

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

SANDY POINT IMPROVEMENT
COMPANY,

Respondent.

DOCKET UW-121408

RESPONDENT SANDY POINT
IMPROVEMENT COMPANY'S MOTION
FOR SUMMARY DETERMINATION

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1. Respondent Sandy Point Improvement Company (“Sandy Point” or the “Company”) has operated as an independent and self-governed water system serving water to its own shareholder members for over 45 years. Because Sandy Point satisfies all the legal requirements for classification as a homeowners’ association under Washington’s Homeowners’ Association Act, chapter 64.38 RCW, WAC 480-110-255(2)(f) exempts the Company from regulation. Furthermore, except for approximately 43 outside customers, Sandy Point does not offer its services to the general public for hire, but rather serves its own shareholder members as a self-governed entity. Accordingly, Respondent Sandy Point, by and through its counsel of record, Joseph Rehberger and Cascadia Law Group PLLC, files this Motion for Summary Determination pursuant to WAC 480-07-380(2) and the Washington Utilities and Transportation Commission’s (the “UTC” or the “Commission”) January 15, 2013 Prehearing Conference Order.

I. RELIEF REQUESTED

2. Sandy Point moves the Commission for summary determination that Sandy Point is not subject to Commission jurisdiction, dismissing this special classification proceeding.

II. STATEMENT OF FACTS

A. Background Facts

3. Sandy Point was established and first began providing water service to its members in 1965.¹ The Sandy Point community is located in Whatcom County approximately

¹ Declaration of Jack Smith in Support of Motion for Summary Determination (“Smith Decl.”) at ¶ 3; Declaration of Joseph A. Rehberger in Support of Motion for Summary Determination (“Rehberger Decl.”) at Ex. 14.

13 miles northwest of Bellingham, and abutting the Strait of Georgia and Lummi Bay.² The Sandy Point community (largely composed of three neighborhoods and developments sometimes referred to as Sandy Point Heights, Neptune Heights, and Sandy Point Shores) is a residential community, and Sandy Point was created in conjunction with these communities. Sandy Point owns and manages common real and other property, including water rights, well site parcels, and the community associated water system infrastructure for the benefit of its shareholder members.³

4. Sandy Point has no outside investors. Rather, Sandy Point has been serving water to its members as a member-managed non-regulated entity for over 45 years. Sandy Point's membership presently includes two types of shareholders, Class A and Class C shareholders.⁴ All of these shares are appurtenant to residential lots within the larger Sandy Point community, and the organization's governing documents provide that no transfer of shares shall be recognized except as incident to the transfer of real property.⁵ Class A shareholders, of which there are approximately 780, and Class C shareholders, of which there are approximately 120, have equal rights with respect to water service. Class A shareholders additionally have rights to use Sandy Point's other recreational amenities, such as a pool and golf course. Sandy Point also separately serves approximately 43 outside non-member customers.⁶

² Declaration of Sharon J. Thompson in Support of Motion for Summary Determination ("Thompson Decl.") at ¶ 2 and Ex. 2.

³ Thompson Decl. at ¶¶ 2-5.

⁴ Declaration of Sharon J. Thompson at ¶ 3 (filed Jan. 4, 2013); Smith Decl. at ¶ 3-5.

⁵ Smith Decl. at Ex. 1 and Ex. 2.

⁶ Declaration of Sharon J. Thompson at ¶ 3 (filed Jan. 4, 2013).

5. The Sandy Point neighborhoods were platted beginning in the 1950s and 1960s.⁷ In 1965, the original water system and unplatted property was sold to Sandy Point's original incorporators.⁸ The 1965 Sale Agreement established the terms of continued water service to the existing lots and the relationship among the properties. In the 1965 Sale Agreement the purchasers (as predecessors to Sandy Point) covenanted to provide water service to the existing platted tracts (Sandy Point Tracts, Bolster's Sandy Point Tracts, Sandy Point Garden Tracts) "upon the same terms and conditions as provided to any owners or occupants of the [purchased] Property."⁹ Sandy Point was incorporated that same month.¹⁰ Documents indicate that following incorporation of Sandy Point, the owners of those pre-existing properties were issued Class C stock.¹¹ The Articles of Amendment filed the following year, in 1966, reflect the amendments establishing and granting the Class C stock was "unanimously adopted."¹² The amendments confirmed the Class A and Class C stock as being appurtenant to the associated real property within the Sandy Point area, and provided that except as provided in the Articles of Amendment, "[i]n all other respects, except as stated above, *the various classes of stock shall be equal*" and "[n]o shareholder shall have any preemptive right with respect to the shares of th[e] corporation."¹³ The shareholders voluntarily accepted and agreed to the characteristics of the different classes of stock, with documents confirming that "[e]ach shareholder of this corporation

⁷ Rehberger Decl. at Exs. 1-12.

⁸ Smith Decl. at ¶ 3.

⁹ Smith Decl. at ¶ 3; Rehberger Decl. at Ex. 15.

¹⁰ Rehberger Decl. at Ex. 14.

¹¹ Smith Decl. at ¶ 3; Rehberger Decl. at Ex. 14 (Amended Articles of Incorporation (Oct. 31, 1966)).

¹² Rehberger Decl. at Ex. 14 (Amended Articles of Incorporation (Oct. 31, 1966)).

¹³ *Id.* (Emphasis added).

hereby agrees to the provisions hereof.”¹⁴ As additional properties were platted, the recorded declarations referenced Sandy Point Improvement Co., tying the Company to the recorded declarations by reference and describing Sandy Point’s quintessential homeowners association type functions, including:

- Describing Sandy Point as having been “formed by . . . for the purpose of providing certain services and recreational facilities for the owners of property in the plat [and] for other properties in proximity thereto.”¹⁵
- Providing for issuance of shares in Sandy Point by virtue of lot ownership, and providing that “[e]ach shareholder who is an owner of property in the plat shall abide with the rules and regulations of the corporation.”¹⁶
- Granting Sandy Point architectural control akin to typical homeowners associations.¹⁷

These are quintessential homeowners association functions.

6. Critical for this proceeding, Class A and Class C shareholders have equal rights with respect to water service. As described above, any other distinctions between the classes of shares were unanimously adopted and voluntarily accepted. Both Class A and Class C shareholders are actively involved in Sandy Point, serving on the Board of Directors, serving on committees, and involved in projects and events of the Company.¹⁸ Both Class A and Class C shareholders have served as President of the Company.¹⁹ The current Articles provide that both

¹⁴ *Id.*

¹⁵ *See, e.g.,* Rehberger Decl. at Ex. 6 (Declaration of Restrictions, Easements and Reservations of Sandy Point Shores No. 1) (Article III, sec. 1).

¹⁶ *See, e.g., id.*

¹⁷ *See, e.g., id.* (Article III, sec. 2).

¹⁸ Smith Decl. at ¶¶ 4-5.

¹⁹ *Id.* at ¶ 4.

Class A and Class C shareholders have a voice in the Company's operations, having "one vote for each share of stock" for election of the Board and on water service matters.²⁰

7. In 2006, the UTC investigated Sandy Point and determined that Sandy Point was not subject to UTC jurisdiction. The UTC Investigation Report confirms that in 2006 the UTC sought to determine whether Sandy Point was a jurisdictional water company, and after reviewing information related to the Company, "staff determined Sandy Point was operating as a homeowners association and did not fall under commission jurisdiction."²¹

8. Except to establish and confirm the voting rights of Class C shareholders, and other minor amendments, Sandy Point has not materially changed in structure or organization since the 1960s.²²

9. Sandy Point serves approximately 43 outside customers who are not shareholders in the Company.²³ Sandy Point has never served 100 or more outside non-shareholder customers.

²⁰ Smith Decl. at ¶ 11 and Ex. 1; Thompson Decl. at ¶ 5 (confirming both Class A and Class C shareholders voted at the last annual meeting for election of the Board).

²¹ See Investigation Report – Sandy Point Improvement Company (UW-121408) dated November 2012 (filed Nov. 21, 2012) (the "Investigation Report") at 2. The original Investigation Report went on to state that "[a]t some point after the review, Sandy Point changed from a homeowners' association to a for-profit company. Regulatory Services staff has been unable to determine the exact date the change took place." In a revised Investigation Report filed March 15, 2013, the UTC added a footnote that provided "[u]pon further investigation, staff determined that Sandy Point has always been a for-profit corporation." As discussed below, whether Sandy Point is organized as a regular or nonprofit corporation is not relevant to whether Sandy Point is a homeowners association. See RCW 64.38.010.

²² Compare Smith Decl. at Ex. 1 (Amended and Restated Articles) with Rehberger Decl. at Ex. 14 (historic Company Articles, as amended); see also Smith Decl. at ¶ 11.

²³ Thompson Decl. at ¶ 5.

B. Procedural History

10. In January of 2012, in response to a consumer inquiry, UTC staff initiated an investigation regarding Sandy Point's jurisdictional status.²⁴ After nearly 10 months of informal investigation and consideration, on November 21, 2012, UTC posted Order 01, Order Initiating Special Proceeding Under RCW 80.04.015; Complaint Against Rates and Charges; and Complaint For Penalties ("Order 01") to Docket No. UW-121408.

11. In its Order 01, the UTC acknowledged that "[w]ater companies are also exempt from the Commission's jurisdiction if they are 'homeowner associations, cooperatives and mutual corporations, or similar entities . . .'"²⁵ However, contrary to prior positions taken by Commission Staff,²⁶ Order 01 alleged Sandy Point was not eligible for the exemption.²⁷ While Order 01 also initiated a complaint against Sandy Point's rates and charges and for penalties, Commission Staff did not allege any facts seeking to establish that Sandy Point's rates and charges were or are actually in any way unfair, unjust or unreasonable.

12. Sandy Point moved the Commission to bifurcate and stay the Commission's complaint against Sandy Point's rates and charges, and for penalties, pending resolution of the jurisdiction question.²⁸ The Commission granted Sandy Point's motion.²⁹ Sandy Point now brings this motion for summary determination, requesting the Commission dismiss this special classification proceeding because Sandy Point is a homeowners association or similar entity exempt from Commission regulation under WAC 480-110-255(2)(f).

²⁴ Investigation Report at 2.

²⁵ Order 01 at ¶ 9 (citing WAC 480-110-255(1)(f)).

²⁶ Investigation Report at 2.

²⁷ *Id.* at ¶¶ 10, 12.

²⁸ Respondent Sandy Point Improvement Company's Motion to Bifurcate and for Stay (filed Jan. 4, 2013).

²⁹ Order 02, Prehearing Conference Order at 6 (Jan. 15, 2013).

III. STATEMENT OF ISSUES

13. Whether Sandy Point is subject to Commission regulation?

IV. EVIDENCE RELIED UPON

14. The evidence relied upon for this Motion is included in the accompanying Declaration of Jack Smith, the Declaration of Sharon Thompson, the Declaration of Joseph A. Rehberger, and the Declaration of Angelia Wesch, together with the pleadings and filings already on file with the Commission in this matter.

V. ARGUMENT AND AUTHORITY

A. Summary Determination Standard

15. Summary determination is appropriate if the “if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (e.g., affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” WAC 480-07-380(2)(a). The Commission will apply the standards applicable to a motion made under CR 56. Under CR 56, a “material fact” is one upon which the outcome of the proceeding or litigation depends. *Jacobsen v. State*, 89 Wn.2d 104, 108 (1977). Once the moving party demonstrates entitlement to summary determination, the opposing party must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. *Cf. White v. State*, 131 Wn.2d 1, 9 (1997). The opposing party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Id.* If no issue of material fact exists, the Commission may grant summary determination as a matter of law. *Cf. State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480 (1984).

B. UTC Jurisdiction Over Water Companies

16. The UTC regulates water companies under chapter 80.28 RCW, and as provided in WAC 480-110-255, which establishes those water companies over which the Commission exerts jurisdiction. RCW 80.04.010(30) defines a water company as “every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, controlling, operating, or managing any water system for hire within this state,” provided that, “[f]or purposes of commission jurisdiction, a “water company” does not include any water system serving less than one hundred customers . . .” Commission adopted rules establish the jurisdiction of the Commission over water companies, providing that the Commission “only regulates investor-owned water companies” that meet the jurisdictional threshold of one hundred or more customers (or the monetary threshold), WAC 480-110-255(1), and further that the Commission “does not regulate” certain providers of water service, specifically including homeowner associations, cooperatives and mutual corporations, or similar entities.

17. Given the differing ways in which companies can be incorporated and organized, the Washington Supreme Court has made clear that for purposes of classifying a water company as a public service company subject to regulation, when a company does business, “the important thing is what it does, not what its charter says.” *West Valley Land Co., Inc. v. Nob Hill Water Ass’n*, 107 Wn.2d 359, 364 (1986) (citation omitted) (“[such cases] must be determined by the character of the business actually carried on”).

18. Because Sandy Point does not provide water service over the customer threshold to the public for hire, but rather provides water service to its own shareholder members as a

homeowners association or similar entity, WAC 480-110-255 provides it is not subject to Commission regulation.

C. WAC 480-110-255(2)(e)-(f) Exempts Sandy Point From Regulation

19. The UTC's regulations exempt Sandy Point from jurisdiction. WAC 480-110-255 provides that "the commission *does not regulate*" "[h]omeowner associations, cooperatives and mutual corporations, or similar entities that provide service only to their owners or members," or "[h]omeowner associations, cooperatives and mutual corporations, or similar entities that provide service to nonmembers unless they serve one hundred or more nonmembers" or have revenue from nonmembers that exceeds the jurisdictional threshold. WAC 480-110-255(2)(e)-(f) (emphasis added).

1. Sandy Point Improvement Co. is a homeowners association (or similar entity).

20. Sandy Point is a homeowners association under Washington law. The legislature established uniform standards for homeowners associations in chapter 64.38 RCW. *See* RCW 64.38.005 ("The intent of this chapter is to provide consistent laws regarding the formation and legal administration of homeowners' associations").³⁰ Sandy Point meets all the statutory criteria under chapter 64.38 RCW for homeowners associations. The legislature defined a homeowners associations as "[1] a corporation, unincorporated association, or other legal entity, [2] each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and [3] by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is

³⁰ *See also* Declaration of Angelia Wesch ("Wesch Decl.") at ¶ 4.

owned by the member.” RCW 64.38.010(11). Further, RCW 64.38.015 provides that “[4] the membership of an association at all times shall consist exclusively of the owners of all real property over which the association has jurisdiction, both developed and undeveloped.” We address each of the above factors below.

21. First, it is undisputed that Sandy Point is a “corporation, unincorporated association, or other legal entity.” Sandy Point is a corporation and legal entity incorporated in 1965.³¹ The purpose of the corporation, as described in the Articles, includes “to acquire, hold, develop, improve, operate and maintain real property and interest and rights therein in order to provide services and facilities for the use and enjoyment of its shareholders as the owners and residents of real property in and about the area known as Sandy Point in Whatcom County, Washington,” specifically including “to acquire, construct, hold, maintain, operate, reconstruct and improve water and sewer systems for such area and its shareholders, including water rights, easements, wells, tanks, pumps, pipelines, filter plants and any other property or property interest that may be incident thereto.”³²

22. Second, each member of Sandy Point “is an owner of residential real property located within the association’s jurisdiction, as described in the governing documents.” Each member of Sandy Point, whether Class A shareholder or Class C shareholder, is an owner of residential real property located within the Sandy Point area. In fact, as to both Class A shares and Class C shares, the Company’s Articles provide that such shares are and “shall be appurtenant” to the real property parcels to which they attach with the Sandy Point area, and that

³¹ Rehberger Decl. at Ex. 14; *see also* Smith Decl. at Ex. 1.

³² Smith Decl. at Ex. 1.

both Class A shares and Class C shares “shall not be transferrable except as . . . to the sale or other transfer of . . . real property” to which it is appurtenant.³³

23. Third, by virtue of membership or ownership of property each member of Sandy Point “is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member.” Both Class A and Class C shareholders, by virtue of their membership in Sandy Point and ownership of real property to which their respective shares are appurtenant are obligated to pay for the services, maintenance, and associated costs for the improvement of real property owned in common by the Company, including the Company’s real property interests in its water rights, easements, and well sites.³⁴

24. Fourth, membership in Sandy Point consists exclusively of the owners of all real property over which the association has jurisdiction, both developed and undeveloped. Again, both Class A shares and Class C shares are appurtenant to real property parcels located at Sandy Point and are nontransferable except at the sale or transfer of the real property to which they are appurtenant.³⁵ The Company has no outside investors; it is entirely composed of the property owners that hold shares and own real property within its boundaries and area.

25. Commission Staff seek to rely on two factors to claim that Sandy Point is not entitled to exemption as a homeowners association under WAC 480-110-255(2)(f)--the Company’s organization as a regular (for-profit) corporation and a 2010 letter. First, in adopting chapter 64.38 RCW, the Washington legislature made clear that organization as a regular (for-

³³ Smith Decl. at Ex. 1 (Articles at V.1, V.3).

³⁴ Thompson Decl. at ¶ 3-5; Smith Decl. at ¶ 8.

³⁵ Smith Decl. at Ex. 1.

profit) corporation has no bearing on an entity's status as a homeowners association.³⁶ This argument is a red herring. Second, while Commission Staff will also likely point to a 2010 letter from a past president of Sandy Point claiming the entity was not a homeowner's association, that letter is not material to the issue here. The 2010 letter was issued by an individual Board member, and no evidence suggests any corporate or Board action was taken in support. To resolve any doubt as to this question, Sandy Point's Board of Directors recently took up the issue and unanimously passed a motion confirming the Company's characterization as a homeowners association and conformity with chapter 64.38 RCW.³⁷

26. In addition to satisfying the statutory criteria, it is evident that Sandy Point functions as a homeowners association.³⁸ While Sandy Point consists of several communities, Sandy Point functions much as an umbrella or master homeowners association for the communities that it comprises.^{39, 40} The 1965 Sale Agreement binds the Company to provide water service to the properties now holding Class C shares, and to provide such water service "upon the same terms and conditions as provided to" the purchased property, which would later be platted and served by the Company.⁴¹ *See contra State ex rel. Addy v. Department of Pub. Works*, 158 Wash. 462 (finding company subject to regulation where collected charges from outside customers while supplying free water to owners of company).⁴² The fact that differences

³⁶ See RCW 64.38.010(11) (confirming homeowners association may be a "corporation, unincorporated association, or other legal entity") (emphasis added).

³⁷ Smith Decl. at ¶ 13.

³⁸ See Wesch Decl. at ¶¶ 4-8.

³⁹ See generally Rehberger Decl. at Exs. 1-14; see also Smith Decl. at Ex. 1.

⁴⁰ Wesch Decl. at ¶ 13

⁴¹ Rehberger Decl. at 15 (1965 Sale Agreement at 3); Smith Decl. at ¶ 2.

⁴² See also *West Valley Land Co. Inc. v. Nob Hill Water Ass'n*, 107 Wn.2d 359, 368 (1986) ("A comparison of [Addy] with [Inland Empire] makes the distinction between those subject to regulation and those not subject to

exist between the Class A and Class C shares does not alter Sandy Point's overall function as a homeowners association,⁴³ governing all properties and shareholders that comprise it.⁴⁴

27. Sandy Point is governed by an elected unpaid and volunteer Board, which Board members must be current shareholders in the Company.⁴⁵ All members of the Company have a voice in the Company's operations, and specifically a voice in the management of water service. Both Class A and Class C shareholders are entitled to vote for and serve on the Board of Directors and on all water service matters.⁴⁶ In addition to typifying classic homeowners association management, that every shareholder maintain a "voice" in the operations of the company, such "voice" was also a key factor in the supreme court's determination in *West Valley Land Co. Inc. v. Nob Hill Water Ass'n*, 107 Wn.2d 359 (1986), that the subject water company was not a public service company subject to regulation. *Id.* at 368 (exempting company from regulation where company functions similar to a cooperative, where "consumers have a 'voice' in the management of its affairs").⁴⁷

regulation apparent. In *Addy* the Fruitdale-on-the-Sound Water Company maintained and operated its system on charges collected from outside customers while supplying free water to those owning property inside the original 46-acre tract and, in addition, the stockholders declared and received a dividend on their stock out of funds derived from water charges against outside patrons. In *Inland Empire* the company did not hold itself out as serving the general public, nor did it conduct its business for gain or the profit of stockholders, and its members were held not to be in need of Public Service Commission regulation.").

⁴³ See Wesch Decl. at ¶ 7 ("RCW 64.38 does not specify all owners must have equal voting rights or interests to qualify as a homeowners association.").

⁴⁴ See generally Wesch Decl. at ¶¶ 4-14; see also discussion *supra* ¶ 5.

⁴⁵ Smith Decl. at ¶ 2; Smith Decl. at Ex. 2 (Restated Bylaws of Sandy Point Improvement Co. at Art. III, sec. 2).

⁴⁶ Smith Decl. at ¶ 11 and Ex. 1 (Amended and Restated Articles of Incorporation).

⁴⁷ While Sandy Point's Articles establish that Class A and Class C shareholders have equal voting rights with respect to election of the Board and water service matters, see Smith Decl. at Ex. 1 (Amended and Restated Articles of Incorporation), *Nob Hill* does not even necessarily require such equality, confirming that "[e]quality of representation is not required by *Inland Empire*; all that is requisite is a voice in the [entity]. Since all members are directly or derivatively represented, the requirement is met." *Nob Hill Water Ass'n*, 107 Wn.2d at 369. See also Wesch Decl. at ¶ 7 ("RCW 64.38 does not specify all owners have equal voting rights . . . to qualify as a homeowners association.").

28. Even if a reviewing court were to conclude that Sandy Point is not a homeowners' association, there is no question, given the above that it is a "similar entity" to a homeowners association, and still exempt from jurisdiction under WAC 480-110-255(2)(f).⁴⁸

2. WAC 480-110-255(2)(f) is not an interpretive rule.

29. Commission Staff has refused to recognize this exemption. In the course of this special proceeding, while Sandy Point has consistently taken the position that it was exempt from Commission regulation based on WAC 480-110-255(1)(f), Commission Staff have refused to apply this exemption to Sandy Point. Sandy Point's Data Request No. 16 asked whether Commission Staff contends that Sandy Point is not eligible for the exemption identified in WAC 480-110-255(1)(f) for "homeowner associations, cooperatives and mutual corporations or similar entities?"⁴⁹ In response, Commission Staff wrote that it "understands that WAC 480-110-255 is an interpretive rule and cannot create exemption where none exist by law."⁵⁰ Commission Staff apparently contend that WAC 480-110-255(1)(f) is an interpretive rule, is not consistent with governing statutes, and therefore is not binding on the Commission. For the reasons discussed below, this contention is contrary to law.

30. An interpretive rule is "a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers." *See* RCW 34.05.328(5)(c)(ii). But the violation of WAC 480-110-255(2)(f) would subject a homeowners association to a very real sanction: regulation by the Commission. The rule states that the Commission does not regulate certain providers of water service, including

⁴⁸ *See generally* Wesch Decl.

⁴⁹ Rehberger Decl. at Ex. 25 (UTC Staff Response to Data Request No. 16); *see also id.* at Ex. 24 (UTC Staff Response to Data Request No. 12).

⁵⁰ *Id.*

homeowners associations. The Commission would violate this rule if it regulated homeowners associations, because its actions would be in direct conflict with the rule. And as a result of the Commission violating the rule, the homeowners association would be regulated. Its previously unregulated actions would then be subject to sanction. By definition, therefore, WAC 480-110-255(2)(f) is not an interpretive rule.

31. Moreover, there is no indication in the rulemaking file that the Commission intended for WAC 480-110-255(2)(f) to be interpretive rather than legislative. In contrast, the file makes clear that certain rules the Commission adopted along with WAC 480-110-255(2)(f) were interpretive. For example, the Concise Explanatory Statement issued when the rules were proposed states that other portions of WAC 480-110-255 would “codif[y] interpretive statement UW-930006,” which stated that the Commission “would not include certain revenues in calculating annual average revenue per customer.”⁵¹ That the Commission identified other rules adopted at the same time as interpretive, but did not so characterize WAC 480-110-255(2)(f), strongly suggests that the Commission did not consider WAC 480-110-255(2)(f) an interpretive rule.

32. Just as there is no evidence in the rulemaking record that the Commission adopted WAC 480-110-255(2)(f) as an interpretive rule, there is no such evidence in the rule itself. An agency adopting an interpretive rule would include language informing the public that the rule is interpretive rather than legislative. For example, in WAC 415-108-441 the Department of Retirement Systems made clear that its “reportable compensation” rules were interpretive when

⁵¹ See Rehberger Decl. at Ex. 28 (May 26, 1999 Concise Explanatory Statement at 3) (emphasis added); *see also id.* at Ex. 29 (November 30, 1999 General Order No. R-467 at 2) (new section WAC 480-110-255 “codifies commission interpretive statement UW-930006 regarding the calculation of revenue for jurisdictional purposes”).

it wrote that the purpose and scope of the rules was to “codify [the agency’s] *interpretation* of statutes and administrative practice regarding classification of payments as compensation earnable in PERS Plan 1, 2, or 3.” (Emphasis added.) *See Serres v. Washington Dep’t of Ret. Sys.*, 163 Wn. App. 569, 586 (2011) (observing that the reportable compensation rules “are by their own terms interpretative rules rather than legislative ones”).

33. Finally, the phrasing of WAC 480-110-255(2)(f) is not consistent with that of an interpretive rule. It states that the “commission *does not regulate*” homeowner associations. (Emphasis added). The rule does not simply reflect the Commission’s interpretation of a statute; it notifies homeowners associations and other providers listed in the rule that the Commission has decided not to regulate them. WAC 480-110-255(2)(f) is not an interpretive rule.

3. Even if WAC 480-110-255(2)(f) were an interpretive rule, the Commission would still be bound by it.

34. Because they reflect only the agency’s interpretation of a statute, interpretive rules are not binding on the courts. *See Association of Washington Bus. v. Washington Dep’t of Revenue*, 155 Wn.2d 430, 446 (2005) (“Therein lies the true difference between interpretive and legislative rules: their effect *on the courts*.” (Emphasis added)); *see also Serres*, 163 Wn. App. at 586 (interpretive rules “have no binding effect *on the courts* at all”) (emphasis added).

35. However, all rules, whether interpretive, legislative, or otherwise, are binding on the agency that adopted them. *See, e.g., Ritter v. Board of Comm’rs*, 96 Wn.2d 503, 507 (1981) (it is “well settled that an administrative body must follow its own rules and regulations when it conducts a proceeding which can deprive an individual of some benefit or entitlement”); *Costanich v. Department of Soc. & Servs.*, 138 Wn. App. 547, 554 (2007), *rev’d on other grounds*, 164 Wn.2d 925 (2008) (DSHS is bound by its rules delineating the authority of the

review judge); *Skamania County v. Woodall*, 104 Wn. App. 525, 539 (2001) (“[a]dministrative agencies are bound by their own rules”); and *Deffenbaugh v. Department of Soc. & Health Servs.*, 53 Wn. App. 868, 871 (1989) (same). The Commission cannot choose to ignore its rules.

36. The state supreme court has confirmed that this principle applies equally to interpretive rules. In *Association of Washington Business*, the court concluded that it “does not really matter” whether a rule is labeled interpretive or legislative. Either way, the court wrote, the agency that adopted the rules:

will stick by its rules (whether interpretive, procedural, or legislative) unless and until they are stricken by a court. For interpretive rules in particular, DOR will maintain it interpreted the underlying statutes correctly, and any taxpayer who disagrees will have to persuade a court otherwise. For legislative rules, a taxpayer who thinks the agency went too far in implementing the authorizing statutes will pursue precisely the same course: a lawsuit. *Agency rules are de facto authoritative for the public until the public challenges them in court and the court agrees.* Thus, how the rules are labeled does not affect the public’s response to the rules.

Association of Washington Bus., 155 Wn.2d at 447-48 (emphasis added). As the quoted language makes clear, the court plainly expects agencies to “stick by” their rules. For an interpretive rule, the court expects agencies to maintain that the rule correctly interprets the governing statutes. And from the public’s perspective, all rules—even interpretive rules—are authoritative unless a court says otherwise. No one has asked a court to invalidate WAC 480-110-255(2)(f). Thus, even if it were an interpretive rule, the Commission must stick by it, and Sandy Point must treat the rule as authoritative.⁵²

⁵² Unlike an interpretive *rule*, an interpretive *statement* is “advisory only.” See RCW 34.05.230(1). Agencies are encouraged to convert “longstanding interpretive and policy statements into rules.” *Id.* Once converted from a

37. The principle that agencies are bound by their own rules also is embedded in the judicial review provisions of the state APA. RCW 34.05.570(3)(h) states that a court shall grant relief from an agency order if the order is “inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency.” A person seeking judicial review of agency action therefore is entitled to relief if the action taken was at odds with the agency’s own rule.

38. The only exception is for situations in which the agency can demonstrate a rational basis for the inconsistency through “facts and reasons.” This means that only case-specific circumstances can justify an agency’s failure to comply with its own rules. An agency’s determination that its rule is inconsistent with a statute would not be based on facts, as required by RCW 34.05.570(3)(h); it would be based only on a legal interpretation. Therefore, if the Commission issues an order subjecting to regulation a homeowners association providing water service, a reviewing court would have to grant relief from the order because the order would be inconsistent with a rule of the agency, and because the Commission could not explain the inconsistency by stating facts and reasons to demonstrate a rational basis for the inconsistency. The statute gives the court no discretion not to grant relief in this situation (“a court shall grant relief from an agency order”).

39. For these reasons, the Commission is bound by WAC 480-110-255(2)(f), regardless of whether the rule is characterized as “interpretive.”

statement to a rule, however, the interpretation is no longer simply advisory. It is binding on the agency and on the public, unless and until a court strikes it down.

4. WAC 480-110-255(2)(f) is consistent with RCW 80.04.010(30) as interpreted by the courts.

40. The Commission Staff's response to Sandy Point Data Request No. 16 suggests that it believes WAC 480-110-255(2)(f) is inconsistent with the statutory definition of "water company" in RCW 80.04.010(30), and can be ignored on that basis. This is incorrect. The rule is consistent with the statute as it has been interpreted by the courts of this state.

41. The Commission's counsel reached this same conclusion in a memo to his client dated September 6, 2012. The memo analyzed whether Sandy Point is a water utility subject to Commission regulation under RCW 80.28 and other statutes. After discussing the relevant statutes and case law, including the "entity exemption" articulated by the state supreme court, the Commission's counsel concluded that:

The UTC has codified the entity exemption in WAC 480-110-255(2)(e), which exempts from UTC regulation "homeowner associations, cooperatives and mutual corporations, or similar entities that provide service only to their owners or members". The rules go on to state that this exemption does not apply to the extent such entities serve more than 99 non-owners or non-members, or the average annual gross revenue related to those non-owners or non-members exceed \$557 per customer. WAC 480-110-255(2)(f), as amended (see footnote 4). *I conclude that these rules reasonably implement the statute and the principles of the court decisions I located and discussed above, and should be applied in light of that statute and those decisions.*⁵³

Sandy Point agrees with counsel for the Commission: WAC 480-110-255(2)(f) reasonably implements the statute and the principles of relevant court decisions. We explain why below.

42. RCW 80.04.010(30)(a) defines a "water company" in relevant part as follows:

"Water company" includes every corporation, company, association, joint stock association, partnership and person, their

⁵³ See Rehberger Decl. at Ex. 28 (Sept. 20, 2012 Memorandum at 6) (emphasis added).

lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, controlling, operating, or managing any water system for hire within this state.

The courts have recognized an exemption from this statute for water companies that fit this definition, but do not serve water to the public. In *Inland Empire Rural Electrification, Inc. v. Department of Public Serv.*, 199 Wash. 527 (1939), the court concluded that an entity operating electrical facilities to provide electricity to its members was an “electrical company,” but not a “public service corporation” subject to state regulation. It wrote that:

A corporation becomes a public service corporation subject to regulation by [the Commission’s predecessor] only when, and to the extent that, its business is dedicated or devoted to public use. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or that portion of it that can be served by the utility; or whether, on the contrary, it merely offers to serve only particular customers of its own selection.

Id. at 537 (citations omitted); *see also West Valley Land Co. Inc. v. Nob Hill Water Ass’n*, 107 Wn.2d 359 (1986) (same) (applying to water company).

43. Sandy Point is not dedicated or devoted to public use under the above test; rather, it provides water service to particular customers of its own selection, its own members, members that have a voice in the operation of its affairs. *See Inland Empire*, 199 Wash. at 537; *Nob Hill Water Ass’n*, 107 Wn.2d at 365, 367. Sandy Point establishes the conditions and criteria for water service, and (save for 43 outside customers), provides that service to its own shareholder members.⁵⁴

⁵⁴ Thompson Decl. at Ex. 2 (reflecting limited and carefully drawn water service area) and Ex. 3 (Sandy Point’s Water System Plan); Smith Decl. at ¶ 8 (describing Board’s duties as including managing water service, establishing service policies, and setting rates for provision of water service).

44. Put another way, Sandy Point is not a water company as defined by RCW 80.04.010(30) because it does not provide water service to the public “for hire,” in excess of the jurisdictional customer threshold. While RCW 80.04.010 does not define “for hire,” the Commission has defined the term “for hire” in the context of the other regulated entities, providing that the term “for hire” means services “offered to the general public for compensation.” WAC 480-51-020(7) (Commission transportation rules) (emphasis added). Again, implicit in the term “for hire” is the notion of providing service to the general “public,” not to one’s own members. The term “public” refers to the people of a “nation, state, or community as a whole,” or “the community at large.” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY (2d ed. 1958) 1456-57 (emphasis added).⁵⁵ Sandy Point does not hold itself out to provide water either to the general public or to the community at large. Sandy Point provides water service to its shareholders (Class A and Class C) pursuant to the obligations under the 1965 Sale Agreement, the recorded declarations and covenants, and the appurtenant shareholder rights related thereto. Sandy Point’s Water System Plan, which was approved by the Department of Health, confirms and reflects these facts, establishing a restricted and carefully drawn geographical water service area, wherein Sandy Point provides water service to its own shareholder members, with limited (approximately 43) exceptions.⁵⁶

⁵⁵ Words not defined by statute are accorded their common or ordinary meaning, which may be discerned by looking to their dictionary definitions. *Swinomish Indian Tribal Cmty. v. Western Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 428 (2007); see also *Washington Utilities & Transp. Comms’n v. Cougar Ridge Water Sys.*, Docket No. UW-040367, 2004 WL 3421994 (July 30, 2004) (UTC Staff relies on dictionary definitions of undefined terms in WAC 480-110-255 pertaining to jurisdiction); see also *Washington Utilities & Transp. Comms’n v. Washington Water Power Co.*, Docket No. UE-971422, 1998 WL 223203 (Jan. 8, 1998) (“Nontechnical words, such as those at issue, are given their dictionary definitions.”).

⁵⁶ Thompson Decl. at Ex. 2 (Sandy Point Water Service Area) and Ex. 3 (Sandy Point’s Water System Plan).

45. Based on the above, WAC 480-110-255(2)(f) is consistent with the law.

Furthermore, the Commission stated in the rulemaking record for WAC 480-110-255(2)(f) that it had specifically concluded the rule was consistent with authorizing statutes. The Rulemaking Analysis prepared after the Commission adopted the rule, for example, includes the following question and answer:

3. What is the objective of the rule?

The objective of the water rulemaking review is to assure that the current water company rules of the Commission:

- Comply with statutes that authorize them⁵⁷

46. As the Commission and its counsel have concluded, WAC 480-110-255(2)(f) is consistent with the statutes regulating water companies. Thus, even if the Commission were free to ignore its own rules, there would be no legal basis for it to ignore WAC 480-110-255(2)(f). WAC 480-110-255(2)(f) exempts Sandy Point from Commission regulation.

D. Sandy Point Serves Its Own Shareholder Members; It Does Not Hold Itself Out to Serve “the Public”

47. In addition to WAC 480-110-255(2)(f), and consistent with the above analysis, Sandy Point is not subject to Commission regulation quite simply because it does not provide service to outside customers in excess of the jurisdictional threshold established in RCW 80.04.010(30)(b) and WAC 480-110-255(1)(b). Apart from its limited non-member customers (numbering approximately 43), Sandy Point does not provide water to the public, but rather, provides water only to its own shareholder members. It cannot be disputed that both Class A and Class C shareholders are shareholders of the Company.

⁵⁷ See Rehberger Decl. at Ex. 30.

48. Commission Staff seek to impose additional criteria, not found in the statutes, to establish that some of Sandy Point's shareholders do not sufficiently resemble shareholders to differentiate them from the general public. There is no basis in law or fact for this position. Specifically, Commission Staff have alleged that provisions in the Company's Articles stating that Class C shares are not eligible for dividends or distribution of assets should Sandy Point dissolve renders the Company jurisdictional.⁵⁸ While certain differences exist between the share classes, those differences were unanimously and voluntarily accepted at the time of their creation, and both shares retain a voice in the management of the affairs of the Company. Class C shares also have been eligible to convert to Class A shares, at their election.⁵⁹ Moreover, the fact remains that Sandy Point has never issued dividends to its Class A members and Sandy Point has never distributed assets or equity as part of any dissolution of the Company.⁶⁰ Commission Staff has proffered no evidence (and cannot proffer any evidence) that Sandy Point has ever issued a dividend or equity distribution to any shareholder or class of shareholders over the 48-year life of the Company.⁶¹ As the *Nob Hill* case makes clear, for purposes of classification as a public service company subject to regulation, when a company does business, "the important thing is what it does, not what its charter says." 107 Wn.2d 359, 364 (1986). Any profits are and have been retained in the Company, a practice confirmed as appropriate by *Nob Hill. Id.* Because all of Sandy Point's shareholders, regardless of type of share, are

⁵⁸ Investigation Report at 4; Order 01 at ¶ 11.

⁵⁹ Smith Decl. at ¶ 6 (noting that, over the years, approximately 50 Class C shareholders have elected to convert their shares to Class A shares).

⁶⁰ Smith Decl. at ¶ 12.

⁶¹ Rehberger Decl. at Ex. 26 (UTC Response to Data Request No. 25) ("Commission Staff does not contend that Sandy Point either has or has not provided a dividend of the corporation to any class of shareholder, individual shareholder, or any other person or entity for the dates 1965 through [2013].").

shareholders and members in the Company, and members with a voice in the Company's water service decisions, management, and operation, the Company is not subject to regulation. The Company has always acted as an exempt water company providing water service to its shareholder members, serving "particular individuals of its own selection," *Inland Empire Rural Electrification*, 199 Wash. at 537, and whose members have a voice in the management of its affairs. *Id.* at 539.

VI. CONCLUSION

49. Sandy Point has reasonably and justifiably relied on the Commission's past determinations that its operations were not subject to regulation under chapter 80.28 RCW and WAC 480-110-255, and has specifically looked to and relied on the exemption in WAC 480-110-255(2)(f) for homeowner associations, cooperatives, mutual corporations, and similar entities. While present Commission Staff would prefer to adopt a different rule than that provided under the Commission's adopted rules, it is not free to do so. WAC 480-110-255(2)(f) exempts Sandy Point from Commission regulation. Furthermore, as the facts herein demonstrate, except for approximately 43 outside customers, Sandy Point does not offer its services to the general public for hire, but rather serves its own shareholder members as a self-governed entity. Sandy Point respectfully requests the Commission issue a summary

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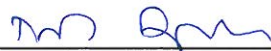
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determination that Sandy Point is not subject to Commission jurisdiction, dismissing this special classification proceeding.

DATED this 6th day of May 2013.

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