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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3	In the Matter of the Petition)	
	of)	Docket No. A-050528
4	WILLIAM L. STUTH and AQUA)	Volume III
	TEST, INC.,)	Pages 51 - 115
5	For a Declaratory Order.)	

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7 A prehearing conference in the above matter

8 was held on April 17, 2006, at 1:35 p.m., at 1300 South

9 Evergreen Park Drive Southwest, Olympia, Washington,

10 before Administrative Law Judge C. ROBERT WALLIS.

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12 The parties were present as follows:

13 WASHINGTON UTILITIES AND TRANSPORTATION

14 COMMISSION, by JONATHAN THOMPSON, Assistant Attorney

15 General, 1400 South Evergreen Park Drive Southwest,
Post Office Box 40128, Olympia, Washington 98504;
telephone, (360) 664-1225.

16 AQUA TEST, INC., by RHYS A. STERLING,

17 Attorney at Law, Post Office Box 215, Hobart,
Washington 98025-0218; telephone, (425) 391-6650.

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24 Kathryn T. Wilson, CCR

25 Court Reporter

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

2 JUDGE WALLIS: This is a prehearing
3 conference in the matter of Commission Docket A-050528,
4 which involves a petition of William L. Stuth and Aqua
5 Test, Inc., for a declaratory order designating a
6 public service company.

7 Let's have appearances at this time, please.
8 If you have previously made an appearance on the
9 record, your name and the name of your clients will do.
10 If you have not made an appearance, we would like all
11 the contact information.

12 MR. STERLING: Rhys Sterling appearing for
13 Bill Stuth and Aqua Test.

14 MR. THOMPSON: I'm Jonathan Thompson
15 appearing for Commission staff, and I did file a
16 written notice of appearance.

17 JUDGE WALLIS: Would you give us that contact
18 information so it's on the transcript, please?

19 MR. THOMPSON: Sure. It's PO Box 40128, and
20 it's 1400 South Evergreen Park Drive Southwest,
21 Olympia, 98504, and my telephone number is (360)
22 664-1225, and the fax is 586-5522, and my e-mail
23 address is jonat@atg.wa.gov, or jthomps@wutc.wa.gov.

24 JUDGE WALLIS: Thank you. The first area
25 that I would like the parties to address in this docket

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1 is to define its goals, and in conjunction with that,
2 talk about what is the goal of this proceeding, what
3 kind of process are we engaged in, and what exactly is
4 it that the Petition seeks, and in trying to answer
5 that question, what does the Petitioner seek. What do
6 the Petitioners want from this.

7 I summarize it this way, and I'm offering
8 this with a question mark at the end so Mr. Sterling
9 can comment. I have read the petition to say that the
10 Petitioners seek a declaratory order that certain
11 activities are subject to regulation. Mr. Sterling, is
12 that essentially an accurate, if not totally complete,
13 statement?

14 MR. STERLING: Not so much totally complete,
15 but what we are trying to do is, I think, very simple
16 and straightforward, and that is whether the person or
17 corporation owning, operating, and managing a large
18 on-site sewage system constitutes a public service
19 company subject to UTC jurisdiction and regulation.
20 That's the question that's before the Commission.
21 Basically, that's what our petition for declaratory
22 order requests is a finding as a determination as a
23 question of fact as to the veracity of the truth of
24 that particular premise.

25 JUDGE WALLIS: As I read the Petition and the

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1 statement of facts, it was not clear to me, and this is
2 probably the principle reason we are here today,
3 exactly what Petitioners are asking, because in places,
4 the Petitioner refers to possible ownership. It refers
5 to backup managers. It refers to fees and assessments
6 for routine operation and maintenance. It refers to
7 manages and operates. It refers to a private company
8 providing operation and management services to the
9 public.

10 It talks about utility services, including
11 but not limited to ownership, operation, maintenance,
12 repair, and replacement and so on as we go through the
13 Petition and the brief and the materials that have been
14 presented. So I would like us to bear down on that and
15 find out exactly what activities and in what context
16 the Petitioners seek regulation.

17 MR. STERLING: I didn't realize I had so much
18 packed into a single petition, but basically what we
19 are asking for is Aqua Test, Inc., will be a corporate
20 entity that owns, operates, and manages large on-site
21 sewage systems.

22 The question that we have presented to the
23 Commission for determination as a question of fact is
24 whether or not Aqua Test, Inc., so we are going to
25 narrow our focus down to Aqua Test, Inc., is going to

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1 be the owner, operator, manager of on-site sewage
2 systems in Washington for the public on demand for
3 hire, and the question is whether or not that corporate
4 entity is a public service company subject to UTC
5 jurisdiction.

6 JUDGE WALLIS: Is it Aqua Test's goal to buy
7 a large on-site sewage system serving any customer or
8 customers, and through that ownership to become
9 regulated? Is it Aqua Test's goal to remain
10 essentially as it is now operating providing these
11 services to a broad range of clientele and perhaps
12 owning and perhaps not, public loss operations, and to
13 be declared a public service company in the operation
14 and management of someone else's large on-site sewage
15 system?

16 MR. STERLING: Well, again, I want to be very
17 straightforward, very candid here, and I hope that we
18 are not building into something that somehow or other
19 will provide some kind of convenient excuse for
20 nonregulation, but the object of the goal is for Aqua
21 Test, Inc., to own by bill of sale or purchase or
22 whatever large on-site sewage systems that are right
23 now more likely than not owned by homeowners
24 associations in which the operation and management
25 services are contracted out to private entity, and that

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1 is further backed up by a public entity, municipal
2 corporation, public water sewer district, small town or
3 whatever for kind of a third-party guarantor type of
4 relationship so that if the private entity should
5 experience problems in the future, go out of business
6 or whatever, that there would be some kind of
7 guaranteed backup.

8 Our intent is, I think, very simple and
9 straightforward, and if I'm missing something, please
10 let us know, because we need to have you and everybody
11 here on the same page.

12 JUDGE WALLIS: This is why we are going
13 through this right now.

14 MR. STERLING: And I think that's great, but
15 basically what we are looking for is for Aqua Test,
16 Inc., to own, operate, and manage these systems
17 statewide wherever they are located, and this is
18 existing systems that are now more likely than not
19 owned by homeowners associations or some other private
20 developer. We would then own these systems either by
21 purchase or by bill of sale and operate and manage
22 these as well as a public service.

23 We feel that ownership is an essential
24 element of this service that we are providing. The
25 facilities, and I know this is one of the questions you

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1 asked us in your order, Your Honor, is to kind of
2 define what are we talking about here. What are these
3 large on-site systems? And we intend to put on a
4 presentation for Your Honor at the hearing that will
5 pictorially and photographically and with great
6 clarity, I hope, explain exactly what it is we are
7 proposing here and what these systems are and look
8 like. They can be mechanical, biological. They can be
9 septic systems. Typically, they are land disposal
10 types of operations.

11 These large on-site systems are now under the
12 jurisdiction and regulation of the state Department of
13 Health. What the state Department of Health does as
14 part of their jurisdiction is they have promulgated
15 rules and regulations regarding the design, the
16 performance, and in other words, where you can put
17 these things, how big do they have to be, how many
18 units for how many people, and typically what kind of
19 performance we are looking at so we don't injure or
20 harm the environment; in other words, that we don't
21 have surfacing sewage affecting public health or
22 inadequately treated affluent or the waste water that
23 percolates down and adversely affects groundwater or
24 service water.

25 So that is their expertise. We are not

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1 asking the UTC to redesign the on-site sewage systems
2 for large on-site systems. We are not asking UTC to
3 regulate large on-site sewage systems. It's the person
4 or corporation, the business enterprise that is to be
5 regulated in the public interest. That's what we are
6 looking at.

7 JUDGE WALLIS: But it is the business
8 operations of the owner of the large on-site sewage
9 system that is providing service to the public; is that
10 correct?

11 MR. STERLING: As we feel is a public service
12 company, and that is the question, is that type of
13 operating entity, the owner, operator, manager of these
14 type of systems where the public is served, and service
15 being broadly defined under Title 80 -- we are looking
16 basically at a statute that says, number one, service
17 is broadly defined, and number two, it's a question of
18 fact, and you know as well as I do that we went before
19 Judge Hicks and he's remanded, so that's why we are
20 here, to have a fact-finding hearing as to whether or
21 not this type of business enterprise constitutes a
22 public service company.

23 JUDGE WALLIS: I think you've answered my
24 question but I'm not sure. Maybe it would help for the
25 time being if you focus on what I'm asking and respond

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1 to that and then see where we get. Is it Aqua Test's
2 proposal to provide management as a public service
3 company for an on-site sewage system that is owned by
4 someone else?

5 MR. STERLING: No.

6 JUDGE WALLIS: Is it Aqua Test's proposal to
7 provide ownership and through that operation and
8 management of an on-site sewage system that serves only
9 a single customer?

10 MR. STERLING: The answer is no. They are
11 serving the public wherever they are located.

12 JUDGE WALLIS: So you do not propose to
13 operate a sewage system except for one that falls
14 within the DOH requirement for a public entity backup?

15 MR. STERLING: You know, again, I kind of
16 wonder where all this is leading. What we are
17 proposing, these large on-site sewage systems right now
18 under currently -- require public entity backup, that's
19 correct.

20 JUDGE WALLIS: Some of them, not all.

21 MR. STERLING: Some of them are owned by
22 government entities who are ill-prepared and
23 ill-qualified to actually operate and manage. State
24 parks is a classic example. We would very much like to
25 have the status to be able to contract them with the

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1 state parks, and if they see --

2 Again, we are getting into an area where --
3 the general rule of thumb would be we would own,
4 operate, and manage because we have the facilities
5 then. We have the expertise. We have the hardware,
6 and we have the service of management and operation of
7 the hardware that we own for the public. What we are
8 looking at is as a public service company, and again, I
9 don't know. I must be missing something. Maybe I'm
10 dense, but to me, it's pretty doggone straightforward
11 as to whether or not this type of person or corporation
12 providing the service is a public service company, and
13 it's a question of fact.

14 I guess what I'm thinking to myself is is
15 there something about -- I'll be very blunt with you.
16 I'm not a great guru on public service companies. When
17 I took a look at the law and what we wanted to try to
18 do, I thought it was pretty doggone straightforward.
19 This is very simple. Here is the question. This is
20 the issue. It's a declaratory order type of petition,
21 determines a question of fact, and the answer is --

22 JUDGE WALLIS: I'm not in any way challenging
23 your litigation decisions or your approach, but what
24 I'm trying to do is define what you are asking for
25 because the rules may apply differently in different

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1 situations; that is, as we go through the hearing, I
2 would like you to present evidence in support of your
3 petition, whatever it is, and exclude evidence that is
4 not relevant to your petition.

5 So one of the reasons that I have
6 distinguished between service to the large on-site
7 sewage systems that require a public entity backup is
8 because you've mentioned that. You've also mentioned
9 ownership of the large on-site sewage system as a
10 critical aspect of that, and now, I'm trying to
11 determine what your proposal is to be filled out
12 through factual statements, oral or written, as we
13 proceed regarding whether your client proposes to,
14 number one, provide this service to large on-site
15 sewage systems that it does not own, and number two,
16 whether it will provide this service and proposes to do
17 it as a public service company for large on-site sewage
18 systems that serve only a single or limited number of
19 customers.

20 MR. STERLING: I guess where I'm coming from,
21 Your Honor, and believe me when I say this -- this is
22 great, seriously, because we definitely need to be on
23 the same page, because when I looked at the statute, I
24 looked at the service under public service company.
25 The statute says clearly that service is broadly

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1 construed, and it's the broadest application of the
2 term, and I'm kind of wondering, are we painting
3 ourselves into a corner here or what?

4 The question that we presented to the
5 Commission is using the broadest possible conception of
6 service, but what we want to do is this: Aqua Test,
7 Inc., own, operate, and manage large on-site systems
8 wherever they located in the State of Washington for
9 the public served by those systems for hire. It's a
10 for-profit. The people who are being served are not
11 part of the board. They don't have a say in the
12 management of the company, and I take a look at that as
13 being, okay, that is the broadest application allowed
14 by the statute, and I, again, don't want to paint
15 ourselves into a corner saying, well, we are going to
16 do this, and I hate like heck to go around and around
17 and pussy foot around things.

18 JUDGE WALLIS: Let me see if I can summarize.
19 It is your position at this point that yes, your client
20 does propose to provide services without ownership and
21 without regard to whether the large on-site sewage
22 system requires a public entity back up; is that not
23 correct?

24 MR. STERLING: Well, here we go again,
25 because in informal discussions -- I don't know where

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1 that leads us. The intent is to own, but basically as
2 a public service company, we can't say no. So if
3 someone who has a large on-site system somewhere in the
4 states wants us as a public service company to offer
5 our services, and for whatever reason, they don't want
6 to give us a bill of sale or own it, which we think is
7 critically important that we own the facilities that we
8 are also managing so that the element of control is
9 there, that we are not going to be prohibited or
10 precluded from doing that, but on the other hand --

11 JUDGE WALLIS: Is it your proposal that that
12 activity would be regulated?

13 MR. STERLING: As a public service company,
14 yes, because we are providing service to the public.

15 JUDGE WALLIS: Not a trick question. That's
16 all I was asking.

17 MR. STERLING: Can you see where I'm coming
18 from though, Your Honor? At some point in time, and
19 I'm being very honest with you, I feel that this whole
20 process has been hijacked, and we've gone down some
21 side roads that basically we've lost our focus, and
22 this is great. I really do appreciate it, and I hope
23 you understand where I'm coming from too, because we
24 want to provide you the information you need.

25 Originally, we did this on our cross-motions,

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1 and that did not get us to where we thought we were
2 going to get, so I feel that somehow or other, we've
3 let you down. We haven't provided you with certain
4 factual information, because what this whole thing is
5 is a determination as a question of fact. Are we or
6 aren't we a public service company, and I think that's
7 very focused.

8 I've had to very candidly give you a Sherwin
9 Williams approach, because I'm not sure, and I would
10 love to pare this down. I would like to get back on
11 track and say, here is our petition, and the petition
12 asks a very simple question, are we or aren't we, and
13 how do we get back on that track instead of opening up
14 all these tangential issues? I really don't think --

15 JUDGE WALLIS: One of the purposes I
16 mentioned earlier for today is to define exactly what
17 your client proposes to do so we can, in fact, make a
18 factual determination or determinations as to the
19 activity or each of the activities that it proposes to
20 do, so in my view, we are moving forward with some
21 precision exactly what we are setting out to
22 accomplish.

23 MR. STERLING: But on the other hand though,
24 the precision that we are defining the issue, I think
25 we still might be on different levels or different

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1 planes because I read in the statute as service is
2 broadly interpreted, so basically, we are swerving the
3 public --

4 JUDGE WALLIS: We have not yet reached the
5 point where we are applying the statute. We are merely
6 trying to find out what your client proposes to do in
7 the Petition.

8 MR. STERLING: So if our position is, for
9 example, we want to keep it as broad as possible,
10 service read as broadly as possible where we would be
11 offering our services whether we own or not, whether
12 it's one facility or a myriad of facilities across the
13 state, that we still feel that under the statute, we
14 qualify as a public service company.

15 JUDGE WALLIS: And you are entirely welcome
16 to support that position and argue it. My question is
17 aimed only at defining what the scope of the proceeding
18 is and what the questions of fact are that need to be
19 addressed. Does staff counsel wish to weigh in on this
20 discussion?

21 MR. THOMPSON: Well, it had struck me when
22 looking at the issues list that it's possible to go
23 down a number of layers. It depends on how far the
24 Commission wants to get into the policy issues, how
25 complex the hearing would be, I think. So far, we've

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1 been sort of at the tip of the iceberg talking about
2 the -- it's been Staff's argument that in the summary
3 judgment motions that well, the Commission lacks
4 authority to regulate this particular industry, even
5 aside the issues of ownership or other sorts of things,
6 and apparently, the idea is to go beyond that issue and
7 look further.

8 One layer below that would be to say, okay,
9 let's just assume that there is authority, that the
10 Commission has authority over this industry, which we
11 don't think is correct, but assuming it does, then do
12 we look into issues of whether one of the entities we
13 are talking about here is one that actually is the
14 owner investor, or is it simply a management entity,
15 and I think we would argue there that if it's just a
16 management entity, then the Commission doesn't
17 typically regulate the hired manager. It regulates the
18 owner, the investor.

19 JUDGE WALLIS: Mr. Thompson, I'm not sure
20 that we are on the same wave length here because my
21 goal in initiating this small portion of our task for
22 today was merely to define what the Petition is
23 seeking.

24 MR. THOMPSON: Okay.

25 JUDGE WALLIS: As I noted at the outset, as I

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1 looked through the Petition and other documents, the
2 briefs and statement, it was not clear to me exactly
3 what the Company was proposing or the Petitioners were
4 proposing to accomplish.

5 MR. THOMPSON: Okay, very well. I thought it
6 might be helpful to have some perspective on where
7 Staff would be coming from because I do think it plays
8 into what the issues are.

9 JUDGE WALLIS: I believe that we will be
10 addressing that question later.

11 MR. THOMPSON: Very good.

12 JUDGE WALLIS: Mr. Sterling, have you
13 concluded your comments? I certainly now have, I
14 believe, what I was looking for and that is a
15 definition of what the Petitioners are seeking.

16 MR. STERLING: Would you mind very much if I
17 asked you what that definition is so that -- again, and
18 this is so critically important because I think where
19 we are coming from is to let's everybody get on the
20 same page. Let's define exactly what we are talking
21 about, what we are asking for and how to go about doing
22 the job, because we are here under order of the
23 Thurston County Superior Court to do a fact-finding
24 hearing. We want to do that and the state wants to do
25 it. You are definitely stuck with it, and I apologize

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1 for that. I'm not being argumentative, but I have a
2 sinking gut feeling that if we narrow the focus, we are
3 doing something that is improper. I read it as
4 "service" as broad. I don't care if it's mandatory --

5 JUDGE WALLIS: I have no problem with your
6 doing that. That is your responsibility, Mr. Sterling,
7 on behalf of your client to define what it is you are
8 asking for, and what I hear you saying is your client
9 proposes to own, operate, and manage; that is, to
10 operate and manage properties that it owns, and also to
11 provide management and operation for entities that it
12 does not own, and that it proposes to do this
13 irrespective of whether the requirement in the DOH
14 regulations applies, that there be a public entity
15 backup. Is that an incorrect statement?

16 MR. STERLING: By George, I think you've got
17 it. Let's move on.

18 JUDGE WALLIS: In the three parts of the
19 truncated statement that I made earlier, a second part
20 is that you ask the Commission to produce an order
21 declaring that your company is subject to regulation,
22 and I want to hear from you when you hear the term
23 "subject to regulation," what do you mean by that? Do
24 you mean that the Commission must regulate the
25 activity, that the Commission may regulate if it

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1 chooses to, or that the Commission should regulate it?

2 MR. STERLING: What we are asking for is as a
3 public service company subject to UTC regulation, i.e.,
4 we would come to UTC for authority, licensure, whatever
5 the proper mechanism is for UTC to assert its
6 jurisdiction over us, over our tariffs -- in other
7 words, what we charge, how we go about charging our
8 customers, our business plan, to make sure that we are
9 financially stable, fiscally responsible, and that we
10 are going to last as a public utility. Basically, we
11 are seeking regulation as a public utility. When we
12 say "subject to," we say you will regulate us as a
13 public service company.

14 JUDGE WALLIS: So if you fail to come in and
15 seek authority to operate and the Commission determines
16 that you are, in fact, conducting these operations,
17 would it then be within the Commission's area of
18 responsibility to require you to register, or whatever
19 term is applied, and to assess penalties if you fail to
20 do so?

21 MR. STERLING: Using that as kind of a
22 background, if we are, in fact, or some other person or
23 company or corporation is providing this service and
24 qualifies as a public service company and they for
25 whatever reason are not subjecting themselves to

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1 licensure, regulation or whatever, then yes, they are
2 subject to regulation penalties or whatever by the UTC.

3 JUDGE WALLIS: Mr. Thompson? I'm asking if
4 you have anything to say at this point.

5 MR. THOMPSON: No, I don't know.

6 JUDGE WALLIS: The third area has to do with
7 the nature of the process. My approach to this, going
8 back to RCW 34.05.240, which authorizes the Commission
9 to conduct a proceeding in a petition for declaratory
10 order, and reading the order of remand in which the
11 Court directs us to have a fact-finding hearing, is
12 that this is not an adjudicative proceeding except to
13 the extent that the Commission determines that it is
14 and orders, again, under 34.05.240 that the proceeding
15 be subject to the adjudicative sections of the APA.

16 Now, I have invoked at least one of those
17 sections in pointing out and directing that whatever
18 order I enter in this docket would be reviewed by the
19 Commission under the review section of the adjudicative
20 statutes, but the other provisions of the APA relating
21 to adjudications have not been invoked.

22 Now, I want a reality check from the parties
23 as to whether you agree with that approach or whether
24 you believe that this is or should be an adjudication
25 and that we should invoke the full provisions of the

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1 APA or selected provisions.

2 MR. STERLING: Well, if we can do it as more
3 of an informal process. The whole idea here is to get
4 you the information you need. The other thing is that
5 can we continue on in the spirit of cooperation between
6 Staff and us as far as a flow of information, i.e.,
7 discovery or whatever we call it in UTC jargon. If we
8 can do that, then I really don't want to keep it
9 structured to the point where you have to dot your i's
10 and cross your t's.

11 And I think Judge Hicks kind of impressed
12 this upon us as well, is that the whole idea is to get
13 you the information you need to make as a
14 determinations of a finding of fact are we or aren't
15 we, and whatever the best way to do that, the most
16 efficient, cost-effective way to do that I believe is
17 -- we have no problem with that. Unless I'm missing
18 something, and I don't think I am, but tell me if I'm
19 off base.

20 JUDGE WALLIS: Mr. Thompson?

21 MR. THOMPSON: I'm not entirely sure what
22 sort of proceeding we would have. I don't know if you
23 are suggesting that maybe we just go on a written
24 record without cross-examination or something of that
25 nature. I don't know. To be honest, I'm not sure that

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1 Staff would have a position as to the best way to
2 proceed.

3 JUDGE WALLIS: There are some consequences in
4 that the discovery provisions are in the adjudicative
5 section, and whether Staff does plan to provide access
6 to information might affect whether Mr. Sterling would
7 want at least that provision of the adjudicative
8 section of the APA to be invoked.

9 MR. THOMPSON: Well, it would help me to know
10 who would constitute staff under that, because judging
11 from Mr. Sterling's last submission, it seems that he
12 has an interest in discussion or analysis that occurred
13 at the level of Dave Danner and Chris Rose, and
14 typically, I guess I would not consider either of those
15 people to be part of the advocacy staff, and it would
16 help me to know how the Commission wants to draw an
17 ex parte wall, if at all, in that regard.

18 Ordinarily, there is not discovery of people
19 that are part of the judge's advisory staff, I think,
20 and that comes from, not to get into the administrative
21 law stuff too much, but I think it's the Morgan cases
22 that talk about not probing the decision-making, the
23 sort of decision-makers thinking. In other words, you
24 wouldn't ordinarily give the discovery request to the
25 judge.

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1 So anyway, that seems that needs to be
2 decided before I would know how to deal with invoking
3 the discovery rule.

4 MR. STERLING: Again, I think we can work
5 through that. I think it was after the first
6 prehearing conference we had kind of an informal
7 discovery rule invoked, and we had a request for public
8 records, and as part of the production of documents, we
9 got some information and indicated these certain
10 individuals had been involved in some correspondence
11 regarding the subject matter of this particular
12 proceeding, and I think that's very interesting, and we
13 got the information, and basically, all I'm trying to
14 find out now is, again, where is Staff coming from as a
15 factual matter?

16 They've been arguing law. As Your Honor
17 knows full well, we've been arguing the facts. They've
18 been arguing the law. What I've been trying to find
19 out now, and we can work around this any way we can. I
20 don't want to break down any walls, but basically,
21 where is the Commission coming from as far as their
22 facts, their evidence, in support of their position?

23 I've heard the law and the legal arguments,
24 but I haven't seen the facts, and now we are getting
25 into fact finding. I don't want to be blindsided. I

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1 don't want to come to a hearing not knowing where these
2 good folks are coming from. Do I pursue the request
3 for public records type of approach, the informal
4 discovery approach? I'm open.

5 JUDGE WALLIS: Let me see on this particular
6 question if we can get right to the crux of it. Are
7 you contending, Mr. Thompson, that neither Mr. Rose nor
8 Mr. Danner were involved in any way in the formulation
9 of the staff position in this docket?

10 MR. THOMPSON: There really hasn't been much
11 of a Staff position in the docket. It's being purely a
12 legal argument, at least at the Staff level, as far as
13 I know. I haven't been aware of any discussions that
14 might have gone on above that level save for Mr. Danner
15 or Mr. Rose.

16 JUDGE WALLIS: I don't want to put words in
17 anyone's mouth, but has staff Staff consulted in any
18 way with Mr. Rose or Mr. Danner about the subject of
19 this docket?

20 MR. THOMPSON: I guess Mr. Eckhardt just told
21 me they had had a meeting on the subject. So it seems
22 to me if we go with a more formal adjudicative
23 approach, there is a possibility of putting an ex parte
24 wall between Mr. Rose and Mr. Danner and yourself and
25 the commissioners and dealing with it that way or just

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1 disclosing any ex parte contact that may have occurred
2 and proceeding in the normal fashion.

3 JUDGE WALLIS: Very well.

4 MR. THOMPSON: By the normal fashion, I mean
5 with Mr. Danner and Mr. Rose on the commissioners' side
6 of the ex parte wall.

7 MR. STERLING: Would it help for them to give
8 you the information, take a look at it in camera and
9 make a determination on that basis, and we will just go
10 with whatever your good judgment gives us?

11 JUDGE WALLIS: One of the questions that I
12 would have is whether the discussions bear on an issue
13 in the proceeding. I would like to take this under
14 advisement and give people a last opportunity to offer
15 comments and then move on.

16 MR. STERLING: Again, this is a fact-finding
17 hearing, and anyone who has, again, relevant
18 information and evidence, we are entitled. I don't see
19 any walls being built. I've taken a look at the
20 organization charts, and I don't exactly see where this
21 is all coming from. I know we did a public records
22 request. I know we had certain information disclosed
23 to us, and I know the names of the individual people on
24 those distribution lists, and they are the people we
25 have asked for further information.

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1 I think that as a fact-finding tribunal, I
2 think that basically, we need to find out what the
3 facts are, and I don't necessarily want to invoke
4 anything too draconian. I don't want to get into a
5 deposition mode. I don't want to get my litigator's
6 cap on if I don't have to. I think we've done very
7 well in the past with kind of an exchange of
8 information. It's been very helpful to us to meet
9 Mr. Eckhardt, and it's appreciated.

10 I also want to let Your Honor know that the
11 information we have from Staff as far as this material,
12 and this stems from the Puget Sound Action team, Terry
13 Hall and Dave Danner and on up the chain, and again, we
14 are at a disadvantage, I think, Your Honor, and I think
15 we are subject to some harm here in this proceeding if
16 we aren't allowed to do some probing, because all we've
17 seen so far is this legal argument. We haven't seen
18 their cards yet. We've kind of seen what the ultimate
19 hand that is played is basically, we don't have
20 jurisdiction, and are we past that, and now we are into
21 the fact-finding mode?

22 If we are past the we don't have legal
23 jurisdiction mode and we are into the fact-finding
24 hearing, I believe we need to do a little more probing,
25 and even if it's to you and then take a look if it

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1 matches, if it fits, if it's appropriate, then I'll
2 trust your judgment as to whether or not the materials
3 can be relayed onto us.

4 We need to find out where the Commission
5 staff is coming from as far as the facts. What
6 supporting evidence do they have that supports their
7 position to oppose our petition for declaratory order,
8 and I think we are entitled to that, and I think it's
9 not a fair hearing if we don't get that inkling, and
10 then all of a sudden, we are blindsided by somebody on
11 the stand saying something we are not prepared for. So
12 that's all I'm trying to do here is --

13 JUDGE WALLIS: And one of my goals for this
14 afternoon is to define what is and is not supportive
15 and to get a handle on what people are going to be
16 asked to say and would say on the stand. How about if
17 we defer any further discussion of this issue until
18 after we've talked about the proposed witnesses and
19 what they would say. Would that be all right,
20 Mr. Sterling?

21 MR. STERLING: That would be fine.

22 JUDGE WALLIS: I am prepared now to move onto
23 the list of possible witnesses --

24 MR. STERLING: Can we do one thing that might
25 take a shortcut through this whole thing?

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1 JUDGE WALLIS: Certainly.

2 MR. STERLING: I'll ask Mr. Thompson and
3 staff also, but we've gotten all kinds of letters that
4 have been entered into the record. Are those still
5 good, number one. Will they be admissible without
6 contest, because a lot of these witnesses have written
7 those letters of support in the past would be here for
8 the principle purpose of confirming their letter in
9 person, and I hope we don't have to do that, but if we
10 did, that's why they are here, very honestly, and to
11 update anything further that they may wish to say, but
12 a lot of that prior documentary evidence would be
13 admitted in this fact-finding hearing --

14 Is this simply a continuation of what we've
15 been doing, or is this a whole new process that we have
16 to start from scratch? I think that that's where I was
17 coming from with my laundry list of witnesses. If we
18 have to start from scratch, then I need all these
19 people in here because their letters may not be
20 admitted in this process. I need to know these things,
21 what those basic ground rules are, and if that's the
22 case, this could get pared down very quickly.

23 JUDGE WALLIS: Mr. Thompson, would it be your
24 intention to object to any of the documents that have
25 been presented earlier?

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1 MR. THOMPSON: Well, I think I might be
2 inclined to just from the standpoint that some of them
3 in my view are rather -- I would like to have the
4 opportunity to cross-examine some of the people on what
5 their assumptions were going into a recommendation that
6 the UTC should regulate large on-site sewage systems,
7 because it's not clear to me in many cases what sort of
8 hypothetical was presented to them or what, for
9 example, what policy standpoint they are coming from.

10 I think it's a good idea to bring those
11 issues out further, and I would feel a little
12 uncomfortable with just having a letter from an
13 academic, for example, saying this is a good idea, but
14 to my mind, we haven't really developed that person's
15 thinking or looked at the basis for their opinion.

16 JUDGE WALLIS: Let me ask you, Mr. Thompson,
17 if the question is whether the Commission is legally
18 obligated to exercise jurisdiction, why would it matter
19 whether people think it is a good idea or not?

20 MR. THOMPSON: As I was talking about
21 earlier, probably out of turn, but I guess I see the
22 issues -- we have to fall back apparently now from the
23 position that just as a matter of law, the Commission
24 lacks the authority to regulate this industry, so
25 falling back --

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1 JUDGE WALLIS: I'm certainly not dictating
2 what the Commission's legal position is or that of the
3 Commission staff or what the Staff must present.

4 MR. THOMPSON: Right, but I just think the
5 way I'm approaching this is to put forth our first
6 argument, but then that failing, this would be our
7 second and third argument, depending on if the
8 Commission ultimately determines that it disagrees with
9 Staff's legal analysis.

10 I guess I saw the issues list and I thought,
11 well, I guess we are getting into some of the policy
12 questions of, setting aside the jurisdiction issues, is
13 it a good idea for the Commission to regulate waste
14 water systems, and maybe I misinterpreted. (Discussion
15 off the record.)

16 Well, Mr. Eckhardt was suggesting that if we
17 are solely debating the legal issue, then the letters
18 that just say simply it would be a good idea, perhaps
19 with a little more elaboration, it would be a good idea
20 for the UTC to regulate waste water systems might not
21 be relevant or helpful to the legal question, and if we
22 are dropping back to the policy question, I think they
23 are probably not helpful if they are not detailed
24 enough.

25 MR. STERLING: Not to pick on Mr. Thompson,

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1 but can he get one thing clear? We are not asking the
2 UTC to regulate waste water systems. That is the
3 Department of Health. It's the person or corporation
4 operating or managing large on-site systems, that's a
5 public service company. That's the question before
6 Your Honor.

7 JUDGE WALLIS: Yes, we understand. Let me
8 see if we are on the same wave length. It is not your
9 position that the Commission should regulate the health
10 aspects of these businesses.

11 MR. STERLING: Correct.

12 JUDGE WALLIS: And never has been, and I
13 don't hear anybody contending that it is. However, the
14 business operations are those for which you seek
15 regulation.

16 MR. STERLING: Correct. It's the person or
17 company doing this as a public service company, as a
18 utility. What I would suggest also since we are here
19 kind of offering things is I think both sides want
20 Richard Benson from the Department of Health. He's
21 kind of a critical player in this whole thing. I know
22 where Staff might have different thoughts, but
23 Mr. Benson is the program lead for the Department of
24 Health loss program, and basically, I think Your Honor
25 wants to hear from him.

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1 Matt Lee and Bill Stuth, and the idea here is
2 we would have a presentation kind of giving Your Honor
3 this is what we are talking about. This is who we are.
4 This is what these systems look like. This is what we
5 propose to do and how we propose to go about it,
6 basically an educational, a helpful process, because
7 some of the fact questions or issues that you raised in
8 your order --

9 JUDGE WALLIS: I believe that would be
10 helpful. Now, I do have a question, and that is
11 whether Mr. Lee's comments would duplicate any of
12 Mr. Stuth's.

13 MR. STERLING: We would make sure to the best
14 we could they would not. I think Mr. Stuth -- he's an
15 individual petitioner but he's also president of Aqua
16 Test, and I think Your Honor has some questions on how
17 is this whole thing going to work financially. If
18 that's a still germane or relevant question to ask and
19 have answered, these are the individuals that would be
20 able to do that.

21 Honestly, we are open. If the letters are
22 okay from these other individuals or we can simply get
23 letter testimony from the other individuals that we've
24 identified as possible fact witnesses. And maybe what
25 we can do is have this as kind of an informal discovery

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1 process as well. Maybe the Commission staff wants to
2 ask questions of some of these individuals in advance.
3 That's fine.

4 I think it's fair for both sides and for Your
5 Honor, because as Your Honor indicated, our question
6 could not be resolved on cross-motions for summary
7 determination. As painful as this is for everybody, we
8 understand that, and now we have to be able to present
9 to you whatever you need to make that determination as
10 a question of fact.

11 JUDGE WALLIS: My goal is to prepare a record
12 and an order that will give the judge all the
13 information that he needs to make a decision, and in
14 the event a party chooses to seek an appeal from that,
15 that the record going up would be complete.

16 MR. STERLING: So do you need or do you care,
17 do you mind if some of the testimony is given in
18 statement form, question-and-answer type form?

19 JUDGE WALLIS: My preference would be to keep
20 this at the least formal practical level, and in that
21 event, I would not demand that testimony be given
22 orally. Mr. Thompson indicates he has questions in the
23 spirit of the process. It may be possible to devise a
24 way in which answers to potential questions are
25 obtained either in writing or in some informal way that

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1 could be conveyed to the record that allow the answers
2 to be considered. Mr. Thompson?

3 MR. THOMPSON: Well, I'm a little leery of
4 going the informal route just because people are
5 unclear of what's expected, and if you are the one
6 trying to obtain the information, I think it puts you
7 at something of a disadvantage if you are dissatisfied
8 with what information you are able to obtain. I think
9 it would go both ways, but probably largely, it would
10 be a disadvantage for Staff in that we would be trying
11 to look behind what might be stated in a written
12 statement.

13 Part of this is difficult because it's not
14 clear to me who carries the burden of proof or those
15 sorts of issues, because ordinarily, it's the
16 Commission under the statute that's going after a
17 company to prove that the company should be regulated,
18 and the Staff would be carrying the burden of proof of
19 showing that, yes, this company meets all of the
20 requisites and regulation; whereas here, it's the
21 would-be regulated entity that's the proponents of the
22 finding that it's regulated while Staff is probably
23 inclined to take the opposite view.

24 So I like the fact that your order, Your
25 Honor, spelled out issues, because I think that Aqua

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1 Test should be required to come forward with evidence,
2 and if that's the case, I would feel better about not
3 having cross-examination opportunity. So far, it's
4 very clear that the written evidence, whatever it is,
5 that's submitted by the Company addresses all of those
6 points that were outlined in your order.

7 I guess I'm just thinking out loud here, but
8 if you specify very clearly that the Company needs to
9 address and will not be considered to have submitted a
10 complete package until it does address each of those
11 questions, I think I could probably dispense with the
12 ability to cross-examine or to do discovery requests or
13 what have you formally.

14 JUDGE WALLIS: Mr. Sterling has indicated a
15 willingness to engage in informal discovery. Is that
16 something that could satisfy your interests?

17 MR. THOMPSON: Yes, with the caveat that I
18 would want the Company to be required to specifically
19 answer all of the questions that you posed plus those
20 that we suggested in addition to those that you had
21 posed in your order.

22 JUDGE WALLIS: And you would be able to
23 present those questions to specific witnesses for
24 responses?

25 MR. THOMPSON: What I had thought you were

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1 proposing is the Company would submit like a written
2 summary or written testimony from each of the
3 witnesses.

4 MR. STERLING: We could almost do this on a
5 written interrogatories, basically ask questions
6 answered under oath.

7 MR. THOMPSON: I guess that's sort of like
8 what I'm suggesting, yes.

9 JUDGE WALLIS: All right. With regard to the
10 witnesses that have submitted statements that are part
11 of the statement of fact, I would not propose that it
12 would be necessary to hear any of those witnesses
13 orally, so that includes Mr. Kastens, Mr. Bounds,
14 Mr. Ruben, Mr. Fay, Mr. Goodwin, and I believe that's
15 all; is that correct? We've already indicated that
16 Mr. Stuth, Mr. Lee, and Mr. Benson, even though two of
17 those have, I believe, submitted statements, would
18 appear as witnesses.

19 MR. THOMPSON: Your Honor, I actually would
20 just make a note on Mr. Benson as to Staff's position.
21 We can take that up now or later, if you like.

22 JUDGE WALLIS: Mr. Thompson, what's your
23 issue?

24 MR. THOMPSON: There are two individuals from
25 the Department of Health listed in this list.

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1 Mr. Benson is the lead engineer for the large on-site
2 systems program, and Mr. Lenning, I believe, is the
3 lead engineer for the -- I'm not sure what it's called,
4 but the small systems essentially, and their supervisor
5 is Mr. Avy, and Mr. Avy submitted a letter to the
6 secretary of the Commission --

7 JUDGE WALLIS: Yes. Now I see what you are
8 getting at. I will address the potential need for
9 Mr. Avy at a later point, so perhaps we can defer that.

10 The next listed potential witness is
11 Mr. Pinkney, and he has not submitted a statement. Is
12 there any need for him to appear either orally or in
13 writing?

14 MR. STERLING: He is Mr. Tennessee waste
15 water systems, Your Honor. We made a lot of focus, I
16 think, on both sides, they have kind of centered on the
17 Tennessee experience, and Pinkney has that experience
18 firsthand. They've also branched out in other states
19 as well as a private company being regulated as a
20 public utility.

21 Would it be helpful? We would have to bring
22 him all the way out from Tennessee someplace. He has
23 expressed a willingness to do that. We can also give a
24 statement kind of outlining -- and if the Staff has
25 some questions that they specifically want to post to

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1 Mr. Pinkney, that would be fine. But that's the reason
2 why he is listed is if Your Honor feels that it might
3 be helpful to hear firsthand the Tennessee experience.

4 JUDGE WALLIS: The question I have, if, as we
5 determined earlier, the focus of this proceeding is on
6 whether the public service laws require the Commission
7 to regulate entities as the Petitioners request, what
8 Mr. Pinkney's testimony would add to addressing that
9 question?

10 MR. STERLING: I guess it goes back to some
11 of the -- maybe I'm reading too much into the issue
12 questions you presented to us, but my gut feeling on
13 this whole thing was why? Why are we being asked to
14 regulate as a policy, as a public interest statement?

15 And I don't know whether that's a correct
16 interpretation on my part or not, but this gentleman
17 can give you those reasons, the experience in Tennessee
18 where they are dealing with a statute quite similar to
19 Washington, his experience in being regulated as a
20 public utility, his experience of what was expected of
21 the Tennessee Regulatory Authority, how has that
22 relationship been built and what's happening.

23 Again, I kind of get in my mind here is not
24 only do we have to but is it a good idea to? It's
25 getting into a policy question that it's almost, what

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1 are we doing? Why are we doing this? Is it a good
2 idea that we get into business of regulating these
3 individuals as public service companies? Again, maybe
4 I'm reading too much into it.

5 JUDGE WALLIS: If it were the Commission's
6 choice to regulate -- that's why one of the first
7 questions I asked was whether you are asking for a
8 determination that the Commission must, that it may or
9 that it should engage in regulation. If the question
10 is must the Commission do so, then I think that there
11 is limited grounds for engaging in a discussion of the
12 question of why it would be a good idea to do so. I'm
13 not sure that that is within the scope of this
14 proceeding.

15 However, Mr. Benson has submitted a statement
16 that the Department of Health, or at least Mr. Benson
17 personally believes that regulation would be
18 well-founded. I believe that the record would be
19 enhanced by having clarification of his statements and
20 the position of the Department of Health through his
21 testimony and that of, perhaps, another witness as we
22 shall explore.

23 Let me ask if the Staff has any questions
24 about issues that Mr. Pinkney might address.

25 MR. THOMPSON: May I consult with

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1 Mr. Eckhardt for a moment?

2 JUDGE WALLIS: Yes. Are we worn down enough
3 that we need a ten-minute recess?

4 MR. THOMPSON: It might be a good idea.

5 JUDGE WALLIS: Let's be off the record for a
6 recess, please.

7 (Recess.)

8 JUDGE WALLIS: During the recess, we
9 discussed process and determined that the full
10 adjudicative provisions of the Administrative Procedure
11 Act would not be invoked but that witnesses would be
12 sworn and that ex parte conventions would be observed
13 in the conduct of this proceeding.

14 Is there any other aspect of the discussions
15 that parties would like to put on the record?

16 MR. STERLING: I think the thing that I would
17 like to have clarified then is with the existing
18 testimony, the prior record, the existing record that
19 was compiled for this particular matter, is it my
20 understanding now that those letters will simply be, if
21 they are offered and we will offer them -- in fact, we
22 could do them at the prehearing conference, I would
23 imagine -- to make an offer of those prior letters that
24 have been previously offered as part of our summary
25 determination?

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1 JUDGE WALLIS: It would be my intention to
2 take the entirety of the statements of fact that the
3 Petitioners and Commission staff have presented up to
4 this point and include them in the record subject to
5 the opportunity to object and subject also to the
6 opportunity to make inquiry about them.

7 MR. STERLING: Can we amend them?

8 JUDGE WALLIS: In some ways, we have asked
9 questions that would require statements of amendment,
10 and it might be rather than preparing actual Q and A
11 type prefile testimony, which the Commission does use
12 in some proceedings, it might be helpful to have
13 written statements from the people who will be coming
14 forward to testify as to what they are going to say.
15 That would remove the need for the Q and A type prefile
16 testimony. It would offer people the opportunity to
17 know what's coming up so that there would be a minimum
18 of surprise. Would that process be acceptable to the
19 parties?

20 MR. STERLING: The scope of the written
21 statement would be more generalized then, or would
22 basically his or her statement on the stand be nothing
23 more or less than the written statements that was
24 proffered previously?

25 JUDGE WALLIS: What I'm contemplating here is

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1 that it would be what the witness would offer as the
2 witness's statement.

3 MR. STERLING: So that would essentially be
4 that witness's direct testimony?

5 JUDGE WALLIS: Yes.

6 MR. STERLING: I don't have a problem with
7 that.

8 MR. THOMPSON: I'm sorry, Your Honor. I
9 might not be tracking, but are you suggesting something
10 like prefiled testimony only it's not a Q and A?

11 JUDGE WALLIS: Would not have to be a Q and
12 A, right, just the information that witnesses offer to
13 present.

14 MR. STERLING: Then that witness then would
15 be subject to cross-examination, which would be an open
16 format.

17 JUDGE WALLIS: Yes.

18 MR. THOMPSON: Okay. That sounds fine.

19 MR. STERLING: That sounds fine.

20 JUDGE WALLIS: Now, anything further on that?

21 MR. THOMPSON: You had asked earlier whether
22 there was anything else that was discussed off the
23 record that needed to be added, and I wasn't sure if
24 you had mentioned that you were invoking the ex parte
25 separation.

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1 JUDGE WALLIS: Yes, I did. If not, we just
2 now invoked. Is there the need for the statement of
3 Mr. Pinkney?

4 MR. STERLING: Only to the extent whether
5 Your Honor wants to hear something about the Tennessee
6 experience and his firsthand knowledge and experience
7 in regulating this type of business enterprise as a
8 public utility, not only in Tennessee but in other
9 states as well, would it be helpful to Your Honor.

10 MR. THOMPSON: To the extent that it fleshes
11 out precisely what the Petitioner would like the
12 Commission to do, exactly what does regulation mean,
13 since there are not specific statutes on waste water
14 regulation, perhaps it would be helpful.

15 JUDGE WALLIS: Would it be feasible for the
16 Petitioners to present a statement from Mr. Pinkney?

17 MR. STERLING: Certainly.

18 JUDGE WALLIS: In the event that
19 cross-examination appears to be necessary, would it be
20 acceptable to do that via telecommunication rather than
21 in-person appearance?

22 MR. THOMPSON: Yes.

23 MR. STERLING: I don't see why not, depending
24 on availability, but that might work out very well.

25 JUDGE WALLIS: Okay. Not saying that it

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1 would be necessary, but in the event that it is.
2 Mr. Jones?

3 MR. STERLING: Again, what we are looking at
4 here is a public interest aspect, and because the
5 Commission regulates under the public utility law as in
6 the public interest, and Mr. Jones has specific
7 information and knowledge as to how the existing system
8 of regulating these businesses in the provision of loss
9 services doesn't work.

10 It's probably duplicative. We really
11 probably don't need him, but if Your Honor feels that
12 more is better, then we would offer his services to be
13 here or to present a statement and to present
14 additional testimony.

15 JUDGE WALLIS: In light of Counsel's
16 statement that the material to be offered by Mr. Jones
17 would largely be duplicative, it would be my desire to
18 reduce duplication in the docket. It appears that his
19 testimony would be factual in nature and that as you've
20 indicated, there are witnesses, particularly Mr. Stuth
21 and Mr. Lee, that would appear to be offering that kind
22 of testimony and could respond to that kind of
23 question. Is that a fair statement, Mr. Sterling?

24 MR. STERLING: As well as for David Jensen
25 and Scott Jones, Steve Wecker. Probably the three of

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1 them could be lumped together, and we would offer their
2 testimony if Your Honor feels it would be helpful.
3 Otherwise, what Mr. Lee and Mr. Stuth and Mr. Benson in
4 particular have to say about this will likely cover the
5 topic.

6 JUDGE WALLIS: If that covers it from your
7 perspective, my preference would be to not hear from
8 these witnesses in order to avoid the duplication on
9 the record.

10 MR. STERLING: It depends on how we want to
11 do this. Could they testify under a sworn, just a
12 written statement, or is that getting too far afield
13 again?

14 JUDGE WALLIS: To the extent that it is
15 duplicative, my preference would be not to take it.

16 MR. STERLING: Okay. Because we definitely
17 want to try to pare this down as best we can, and I
18 think it will work fine.

19 JUDGE WALLIS: Mr. Thompson?

20 MR. THOMPSON: I have nothing to add on that,
21 Your Honor.

22 JUDGE WALLIS: Mr. Lenning?

23 MR. STERLING: Again, it goes to helpful.
24 One of the issues was what are we dealing with? What
25 are these systems, and David Lenning has a long history

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1 in the health department in regulation, is very
2 knowledgeable about these type of systems and other
3 on-site systems. If it would be helpful for Your Honor
4 to receive the additional tutorials regarding what are
5 we dealing with here, what is being asked of this
6 service company in providing these types of service,
7 what are we dealing with, the people that are being
8 served, that's basically -- my mind thought right now
9 is that Mr. Lenning, again, is available if helpful,
10 and I guess that's really what it boils down to is
11 would his testimony be helpful with respect to just
12 general information on on-site sewage systems.

13 JUDGE WALLIS: Is there anything that
14 Mr. Lenning would offer that Mr. Benson would not?

15 MR. STERLING: No.

16 JUDGE WALLIS: So in that event --

17 MR. STERLING: If we want to pare this down
18 and get right to the point and the issue, then Richard
19 Benson is basically it.

20 JUDGE WALLIS: As long as he would cover it,
21 then it would be my preference not to add Mr. Lenning.
22 Mr. Hull?

23 MR. THOMPSON: Your Honor, before we get off
24 that point, would this be a good time to bring up our
25 point regarding our preference with regard to the

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1 Department of Health official to testify, since we were
2 just discussing Mr. Lenning?

3 JUDGE WALLIS: How about if we wait until we
4 get down to the Staff witnesses or witness as the case
5 may be. Mr. Hull?

6 MR. STERLING: Terry Hull, again, is Puget
7 Sound Action team. He's their on-site sewage liaison,
8 and we do have a statement of his that is in the
9 record. He has expressed a willingness to come and be
10 helpful to the tribunal here as to what the issues are.

11 It kind of goes to why the need, what's the
12 problem, why the need, why is this a good idea? And if
13 we are past why or why not it's a good idea and into
14 the meat and potatoes, so to speak, as to who we are
15 and what we are going to do and the fact that you've
16 got to do it -- I guess it goes back to whether or not
17 the original statements and letters that are already in
18 the record are going to also find their way into the
19 record of this fact-finding hearing, and if they are,
20 then Mr. Hull likely would not have much more to say
21 than what he's already said in his statement.

22 JUDGE WALLIS: It would be my intention that
23 the statements of fact that the parties previously
24 submitted be taken into the record subject to the
25 opportunity to raise objection, and consequently, I do

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1 not believe it would be necessary, given what you've
2 said, Mr. Sterling, to call Mr. Hull.

3 MR. STERLING: The only thing then, Your
4 Honor, would be objection, so in other words, at some
5 point in time when it's too late to call anybody --

6 JUDGE WALLIS: No. As we look at a schedule,
7 it would be our intention to build in some deadlines on
8 that so that we have the opportunity for a timely
9 ruling and for parties to present what they need to.
10 Subject to that concern?

11 MR. STERLING: I guess it goes back to the
12 evidentiary rules, what rules apply if hearsay, because
13 none of these letters were, I believe, sworn. We could
14 certainly go back and have them put either in a
15 tutorial or...

16 JUDGE WALLIS: I do not believe that's
17 necessary so long as no party objects.

18 MR. STERLING: Can we find out if there is
19 going to be an objection now?

20 JUDGE WALLIS: Mr. Thompson?

21 MR. THOMPSON: We've already discussed the
22 idea that Staff would be able to pose the questions, I
23 guess, to the witnesses, and I'm not sure if the
24 answers would be sworn or --

25 JUDGE WALLIS: As I indicated, it would be my

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1 intention to swear the witnesses who appear orally.

2 MR. THOMPSON: Then they will attest to their
3 responses to the questions.

4 JUDGE WALLIS: Yes.

5 MR. STERLING: If we are talking here, it
6 might not be a bad idea. We have the letters. We have
7 the certain statements. They were prepared by these
8 individuals. At least we are representing that's who
9 prepared these statements. I don't have a problem with
10 going back and getting like a sworn or at least a
11 declaration saying and attaching a letter to the
12 individual's statement that was previously offered and
13 then have a sworn statement saying, this is, in fact, a
14 true copy of my statement, and then if Staff wants to
15 then ask as kind of a written interrogatory type of
16 further questions so that witness who would not be
17 appearing, I think that might work. I don't really
18 have a problem with that.

19 JUDGE WALLIS: Would that work for you,
20 Mr. Thompson?

21 MR. THOMPSON: That sounds fine.

22 JUDGE WALLIS: Very well. Mr. Sterling, you
23 indicated that you would like Mr. Eckhardt to be
24 called. Staff also indicates that Mr. Eckhardt would
25 be called.

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1 MR. STERLING: Looks like everybody wants
2 him.

3 JUDGE WALLIS: It looks like we are going to
4 have Mr. Eckhardt.

5 MR. THOMPSON: Correct, yes.

6 JUDGE WALLIS: And the protocols that we have
7 identified, written statements, responding questions
8 would be adequate for Mr. Eckhardt?

9 MR. STERLING: To get his direct testimony in
10 writing and then we can follow that up, yes.

11 MR. THOMPSON: Yes.

12 JUDGE WALLIS: Very well. Now, Mr. Danner
13 and Mr. Rose.

14 MR. STERLING: Again, it just goes back to
15 whether or not there is anything factual. It goes to
16 the discovery.

17 JUDGE WALLIS: Could you propose specific
18 questions to the Staff for them to answer, and would it
19 be Mr. Eckhardt that would answer that on behalf of
20 Staff as to the nature of the discussions?

21 MR. STERLING: That would work.

22 MR. THOMPSON: We can certainly respond to
23 those questions.

24 JUDGE WALLIS: Very well. So we will not put
25 them on our list of witnesses pending the exchange of

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1 inquiry and response.

2 At this point, as I indicated to
3 Mr. Thompson, there were two statements presented at
4 the time of the earlier statements of fact and law that
5 represented positions of the Department of Health. One
6 of them was Mr. Benson's. Another was presented by
7 Brad J. Avy, who is listed as the supervisor of the
8 waste water management program.

9 It would be my intention to ask the
10 Department of Health to present a witness to respond to
11 questions about the position of the Department of
12 Health in this matter to flesh out and clarify any
13 distinctions between the earlier letter of Mr. Benson
14 and the letter of Mr. Avy so that it is clear in the
15 record exactly what the DOH position is.

16 Rather than issuing the subpoena, it would be
17 my intention to send a letter to the Department of
18 Health asking them to cooperate in this endeavor and to
19 provide a witness. Would that be acceptable to the
20 parties?

21 MR. STERLING: No. Just to kind of flesh
22 this out a little bit more, Your Honor, would it be a
23 possibility that we would not have Avy, we would not
24 have Benson, we would have someone further up the food
25 chain?

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1 JUDGE WALLIS: It's possible, yes. Now, I'm
2 not saying it would be inappropriate to ask Mr. Benson.
3 We've already determined that he would be an
4 appropriate person given his responsibilities.

5 MR. STERLING: Because I think it's critical
6 that Richard be here because I think that he's someone
7 that everyone has questions of and wants to hear from.
8 He's also been involved in the loss program rules
9 committee. He's also a program head for the Department
10 of Health. I think he's a key fact witness in this
11 whole thing. If the staff or Your Honor wants to
12 suggest that someone else come over from the Department
13 of Health --

14 My only problem is I used to work for the
15 Department of Ecology. I was an engineer for a number
16 of years. It seemed to me that the farther up the
17 chain of command you went, the less they knew about the
18 specifics of anything and the more political they
19 became, and seriously, that is a very grave concern
20 here, because after you get out of the operating staff
21 level, and basically, there might be, well, gee, I
22 don't know if this is such a -- they don't recognize or
23 acknowledge the problems and it just gets real messy on
24 cross-examination, and all of a sudden, it looks like
25 does anybody know what they are talking about.

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1 It's your call. You can call anybody you
2 want to, but Benson for sure. If Avy or somebody else
3 wants to come over and explain his position or why he
4 wrote that letter, I think that's fine too. I think if
5 we get anybody else, I don't know what we are getting
6 ourselves into then, because what we are dealing with
7 is we are dealing with the loss rules development
8 committee and their recommendations, and very frankly,
9 that has not yet been totally filtered out or become
10 regulation or anything like that.

11 But there is a need, and that's been
12 expressed by Mr. Benson, I think, very forthrightly and
13 eloquently, but it's also true we want him here. I
14 don't have a problem with that, but if we start getting
15 someone else, then I don't know what we are getting
16 ourselves into then.

17 JUDGE WALLIS: One of the concerns I had that
18 was highlighted by the distinction between these two
19 letters was that Judge Hicks did appear to find it
20 significant that the Department of Health appear to be
21 supporting the Petition and the Commission appeared to
22 be opposing it, and my concern in light of the
23 distinction in these two letters is exactly what is the
24 position of the Department of Health with regard to the
25 Petition for a declaratory order as that has been

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1 defined, and it has been my experience in state
2 government that many times the line officials are not
3 able to speak for the agency in terms of its legal
4 position, so that is the nature of my concern. Mr.
5 Thompson?

6 MR. THOMPSON: That's precisely my concern
7 too, Your Honor, is the fact that Judge Hicks appeared
8 to place such an emphasis on the Department's position.
9 If Mr. Benson has something to offer in the way of
10 testimony other than, here's why the Department of
11 Health thinks this would be a good idea, then I think
12 that he should be heard from, but if he's presented as
13 the person speaking on a policy level for the
14 Department of Health, I think the Department of Health
15 should be able to designate somebody as their speaking
16 agent on that.

17 MR. STERLING: I would sorely love to get
18 into the background of that Brad Avy letter but I
19 won't, unless we go off record, but there are issues
20 there of undue pressure and influence and the reason
21 why that letter was written, and I have grave concerns
22 about that whole process.

23 There is a long history here, Your Honor, and
24 I'm sure you got a little bit of an inkling of it, but
25 this is quite a little bit of history, but where

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1 Mr. Benson is coming from, which Avy's did not change
2 or challenge at all is as a matter of fact. The fact
3 is we have problems. We have a need, and this will
4 work, and the rules regulatory committee recognizes it
5 and made that one of their top, if not the top,
6 priority.

7 We have Mr. Avy's letter that came out
8 subsequent to that -- gee, I wonder why -- and
9 seriously, there is some issues there, and said
10 basically, but we are not taking a legal position here.
11 In other words, the Department of Health is not telling
12 UTC what they should be doing, and it's true. We are
13 here asking the Commission as a question of fact, is a
14 person or corporation that does these services a public
15 service company.

16 I just think that, again, we are probably
17 losing our focus again, but Benson and Avy, I think,
18 are the two people we want to hear from because those
19 are the two players. I don't have a problem with
20 Benson or Avy. Let them come over. Let's hear from
21 them. Let's have you ask questions as well. That's
22 fine. They are fair, open game. I don't have a
23 problem with that, but if you introduce a third person
24 in here farther up or wherever, I don't know what we
25 are getting ourselves into, and we might find ourselves

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1 being drawn away from our focus of just, is this type
2 of business operation a public service company,
3 regardless of what DOH says.

4 JUDGE WALLIS: My concern is only to make
5 clear what the legal position of the Department of
6 Health is with regard to the Petition.

7 MR. STERLING: I think the two principles
8 that the Department of Health has placed in this so
9 far, Benson and Avy, I think those are the two
10 individuals we need to hear from.

11 JUDGE WALLIS: Because what I am concerned
12 with here is the legal position of the Department of
13 Health. I don't know at this juncture whether Mr. Avy
14 is the person who can respond to that, and my
15 preference would be to submit a letter to the
16 Department and ask them to send someone to us that can
17 speak for the director in making that statement, and it
18 may well be Mr. Avy. I'm not sufficiently familiar
19 with the internal organization or operations of the
20 Department of Health.

21 MR. STERLING: Just kind of a precaution,
22 because again, I worked in the Department of Ecology
23 and I have an idea how these things work. You ask that
24 question, and we are going to hear from another AAG,
25 and that's what we are going to end up with. They are

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1 going to ask their assistant attorney general, what is
2 our legal position. Do we want that? Do we want
3 another legal opinion or do we want fact witnesses, and
4 I think for fact witnesses, Benson and Avy -- because
5 basically, that's how we got stuck with Avy's letter is
6 an AAG quasi opinion.

7 Our position is we are not going to tell UTC
8 what to do. That's your job. So if we are going to
9 get some individual here on cross-examination saying,
10 on what grounds did you derive this particular
11 position? Were you assisted at all, and they are going
12 to say, attorney client, and we are going to get stuck
13 with attorney client, seriously, and that's a real
14 issue.

15 I've tried to get attorney client things out
16 of the Department of Health, but they won't budge, and
17 I think that's exactly what we are going to end up with
18 if we go another step. AAG's, we love you, but that's
19 what you are there for, and someone is going to espouse
20 an AAG quasi opinion. Who is really testifying? Is it
21 you in the chair or is it an AAG someplace else, and I
22 honestly believe it's going to be an assistant attorney
23 general that we aren't going to be able to talk to, and
24 if that's the case, we aren't going to get good solid
25 testimony that anybody needs.

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1 JUDGE WALLIS: I'm not sure what the danger
2 is in asking the Department of Health to provide
3 someone who can speak to the agency as to its position
4 in this particular litigation. If, as you say, and as
5 Mr. Avy appears to say, it's the official position of
6 the DOH that it has no position, then it seems to me
7 that's a rather simple and straightforward statement.

8 MR. STERLING: Can we get behind Mr. Avy or
9 somebody else's statement to get the actual attorney
10 general's opinion letter? I don't think so. I really
11 for truly I foresee this. I don't foresee it. I know
12 this is going to be an issue. This is going to be a
13 problem if we go down that road. I think Benson is a
14 straightforward fact issue. I think Avy is also a fact
15 issue, but I have a very good idea as to on what
16 grounds Avy wrote that letter.

17 MR. THOMPSON: If I can interject --

18 MR. STERLING: Behind the scenes, we have all
19 these AAG's running around giving their opinions, and
20 we can't ask them the question.

21 MR. THOMPSON: The other side of this, if I
22 can break in, is it seems to me there was in this
23 impression before Judge Hicks that this was the
24 Department of Health acting on independent legal advice
25 recommending that the Commission do what was being

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1 asked of it, and I don't think that's true. I think we
2 need to straighten that out on the record here, so
3 that's where I'm coming from on this. I think it's
4 important that to the extent there is not -- you made
5 clear whether or not the Department of Health is
6 actually saying as a matter of Department of Health
7 policy, this is a good idea.

8 MR. STERLING: I think unless we can get
9 behind who is actually telling the statement, then it
10 not only calls the whole testimony into question but
11 who is, in fact, testifying? Is it that individual in
12 the chair under oath, or is it another individual who
13 is basically telling that individual what to say, and
14 that's the issue, Your Honor. I honestly do see that
15 as a real problem.

16 JUDGE WALLIS: I think that there is a
17 distinction between whether we are inquiring of the
18 witness whether it is his personal view that one thing
19 or another happened or whether we are inquiring as to
20 what the official policy is of the Department of
21 Health, and I think you can inquire into how that
22 position was determined, and I do not see the
23 challenges in doing that that I hear you raising.

24 However, if the Department of Health does
25 send someone to make that statement, I would not

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1 foreclose you from making whatever inquiry or whatever
2 objections would be proper under the circumstances.

3 MR. STERLING: Can you require them as part
4 of the subpoena process to waive attorney client
5 privilege?

6 JUDGE WALLIS: It would be my intention not
7 to issue a subpoena if the Department is willing to
8 present a witness.

9 MR. STERLING: Would you be willing to ask
10 them to disgorge any letter opinions that they might
11 have gotten from the AG's office?

12 JUDGE WALLIS: Only after the full
13 opportunity for parties to argue it and for me to make
14 a decision on it.

15 MR. STERLING: Maybe this whole thing would
16 get cleared up as well, because that individual,
17 whoever they will be identifying, will be giving us his
18 or her direct statement in written form; correct?

19 JUDGE WALLIS: That would be my intention.

20 MR. STERLING: And we can ask that person
21 under oath follow-up questions.

22 JUDGE WALLIS: Yes. Mr. Thompson?

23 MR. THOMPSON: That sounds agreeable for
24 Staff.

25 MR. STERLING: It will be interesting.

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1 JUDGE WALLIS: This entire proceeding has
2 been very interesting.

3 MR. STERLING: Thank you. I think that will
4 work. That's fine.

5 JUDGE WALLIS: Now, is there anything in the
6 statements of subject areas to be addressed that we
7 have not covered to date in the testimony of the
8 witnesses and the statements of the witnesses that we
9 have discussed?

10 MR. STERLING: Any issues raised, you mean,
11 Your Honor, that we still need additional input on?

12 JUDGE WALLIS: Yes, that's correct.

13 MR. THOMPSON: Your Honor, we had proposed
14 some additional questions or issues to be added that
15 were posed by your order.

16 JUDGE WALLIS: Yes. That's why I'm asking.

17 MR. STERLING: As did we also.

18 JUDGE WALLIS: Your concerns about the policy
19 rationale behind the Board of Health requirement,
20 Mr. Benson, I believe, would be the appropriate person.

21 MR. STERLING: Again, I think all of the
22 issues that have been raised, I think with the letters,
23 statements, follow-up opportunity of follow-up
24 questions to be answered under oath and the declaration
25 is okay under oath, Your Honor?

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1 JUDGE WALLIS: Yes. For a person who is
2 appearing as a witness, we would expect counsel to ask
3 as a second or third question after who are you and
4 where you come from, is this your statement and is it
5 true and correct to the best of your information and
6 belief.

7 MR. STERLING: I will just be very pointed.
8 Is there anything Your Honor thinks that we are missing
9 that we still need to cover?

10 JUDGE WALLIS: I do not identify anything
11 here that I recognize as being omitted.

12 MR. STERLING: I take it during the hearing
13 process Your Honor has full authority and power and
14 will take the license and liberty to ask ample
15 questions that you feel need to be asked?

16 JUDGE WALLIS: I don't know about ample, but
17 if something comes to mind that I think bears on the
18 result, I will not be hesitant to ask.

19 MR. STERLING: That's fine. For me, that is
20 very much appreciated.

21 JUDGE WALLIS: All right. Given the
22 relatively limited nature of the oral presentations,
23 what is the parties' estimate as to the length of time
24 that would be required for inquiry of the witnesses?
25 Maybe I can share my guesstimate. I think two days at

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1 the outside but more likely one.

2 MR. STERLING: I was going to suggest two
3 just to cover, because I'm not exactly sure if there is
4 preliminary matters that would be covered and whatever,
5 but two days, two days consecutive could be reserved.
6 That would be more than adequate.

7 JUDGE WALLIS: Very well, and we've talked
8 about the presentation of statements, the opportunity
9 for questions, and do we expect the opportunity for
10 responses to those questions as well prior to the
11 hearing? So what kind of time frame are we looking for
12 to prepare that? Let's go off the record for a
13 scheduling discussion.

14 (Discussion off the record.)

15 JUDGE WALLIS: Let's be back on the record
16 following the scheduling discussion. The parties have
17 agreed that subject to one qualification, statement of
18 the witnesses who will be appearing and those who will
19 be supplementing written statements but not expected to
20 appear in the absence of questions that require oral
21 inquiry would be due on May 24th.

22 Questions to the witnesses regarding the
23 statements would be due to the opposing counsel on the
24 5th of June, responses to those questions on the 22nd
25 of June. Hearing will be convened in Olympia on June

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1 29th, and the 30th will be reserved for use, if
2 necessary, and simultaneous briefs will be due
3 electronically in the Commission offices by two p.m. on
4 July 7th.

5 Now, in part, this schedule was determined by
6 my potential unavailability during August. If that can
7 be addressed, then I will be in touch with counsel with
8 a proposal based on the discussions, and we will engage
9 in dialogue by teleconference, if appropriate, to
10 determine whether this schedule or an alternative would
11 be best under the circumstances.

12 I did want to inquire, Mr. Sterling, early on
13 in the conference, you indicated some concern about
14 process, and I wanted to inquire whether you are
15 satisfied based on our discussions here this afternoon
16 that we have, indeed, narrowed the issues rather than
17 expanded them and that we are focusing on what is
18 appropriate for the Petition that you've presented and
19 process that the remand demanded.

20 MR. STERLING: This is where I have to go on
21 line and say yes or no; right? Yes. The focus of the
22 hearing is on that question, to be presented to the
23 Commission for determination as a question of fact, and
24 I believe that we are there. So thank you very much
25 for that and getting us through this point.

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1 JUDGE WALLIS: Is there anything further to
2 come before the Commission at this time?

3 MR. STERLING: Just one last thing, on the
4 additional inquiry of the Department of Health, how
5 does that whole thing fit into it? Are you going to
6 give the Department some deadline to respond?

7 JUDGE WALLIS: I will ask the Department for
8 a response and explain the deadlines that we have
9 established. I will, of course, provide copies of that
10 correspondence to the parties.

11 MR. STERLING: Then that person's witness
12 statement, his or her primary direct testimony would
13 then be due on the same schedule?

14 JUDGE WALLIS: I would ask that it be due on
15 the same schedule.

16 MR. STERLING: Thank you. That's fine.

17 JUDGE WALLIS: Anything further? Let the
18 record show there is no response. Thank you all for
19 your attention, for your presence, and for your spirit
20 of cooperation today. This conference is adjourned.

21 (Prehearing conference adjourned at 4:21 p.m.)

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