20 es to be excused for its neglectful conduct. Such tactics should

21 _____
22 ⁸(...continued)
23 912 P.2d 1040 (1996); Prest v. American Bankers Life Assurance Com-
24 pany, 79 Wn. App. 93, 100, 900 P.2d 595 (1995). State v. Mack, 89
Wn.2d 788, 794-95, 576 P.2d 44 (1978) ("Self-created hardship is
not an excuse for violating mandatory rules . . . [and] does not
constitute good cause for delay [or a continuance].").

STUTH AND AQUA TEST'S
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1 not be sanctioned by the Chief ALJ in any proceeding by any party.

2 Stuth and Aqua Test respectfully ask the Chief ALJ to deny
3 WUTC Staff's Motion For Leave To File Reply and to forthwith pro-
4 ceed to issue a final judgment on the parties' cross-motions for
5 summary determination on the existing briefs.

6
7 DATED this 22nd day of February, 2006.

8
9 Respectfully submitted,
10 RHYS A. STERLING, P.E., J.D.

11
12 
13 Rhys A. Sterling, WSBA #13846
14 Attorney for Petitioners Stuth and
15 Aqua Test, Inc.

16
17 CERTIFICATION OF SERVICE

18 I certify under penalty of perjury
19 under the laws of the State of Washington
20 that on the 22nd day of February
21 ~~2006~~ I mailed a copy of this document
22 to all parties.

23 DATED at Issaquah, Washington
24 