

[Service Date November 8, 2002]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

| | | |
|----------------------------------|---|-----------------------|
| DAVID and JANIS STEVENS, PAUL |) | |
| CARRICK, ALAN and JIM WIEMEYER, |) | DOCKET NO. UW-011320 |
| CHRIS and CECILY FLAVELL, STAN |) | |
| and KAY MILLER, MICHAEL and |) | |
| COLLEEN STOVER, RICHARD and |) | SIXTH SUPPLEMENTAL |
| PAULA RUSSELL, BEN G. MARCIN, |) | ORDER |
| RONALD and VICTORIA |) | |
| MONTGOMERY, CHARLES and |) | INITIAL ORDER DENYING |
| MICHELLE CLARK, PAUL SCHULTE, |) | COMPLAINT |
| SUE PERRAULT, and JORG REINHOLT, |) | |
| |) | |
| Complainants, |) | |
| |) | |
| v. |) | |
| |) | |
| ROSARIO UTILITIES, LLC. |) | |
| |) | |
| Respondent. |) | |
| |) | |

1 *Synopsis: This order proposes that the complaint be denied.*

2 **Nature of the Proceeding:** This is a formal complaint brought by twenty-one
property owners within the service area of Rosario Utilities, LLC who allege that
Rosario Utilities, owned by Oly Rose, LLC, has given preferential rights to available
water connections to Rosario Resort, also owned by Oly Rose.

3 **Procedural history:** The matter was heard upon due and proper notice to all
interested parties before Administrative Law Judge Karen M. Caillé on July 25 and
26, 2002, in Seattle, Washington.

4 **Initial Order:** The presiding administrative law judge proposes that the Commission
deny the complaint because Complainants have failed to sustain their burden of proof
as to the allegations in their complaint, namely that Rosario Utilities improperly
conducted the June 15, 2002, sale of water certificates, and granted Rosario Resort
preferential treatment in obtaining water certificates.

5 **Appearances:** The parties were represented as follows.

| | |
|---------------------------|--|
| Complainants by | Michael M. Hanis Patrick M. Hanis Hanis & Olson Attorneys at Law 3900 East Valley Highway, Suite 203 Renton, WA 98055 |
| Rosario Utilities, LLC by | Thomas M. Pors Attorney at Law 700 Fifth Avenue, Suite 5600 Seattle, WA. 98104-5056 |
| Oly Rose, LLC by | Richard A. Finnigan Seth Bailey Attorneys at Law 2405 Evergreen Park Drive SW Suite B-1 Olympia, WA 98502 |

I. DISCUSSION AND DECISION

ESSENTIAL FACTS

6 Complainants are individuals or representatives of individuals who own land on Orcas Island. Rosario Utilities (the Utility) is a water service company owned by Oly Rose and regulated by the Commission. Rosario Resort (the Resort) is an unincorporated entity wholly owned by Oly Rose that operates a resort on Orcas Island. Rosario Resort is an existing customer of Rosario Utilities. In addition to its ownership of Rosario Utilities and Rosario Resort, Oly Rose owns certain undeveloped lands within the area served by Rosario Utilities. Oly Rose petitioned to intervene and was granted intervention to protect its interests as a land owner and customer of Rosario Utilities. Vusario, Orcas Highlands, and Rosario Water Systems are licensed public water systems that distribute water bought from Rosario Utilities.

- 7 This complaint relates to a June 15, 2001, first-come, first-serve sale¹ (June 15th sale) of a limited number of water service connections by Rosario Utilities. The June 15th sale followed a five-year moratorium imposed by the Department of Health that barred the Utility from adding new customers until it made certain improvements to the facilities. The Utility spent more than \$1 million on new equipment culminating in the inauguration of a new water treatment plant.²
- 8 In May 2001, the Department of Health lifted the moratorium and approved 127 new service connections. However, only 38 of those service connections were available for the June 15th sale. The remainder of the service connections went to those property owners on a priority list that included residents who had prepaid for service connections prior to the moratorium.³ The Resort was included on the priority list for 34 connections to service a 71-room expansion of the resort pursuant to a 1996 conditional use permit. The conditional use permit was issued with a condition that the water system be upgraded to capacity. Oly Rose financed the \$1 million to construct the new water treatment plant in compliance with the condition on this permit.⁴
- 9 By letter dated May 23, 2001, Rosario Utilities notified all property owners in the Vusario, Orcas Highlands and Rosario Water Systems that the moratorium had been lifted, that those customers who were on the Utilities Commission priority list would be the first to receive water certificates, and that a limited number of new water certificates would be available beginning June 15th, on a first-come, first-serve basis. The letter set the location of the sale at the Rosario Utilities office and listed the office hours as 9 a.m. to 5 p.m. In addition the letter suggested that if the property owner was unable to come to the Rosario Utilities office, then the property owner should designate a representative to attend the sale.⁵
- 10 Two days before the sale, the Utility changed the representative rule to require that island residents represent themselves. The change was made to prevent line jumping, where property owners pass their applications and checks up the line to a friend, potentially depriving those in between of an opportunity to purchase a connection.

¹ Water certificates were available for purchase upon submission of the appropriate fee and documentation.

² Exs. 67, and 70.

³ Exs. 67, 68, and 132.

⁴ Ex. T-65, pp.4-5.

Property owners residing off the island were allowed to have a representative waiting in line for them.⁶

- 11 The day before the sale, after people began showing up early for the sale, the Resort general manager informed the Utility manager that the location of the sale needed to be changed from the Utility office in the Resort's headquarters, called "the Mansion," to avoid people forming a line in the Resort's main building, and potentially disrupting Resort operations at the main desk. The Resort selected the Discovery House, a meeting room facility 300 to 400 yards away that was larger than the Utility office, and had ADA access and restrooms. The Utility posted notice of the change on the Utility office door and at the Discovery House.⁷ The sign posted at the location of the sale requested that persons not queue or gather prior to Friday.⁸
- 12 Despite that request, people began to line up outside the Discovery House at about 5:00 p.m. on June 14th. Mr. Joseph March, Controller for the Resort, joined the line between 5:30 and 6:30 p.m. Mr. March was eighth or ninth in line.⁹ At midnight, he unlocked the door to the Discovery House and people filed into the building, keeping their places in line. Mr. March purchased 16 connections for the Resort on June 15, 2001. Mr. March testified that the Resort master plan called for 40 additional water service connections at the time the sale took place on June 15, 2001. However, the Resort did not purchase all of the water service connections it could have purchased under the master plan. The Resort Management decided that it was in the best interest of the Resort to have the Island developed both by the Resort and by other property owners.¹⁰
- 13 Complainants are property owners who failed to obtain water certificates at the June 15, 2001, first-come, first-serve sale. They allege that their failed attempts occurred after they had made efforts to understand and comply with the ambiguous notice and rules of the sale, and the ambiguous statements of the Utility Manager. They allege that the Resort had contact with the Utility leading up to the sale and was given information by the Utility not afforded to Complainants. Complainants assert that the sale did not comply with statutory requirements and must be voided. Complainants

⁵ Ex. 69.

⁶ Ex.T-65, pp. 6-7.

⁷ Id. at 8.

⁸ Ex. 55.

⁹ Ex. T-81, pp.5-6.

urge the Commission to grant each one of them a water certificate because they have established that they complied with the express rules of the sale and were the next thirteen property owners that would have received water service connections.

ISSUES PRESENTED

- A. **Were the notice and rules of the water certificate sale “just and reasonable” under RCW 80.28.010(3)?**
- B. **Did Rosario Resort receive undue or unreasonable preference in obtaining water certificates in violation of RCW 80.28.090?**

PARTIES' POSITIONS

14 Complainants allege that the notice and rules of the sale were not “just and reasonable” in violation of RCW 80.28.010(3).¹¹ In addition, Complainants allege that Rosario Resort received preferences and advantages regarding the sale, not afforded to the Complainants, in violation of RCW 80.28.090.¹² Complainants propose two alternative remedies to the Commission to address these statutory violations: (1) rescind the sale in its entirety and allow Complainants to receive the first thirteen water certificates, or (2) rescind the sixteen water certificates sold to Rosario Resort, give thirteen of the certificates to Complainants and then decide what to do with the remaining three certificates.¹³ Finally, Complainants allege that they are entitled to an award of attorney’s fees and costs under RCW 80.04.440.¹⁴

15 Respondent/Intervenor¹⁵ contend that Complainants have failed to carry their burden of proof to demonstrate that Rosario Utilities violated any of the applicable statutes, have attempted to impute wrongdoing and manufacture a remedy against Rosario Resort, when neither the alleged wrongdoing nor the proposed remedy is supported

¹⁰ Ex. T-81, pp. 9-11.

¹¹ Complainants’ Closing Argument Br. pp. 3-14.

¹² Id., pp. 3-4, and 14-16.

¹³ Id., pp. 16-21.

¹⁴ Id., pp. 21-23.

¹⁵ Rosario Utilities and Rosario Resort are separate entities. However, in the interest of judicial economy, and to better address the Complainants’ arguments Oly Rose has adopted the arguments in the Utility brief and Respondent/Intervenor have jointly filed a Response Brief.

by law or fact, and have failed to justify an award of attorney's fees.¹⁶ Moreover, Respondent/Intervenor argue that sanctions against Complainants and their counsel are in order for the assertion of the claim of attorneys' fees under Civil Rule 11.¹⁷

A. Were the notice and rules of the water certificate sale “just and reasonable” under RCW 80.28.010(3)?

16 **Complainants.** Complainants argue that “[a] sufficient notice would reasonably require that the rules and expectations of the sale are clearly stated so that a potential purchaser could understand what was required of them to purchase a water certificate.”¹⁸ Complainants maintain that the May 23, 2001 letter informing property owners that “*Rosario Utilities will issue water certificates on a first-come, first-serve basis, beginning June 15th. Office hours are 9 am – 5pm.*”¹⁹ compels a finding that the sale was unjust and unreasonable.

17 Despite Complainants assertions that the notice and rules of the sale were ambiguous, they maintain that the rules in the notice were clear in that the notice did not allow persons to line up prior to June 15, 2001.²⁰ Complainants further suggest that the office hours are stated in such a way that a reading of the notice would suggest that a person not arrive prior to the office hours of 9 a.m. to 5 p.m. Complainants argue that this interpretation is consistent with several witness' accounts that Ms. Vierthaler, the manager of Rosario Utilities, told them there would be no “camping out” and that people “should not come before 9:00 a.m. when the office opened.” Complainants assert this interpretation is also consistent with Ms. Vierthaler's testimony at the hearing where she explained that she wrote the notice that went up on the Discovery House, which included the statement: “*Please – no queuing or gathering prior to Friday. Thank you,*”²¹

so it could be interpreted as midnight should someone want it, it could be interpreted as daylight, it could be interpreted as office hours. I specifically put it that way to avoid a mob, because there were so many rumors on the island of hundreds of people lining up, fighting, camping out, you know,

¹⁶ Joint Response Brief p. 2, 25.

¹⁷ Joint Response Brief, p. 25.

¹⁸ Complainants' Closing Argument Br., p.5

¹⁹ Ex. 69.

²⁰ Complainant's Closing Argument Br., p.6.

bringing their tents, their sleeping bags, creating total havoc. So I left it up to the individual.²²

- 18 Complainants argue that all the certificates went to persons who lined up prior to midnight in violation of the clearly established rules. According to Complainants, those persons received preferential treatment and an unfair advantage over the Complainants who lined up the morning of the sale as directed in the sale notice.
- 19 Complainants argue that the “first-come, first-served” language is ambiguous and does not satisfy the “just and reasonable” requirement for the sale. Complainants maintain that “[a]ny sale that results in the owner of the Utility receiving 16 of the 38 available permits is unjust and unreasonable pursuant to RCW 80.28.010(3).”²³ Complainants suggest that a reasonable interpretation of first-come, first-serve could include a sale in which one water certificate would be issued per property owner as testified by Jim Ward of Commission Staff.²⁴ After all property owners received a permit, the line could start over until all permits were exhausted. According to Complainants, “[b]y allowing persons to purchase more than one certificate at the June 15 sale, they were giving preferential treatment over those not allowed to purchase certificates in violation of RCW 80.28.090.”²⁵
- 20 Complainants argue that the change in the location of the sale by Rosario Resort, from the Utility office in the Mansion to the Discovery House 300 to 400 yards away, the day before the sale demonstrates the insufficient process created by the Utility. Complainants further argue that it demonstrates the Resort’s role and authority to control the Utility in how the Utility conducted the sale.
- 21 Complainants also argue the change in the representative rule two days before the sale was unreasonable. The May 23rd letter stated “we suggest you designate someone to come to the Rosario Utilities office in your place if you are unable to come yourself.”²⁶

²¹ Ex. 55.

²² Vierthaler, TR. 331-333.

²³ Complainants’ Closing Argument Br., p. 9.

²⁴ Ward, TR. 144-145.

²⁵ Complainants’ Closing Argument Brief, p. 10.

²⁶ Ex. 69.

22 On June 13, 2001, Ms. Vierthaler made the decision to require that island residents could only represent themselves in order to avoid “line-jumping.” She provided notice of the change on the sign posted on the Discovery House and to anyone who called after the decision was made.²⁷ Complainants maintain that the rule change further demonstrates the Utility’s lack of control over the sale, insufficient notice of how the sale would be conducted, and inability of potential customers to rely on what they were told by the Utility in preparing for the sale.

23 **Respondent/Intervenor.** Respondent/Intervenor observe that Complainants are confused about the “rules” of the sale, and have tried to create additional confusion about the rules to support their case. According to Respondent/Intervenor, it is important to sort through the confusion and determine precisely what the rules were, as opposed to individual Complainants’ interpretations of the rules. Respondent/Intervenor suggest that the principal, controlling rules concerned the manner, place and time of the sale. Other supplementary rules concerned a change in location, restriction on representation for Orcas Island residents, and prohibition on the use of a numbering system to save places in line.

24 Respondent/Intervenor assert that there is no question that the manner of the sale was “first-come, first-serve,” as communicated in the May 23, 2001, written notice and the sign posted at the sale. Likewise, they contend that there is no question that the manner of the sale chosen was consistent with advice from Commission staff.²⁸ Further, they contend that there is no question that a “first-come, first-serve” sale usually and customarily means that any customer could purchase as many connections as they could use.²⁹ According to Respondent/Intervenor, testimony establishes that the rule “first-come, first-serve” was not described, interpreted or listed by Rosario Utilities as restricting any customer in line to only a single certificate.³⁰ Respondent/Intervenor note that Complainants’ contention that it was not just or reasonable for Rosario Resort to obtain more than one water certificate ignores their own intentions to purchase multiple certificates and the ability of other customers, including Orcas Highlands, to do so.³¹

²⁷ Vierthaler, TR. 340-341.

²⁸ Joint Response Br. at 9, Exs. 69 and 55.

²⁹ Ward, TR. 164.

³⁰ Ex. T-65, p. 18; Ward TR. 164-165.

³¹ Paul Carrick testified that he intended to buy more than one water certificate. Carrick, TR. 172. Jorg Reinhold testified that he intended to purchase more than one water certificate. Reinhold, TR. 194. Ben Marcin intended to purchase 26 water certificates. Ex. 46.

- 25 Thus, Respondent/Intervenor maintain that Complainants' assertions that the "first-come, first-serve" sale was inappropriate because parties could purchase more than one certificate at a time is in direct conflict with the testimony and evidence presented at the hearing.
- 26 Respondent/Intervenor argue that the time of the sale was 9:00 a.m. on June 15, 2001, as communicated in all relevant notices. They contend that the rule concerned the date of the sale and when the office would open for the sale. They maintain that the rule did not concern when persons should arrive at the Resort property to wait in line. According to Respondent/Intervenor, there is not a single document that supports Complainants' claim of a "rule" that no one could arrive or wait in line before 9:00 a.m. on June 15th, or that no one could arrive before 12:00 a.m. on June 15th to wait in line for certificates. Moreover, they argue that even if such a rule existed, there is no evidence that it would have changed the result.
- 27 Respondent/Intervenor note that despite Complainants' assertion that the change in the location of the sale was not "harmless," there is nothing to link the change in the location of the sale to any alleged harm suffered by any of the Complainants. Ms. Burrill is the only witness that claims to have even been affected by the change, and her testimony contradicts the testimony of Mr. Carrick who insists that he was next in line behind the last person to obtain a water certificate.³²
- 28 Finally, Respondent/Intervenor note that not a single Complainant asserted that the rule requiring those who lived on Orcas Island to represent themselves in person had any impact on whether they obtained a water certificate.

B. Did Rosario Resort receive undue or unreasonable preference in obtaining water certificates in violation of RCW 80.28.090?

- 29 **Complainants.** Complainants argue, "without going into great detail,"³³ that the following examples demonstrate that Rosario Resort received unreasonable preference in obtaining water certificates. The Resort changed the location of the sale; the Resort lined up at approximately 5:30 p.m. on June 14, 2001, despite the rule

³² Ex. T-2 at p. 2 vs. Ex. T-37 at pp. 3-4

³³ Complainants' Closing Argument Br., p. 14.

that no lining up was allowed prior to June 15th;³⁴ the Resort contacted the Sheriff's Department and decided whether or not people could remain in line;³⁵ the Resort held closed door meetings with Ms. Vierthaler and discussed the method of the sale, the number of permits the Resort would attempt to get versus the number left for other property owners;³⁶ and the Resort received 50 of 127 available water certificates. Complainants observe that Ms. Vierthaler may have had no intent in giving an unfair preference to the Resort. However, with the Resort's involvement, decision making, and authority over the Utility, it could not be avoided.³⁷

30 **Respondent/Intervenor.** Respondent/Intervenor suggest that Complainants do not understand the law associated with an "undue or unreasonable" preference under RCW 80.28.090. According to Respondent/Intervenor, first, there must be a preference. Second, it must be granted from Rosario Utilities to an applicant, like Rosario Resort. Third, it must be intentionally granted. Fourth, it must be "undue" or "unreasonable."

31 Respondent/Intervenor note that rather than satisfying each of these elements, Complainants assert that actions of Rosario Resort, over which they admit Rosario Utilities had no control, constitute undue or unreasonable preferences under RCW 80.28.090.

32 In response to the Complainants' preference example of the Resort changing the location of the sale, Respondent/Intervenor argue that this had no impact on whether Complainants got certificates and it was not a preference. According to Respondent/Intervenor, the Resort did not gain any kind of advantage over other applicants by lining up in the Discovery House parking lot as opposed to lining up in the Mansion parking lot. Respondent/Intervenor argue that the change in location was a matter of convenience for all the applicants, not preference for one;³⁸ it was not granted from Rosario Utilities to Rosario Resort;³⁹ and it was not undue or unreasonable to change the location of the sale.⁴⁰ Consequently, they maintain that

³⁴ March, TR. 384-385.

³⁵ Vierthaler, TR. 344-345.

³⁶ Id., 324-325; March, TR. 376.

³⁷ Complainants' Closing Argument br. at 15.

³⁸ Ex. T-81, p. 4.

³⁹ March, TR. 377.

⁴⁰ Ward, TR. 166.

this change does not meet the definition of an undue or unreasonable preference under RCW 80.28.090.

- 33 In response to Complainants' preference example of the Resort lining up early despite the "rule" than no lining up was allowed prior to June 15, 2001, Respondent/Intervenor point out that this was not something that Rosario Utilities "allowed" Rosario Resort to do, rather, it was something that Rosario Resort did out of necessity due to the unyielding nature of Roy Blay and others who were willing to go to jail rather than come back on June 15.⁴¹ Respondent/Intervenor contend that it is undisputed that the Resort's representative, Joe March lined up in response to a telephone call, and that he had not previously planned to line up prior to June 15.⁴² They point out that Complainants have presented no evidence that Ms. Vierthaler knew that Mr. March had lined up on June 14. To the contrary, Ms. Vierthaler left before Mr. March lined up and did not see him in line until the next morning at the sale. She testified that she did not know when Mr. March got in line for the sale.⁴³ As a result, Respondent/Intervenor assert that this cannot be deemed a preference granted from Rosario Utilities to Rosario Resort.
- 34 In response to the Complainants' preference example of the Resort's action of calling the Sheriff's Department, Respondent/Intervenor argue that the fact that Rosario Resort contacted the Sheriff's Office demonstrates that it was attempting to keep the sale orderly. They maintain that Rosario Utilities did not "grant" Rosario Resort the opportunity to call the Sheriff's Office. They point out that Ms. Vierthaler testified specifically that this was not an issue over which Rosario Utilities had control.⁴⁴
- 35 In response to Complainants preference example of the Resort holding a meeting with the Utility in which the water certificate sale was discussed, Respondent/Intervenor argue that virtually all of the Complainants attempted to contact Ms. Vierthaler and discuss their options and opportunities to obtain water certificates. They maintain that the fact that Rosario Resort did the same thing has nothing to do with undue or unreasonable preferences. To the contrary, the only testimony on this subject is that Rosario Resort was treated identically to other applicants. Respondent/Intervenor acknowledge that Rosario Resort inquired, as so many of the Complainants did, about

⁴¹ Ex. T-35, pp. 2-3.

⁴² Ex. T-35, pp.2-3.

⁴³ Vierthaler, TR. 345-346.

⁴⁴ Id. at 344.

whether it could obtain the water certificates via the priority list. Rosario Utilities rejected the Resort's request. Instead, Rosario Resort had to stand in line like everyone else.⁴⁵

36 Finally, Respondent/Intervenor argue that the fact that Rosario Resort obtained a number of water certificates, in and of itself, is irrelevant to whether there was any undue or unreasonable preference granted from Rosario Utilities to Rosario Resort. They assert that Rosario Resort was eligible for more than 60 water certificates.⁴⁶ They acknowledge that the Resort received 34 water certificates through a priority list filed with the Commission.⁴⁷

37 Respondent/Intervenor note that Complainants have not complained about the priority list in their Complaint or made an issue of this matter throughout the course of this litigation. They maintain that the other 16 certificates that Rosario Resort purchased were obtained in exactly the same manner that other successful applicants obtained their certificates.

38 According to Respondent/Intervenor, each of the alleged "preferences" was the action of Rosario Resort, not Rosario Utilities. Moreover, Complainants acknowledge that Ms. Vierthaler may have had no intention to grant any undue preferences.⁴⁸ Thus, Respondent/Intervenor argue that Complainants have failed to establish that Rosario Utilities granted any preference, whether undue or otherwise, to Rosario Resort. Further, Respondent/Intervenor point out that Rosario Resort is not a respondent in this case and not subject to any of the causes of action asserted by Complainants in their Complaint.

DECISION

39 Complainants have failed to sustain their burden of proof as to the allegations in their complaint. Specifically, Complainants have failed to show by substantial competent evidence that the notice and rules of the water certificate sale were not "just and reasonable" under RCW 80.28.010(3), that the sale was unfair, unjust and

⁴⁵ Id. at 360.

⁴⁶ Ex. T-81, p. 11.

⁴⁷ Vierthaler, TR. 337-338

⁴⁸ Complainants' Closing Argument Br., p.15

unreasonable pursuant to Title 80.28 RCW, and that Rosario Resort received “undue or unreasonable” preference in obtaining water certificates under RCW 80.28.090.

40 Complainants acknowledge that that they all received the same May 23, 2001 notice⁴⁹ that was sent to all property owners in the Vusario, Orcas Highlands and Rosario water systems advising them of the manner, place, and time of the sale. However, Complainants interpret the notice to have established a rule that no one could line up before 9 a.m. on June 15th. They support this interpretation with the testimony of six Complainants who claim that Ms. Vierthaler told them there would be no camping out and that they could not line up before 9:00 a.m. on June 15. Two of those Complainants, Ms. Burrill and Mr. Russell, testified that they spoke with Ms. Vierthaler the afternoon before the sale. Ms. Vierthaler testified that she could not have spoken to them the afternoon of June 14, because she attended a seminar all afternoon. Mr. March, who also attended the same seminar, corroborated Ms. Vierthaler’s testimony. Seven of the Complainants offered no testimony that Ms. Vierthaler told them not to line up prior 9:00 a.m. on June 15. Of the six who allegedly received the admonition from Ms. Vierthaler, five ignored it and lined up before 9:00 a.m. Ms. Burrill, one of the five Complainants who did not follow Ms. Vierthaler’s alleged instructions and arrived at 5:30 a.m., testified as to her understanding of what constitutes a first-come, first serve sale:

Simply like buying rock tickets, that anybody looking for them was going to get there so that they could be first-come, first-serve. That’s what that indicates to me. Whatever you’re going for, it’s first-come, first- serve. You know you need to be there in advance if you’re going to be first-come, first-served.⁵⁰

41 Ms. Vierthaler testified that she never told anyone, including any of the Complainants, that they could not line up prior to business hours on June 15.⁵¹ This testimony is credible because is it consistent with the written notices regarding the sale, including Exhibits 55 and 69. Neither notice prohibited persons from coming early to the sale location to establish a place in line. Exhibit 55, the sign posted at the door of the Discovery House, has four rules, but the language, “*Please—no queuing or gathering prior to Friday. Thank you,*” is listed apart from the rules and was

⁴⁹ Ex. 69.

⁵⁰ Burrill, TR. 72.

⁵¹ Vierthaler, TR. 342-344; Ex. T-65, p. 7.

considered a request, not a rule, by Ms. Vierthaler.⁵² Ms. Vierthaler testified that the request to not line up before June 15 could not have been a rule because she did not have the authority to remove anyone from the Resort.⁵³

42 While Complainants maintain that the May 23 notice is clear with respect to when people may line up for the sale, they argue that the first-come, first-serve language in the notice is ambiguous and does not satisfy the “just and reasonable” requirement for the sale. They argue that because of the limited number of water certificates, a first-come, first-serve sale where one person could take every water connection is not statutorily sufficient. Complainants support their argument by referencing the testimony of Jim Ward of Commission staff. Mr. Ward was asked on cross-examination whether a sale of first-come, first-serve, one person per certificate would meet the general definition of first-come, first-serve.⁵⁴ Mr. Ward responded that it would be one of the many definitions.⁵⁵ On redirect examination, Mr. Ward characterized the first-come, first-serve process where customers purchase more than one connection at a time “as a normal, a typical occurrence.”⁵⁶

43 Complainants’ assertions that the “first-come, first-serve” sale was inappropriate because parties could purchase more than one certificate at a time is in direct conflict with the testimony and evidence presented at the hearing. Complainant Paul Carrick testified that he intended to purchase three water certificates at the sale.⁵⁷ Complainant Jorg Reinholt testified that he intended to purchase two certificates.⁵⁸ Complainant Ben Marcin was listed on Ex. 46 as seeking 26 certificates. Ms. Vierthaler testified that if Orcas Highlands had been first in line, it would have been entitled to purchase all of the certificates they sought.⁵⁹

44 Complainants’ arguments that the change in the location of the sale and the change in the representative rule further demonstrate that the sale was unreasonable carry little weight when viewed in light of all the evidence presented. Mr. Ward acknowledged that it would be reasonable for the water company to make adjustments in the

⁵² Id., p. 343.

⁵³ Id., p. 331, 343.

⁵⁴ Ward, TR. 144.

⁵⁵ Id., p. 145

⁵⁶ Id., p. 165-166.

⁵⁷ Carrick, TR. 172.

⁵⁸ Reinholt, TR. 194.

⁵⁹ Vierthaler, TR. 326-328, 358; Ex. T-65 at 10.

procedures of a sale as time went forward to try and accommodate events that occurred.⁶⁰ The evidence establishes that the change in location from the Mansion Utility office to the Discovery House came about when people started gathering to line up in the early afternoon on June 14. The decision was made by the Resort in order to avoid interruption of the Resort operations, and to provide facilities for those waiting in line. The change in location was posted on the Utility office door, and the Discovery House door. In addition, those people who phoned in after the change was made were informed of the relocation of the sale. Similarly, the change in the representative rule occurred two days before the sale when Ms. Vierthaler realized that there would be a high risk of line-jumping if she did not require island residents to represent themselves. Again, the change was posted in the notice. In each instance, the change was made to adjust to a recent change in circumstances or to avoid the risk of unfair tactics at the sale. Complainants have failed to demonstrate that these changes were unreasonable. Moreover, Complainants arguments have not established a causal connection between these changes and their failure to receive a water certificate.

45 Complainants have failed to sustain their burden of proof as to their allegations that the notice and rules of the water certificate sale were not just and reasonable. Based on the evidence, Rosario Utilities meets the minimum requirements for reasonable notice and rules for a first-come, first-serve sale of water certificates. However, had the notice and rules been more clear and more definite, it could have avoided confusion, litigation, and the time and expense associated with litigation.

46 Complainants have also failed to establish under RCW 80.28.090 that there was a preference granted by the Utility to the Resort, that the preference was undue or unreasonable, and that the Utility intended to grant an undue or unreasonable preference. As demonstrated above, Complainants have failed to establish that those who successfully purchased water certificates at the June 15, 2001, sale were subject to a different set of rules from the Complainants. No preference was provided to Rosario Resort or any other customers because several customers arrived as early or earlier than the Resort for the sale, and no customer was prohibited from purchasing multiple certificates. The undisputed testimony is that Rosario Resort made its own decision when to line up and how many certificates to purchase, and was not treated

⁶⁰ Ward, TR. 166.

differently than other applicants regarding the sale.⁶¹ Rosario Resort was not first in line, but eighth or ninth. As a result, the Resort faced the same risk that other applicants faced, that there would not be enough certificates to meet its desires. With a short supply of certificates, some persons were destined to be unsuccessful at the sale. Those who arrived earlier purchased certificates; those who arrived later did not. This is the essence of a “first-come, first-serve” sale.

47 In conclusion, there was no undue or unreasonable preference granted to Rosario Resort or any other customer, and the sale complied with the statutes regulating water companies. Accordingly, the complaint is denied. In light of this decision, the remaining issues of the correct remedy, and attorneys’ fees will not be addressed.

II. FINDINGS OF FACT

48 Having discussed in detail both the oral and documentary evidence concerning all material matters inquired into, and having previously stated findings and conclusions based thereon, the following summary of the facts is now made. The portions of the proceeding detailing findings and discussion pertaining to the ultimate facts are incorporated by this reference.

49 (1) The Washington Utilities and Transportation Commission (Commission) is an agency of the state of Washington vested by statute with the authority to regulate rates, rules, regulations, practices, accounts, securities and transfers of public service companies, including water companies.

50 (2) Rosario Utilities, LLC, is a public service company engaged in the business of furnishing potable water to the public within Washington State and, as such, is subject to the jurisdiction of the Commission.

51 (3) Complainants are individuals or representatives of individuals who own land on Orcas Island.

52 (4) Complainants failed to obtain water certificates during the June 15, 2001, first-come, first-serve sale of water connections by Rosario Utilities.

⁶¹ Vierthaler, TR. 360.

- 53 (5) On September 24, 2001, Complainants filed a formal complaint against
Rosario Utilities, LLC, alleging improper distribution of water permits.
- 54 (6) Complainants have failed to sustain their burden of proof as to the allegations
in their complaint.

III. CONCLUSIONS OF LAW

55 Having discussed above in detail all matters material to this decision, and having
stated general findings and conclusions, the following provides summary conclusions
of law. Those portions of the preceding detailed discussion that state conclusions
pertaining to the ultimate decisions of the Order are incorporated by this reference.

- 56 (1) The Washington Utilities and Transportation Commission has jurisdiction
over the parties to, and subject matter of, this proceeding. *RCW 80.01.040,*
Chapter 80.04, Chapter 80.28 RCW.
- 57 (2) Complainants failed to sustain their burden of proof as to the allegations in
their complaint.

IV. ORDER

58 The Commission has jurisdiction over the subject matter and the Parties to these
proceedings.

59 The Complaint is denied.

DATED AT Olympia, Washington, and effective this 8th day of November, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

KAREN M. CAILLÉ
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-09-780(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-09-780(3). WAC 480-09-780(4) states that any *Answer* to any Petition for review may be filed by any party within (10) days after service of the Petition.

WAC 480-09-820(2) provides that before entry of a Final Order any party may file a *Petition to Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

One copy of any Petition or Answer filed must be served on each party of record, with proof of service as required by WAC 480-09-120(2). An Original and nineteen copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia Washington 98504-7250.