

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

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February 28, 2006

**VIA FACSIMILE, E-MAIL AND 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  
**PETITIONERS' SUR-REPLY TO STAFF'S REPLY TO RESPONSE**

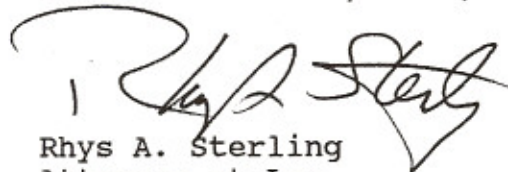
Dear Ms. Washburn:

Enclosed herewith is the original and five (5) copies of Stuth and Aqua Test's Sur-Reply to Staff's Reply to Response. 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, ) PETITIONERS' SUR-REPLY TO  
INC., ) STAFF'S REPLY TO RESPONSE  
)  
For Declaratory Order Designating )  
a Public Service Company )

In order to set the record straight and to correct legal misconceptions continued to be advanced by WUTC Staff, Petitioners Stuth and Aqua Test respectfully ask for the patience and indulgence of the Chief ALJ to consider the following very brief discourse.<sup>1</sup>

First, WUTC Staff still peddles its attempt to misdirect the focus of this proceeding by continuing to proclaim as grounds for

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<sup>1</sup> It should nonetheless be noted that as of 11:15 a.m. this morning counsel for Petitioners has still not received any fax, e-mail or regular mail service of WUTC Staff's Reply To Response Of Stuth And Aqua Test. Furthermore, counsel never was served with any fax, e-mail or regular mail copy of Staff's motion to extend time for filing its reply until Monday, February 27, 2006, until well after the Chief ALJ received, considered and granted such ex parte motion. Petitioners could take this opportunity to cry "foul" and move to strike all such documents from the record. In lieu thereof, Petitioners merely ask the Chief ALJ to consider their sur-reply.

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1 denial that "the Commission lacks statutory authority to regulate  
2 on-site sewage systems." Staff Reply at p. 11. For the umpteenth  
3 but very last time in this proceeding, Stuth and Aqua Test have pe-  
4 titioned the WUTC for a declaratory order that the *persons or corp-*  
5 *orations* owning, operating, and managing large on-site sewage sys-  
6 tems for hire for the public on demand wherever located are subject  
7 to WUTC regulation as a public service company. The sewage system  
8 itself will still be subject to design and performance requirements  
9 imposed by the Department of Health, but it is clear that the per-  
10 sons or corporations owning, operating and managing such essential  
11 utility service of consequence are in fact and law public service  
12 companies. And regulating public service companies in and for the  
13 public interest is squarely in WUTC's jurisdiction and expertise.

14 Second, Judge Hicks did indeed hear, read, consider and rule  
15 on the Staff's assertion that grounds for entry of a declaratory  
16 order allegedly did not exist as there purportedly is no "contro-  
17 versy". In the Staff's Reply To Trial Brief, at p. 11, lines 16 -  
18 24, Staff argued to Judge Hicks that "RCW 34.05.240(1)(a) through  
19 (b) require the petition for declaratory order to set forth facts  
20 and reasons showing uncertainty and controversy." In his decision,  
21 Judge Hicks found and concluded that "the fact that the Department  
22 of Health, another large state agency, is supporting the petition-  
23 ers in their application, it seems to me on its face makes this  
24 controversial when two state agencies are taking opposite positions

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1 on the same subject matter." Ruling of the Court, at p. 10.

2 Third, as for presenting argument in support of the adversity  
3 of uncertainty element in RCW 34.05.240(1)(d), Stuth and Aqua Test  
4 in fact included a statement of fact in their Petition for Declara-  
5 tory Order regarding such element. See Petition at p. 8, § 3.8.<sup>2</sup>  
6 Moreover, as part of the public record the WUTC contacted and spe-  
7 cifically invited numerous individuals, entities, and government  
8 agencies to consider the pending Petition and to offer commentary,  
9 pro or con, thereon. The public interests were fully represented  
10 in this proceeding by Simon ffitch, AAG.<sup>3</sup> It is most notable that  
11 no adverse comments from the public or interested entities that may  
12 come within the regulatory ambit of WUTC were received. Every let-  
13 ter or comment received as part of the factual record from outside

14 \_\_\_\_\_  
15 <sup>2</sup> This issue was also raised and addressed in Petitioners' Trial Brief, at  
16 p. 13 fn.19. To somehow contend that the adversity element was not presented to  
17 and before Judge Hicks simply does not do justice to the depth and breadth of all  
18 issues and arguments raised by the parties and carefully considered by the Court.  
19 Just because the specific citation to the statute might not have been included  
20 does not mean that the issue itself was not adequately included and considered.  
21 Furthermore, nowhere in either RCW 34.05.240 or WAC 480-07-930 is there imposed  
22 on the Petitioners the duty or obligation to present details regarding funding  
23 or the other matters that seem to startle Staff. See Staff Reply, at p. 4. And  
24 this is most certainly not "the unprecedented" regulation of owners, operators  
and managers of on-site sewage systems as a public utility/public service company  
in the absence of specific statutory inclusion by name -- consider as did Judge  
Hicks the Tennessee Regulatory Authority program. Also consider the WUTC's pre-  
decessor agencies' undertaking regulation of motor busses and garbage haulers  
under their generic common and contract carrier authority. Staff objections of  
this type were considered and rejected by Judge Hicks.

<sup>3</sup> Likely because the public would not be adversely affected by a favorable  
determination in this proceeding, and rather would be benefitted greatly, the  
public by and through Mr. ffitch decided only to watch from the sidelines.

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1 WUTC Staff were very supportive of the pending Petition and encour-  
2 aged WUTC to make the requested determination. The record clearly  
3 demonstrates that WUTC regulation of such persons or corporations  
4 as public service companies is not only in the public interest, but  
5 that the interest of the public is best served by so doing.

6 Finally, Staff continues to erroneously espouse a ground for  
7 denial that the WUTC lacks "subject matter jurisdiction" in this  
8 proceeding. WUTC Staff is, however, very much mistaken as a matter  
9 of law.

10 A tribunal lacks subject matter jurisdiction when it  
11 attempts to decide a type of controversy over which it  
12 has no authority to adjudicate. The focus must be on the  
13 words "type of controversy." . . . A lack of subject mat-  
14 ter jurisdiction implies that an agency has no authority  
15 to decide the claim at all, let alone order a particular  
16 kind of relief.

17 Marley v. Department of Labor and Industries, 125 Wn.2d 533, 539,  
18 886 P.2d 189 (1994). Clearly, the WUTC has the authority to enter  
19 a declaratory order to make the determination as a question of fact  
20 whether or not any person or corporation is a public service compa-  
21 ny. Judge Hicks expressly ruled as such and ordered the WUTC "to  
22 hold the statutory mandated fact finding hearing." Ruling of the  
23 Court, at p. 12.

24 But I do rule that the petitioners in this case have  
set out a prima facie case that requires the Commission  
to hold a fact finding hearing and make a determination  
as to whether or not this kind of company can be a public  
utility.

Ruling of the Court, at pp. 12 - 13.

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1            Respectfully, it is time for the Chief ALJ to make the deter-  
2 mination as a question of fact based on the body of public service  
3 laws of the State of Washington that a person or corporation own-  
4 ing, operating and managing large on-site sewage systems for hire  
5 for the public on demand wherever located is a public service com-  
6 pany subject to WUTC regulation.

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DATED this 28<sup>th</sup> day of February, 2006.

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

  
Rhys A. Sterling, WSPA #13846  
Attorney for Petitioners

CERTIFICATION OF SERVICE

I certify under penalty of perjury  
under the laws of the State of Washington  
that on the 28<sup>th</sup> day of February  
~~2006~~, I mailed a copy of this document  
to all parties.

DATED at 2006, Wash. Washington  
