

Docket No. UW-170924 - Vol. II

Hand v. Rainier View Water Company, Inc.

June 25, 2018



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BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

Sarah Hand,)
)
Complainant,)
)
vs.) Docket No. UW-170924
)
Rainier View Water Company,)
Inc.,)
)
Respondent.)

HEARING, VOLUME II

Pages 24 - 46

ADMINISTRATIVE LAW JUDGE KOPTA

9:31 A.M.
JUNE 25, 2018

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-o0o-

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OLYMPIA, WASHINGTON; JUNE 25, 2018
9:31 A.M.

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P R O C E E D I N G S

JUDGE KOPTA: Let's be on the record in
Docket UW-170924 captioned Sarah Hand versus Rainier
View Water Company, Inc. I am Gregory J. Kopta, the
administrative law judge who is assigned to preside
over this proceeding. We are here today on
cross-motions to compel responses to the discovery
requests.

Let's begin by taking appearances, beginning
with counsel for Ms. Hand.

MR. MALDEN: Nigel Malden appearing for
Sarah Hand, Complainant.

JUDGE KOPTA: And for the Company?

MR. RANKIN: Daniel Rankin appearing for
Rainier View Water Company.

JUDGE KOPTA: And for Staff?

MR. ROBERSON: Jeff Roberson, AAG, for
Staff.

JUDGE KOPTA: Okay.

MS. HAND: Sarah Hand is on the phone.

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1 JUDGE KOPTA: I'm sorry, who was that?
 2 MS. HAND: Sarah Hand is on the phone.
 3 JUDGE KOPTA: Oh, okay. Thank you,
 4 Ms. Hand.
 5 We are here, as I said, to discuss the motions
 6 to compel. I have read the motions and the responses,
 7 and am prepared to discuss them. My anticipation is
 8 that I will rule from the bench on the requests, I
 9 will not issue a written order. To the extent that
 10 you need something in writing, then it will come via
 11 the transcript.
 12 All right. Let's begin with the Company's
 13 motion to compel, since that was the first one that
 14 came in. Mr. Rankin, did you have anything further to
 15 add to what you have filed in response to Ms. Hand's
 16 response?
 17 MR. RANKIN: I believe the only thing
 18 that I would add in reply to Ms. Hand's response is
 19 that to the extent Ms. Hand is claiming the
 20 attorney-client privilege or work product protection,
 21 I believe they should produce a privilege log so that
 22 the Company can inquire and test the sufficiency of
 23 those claims. To date they have not done that. I
 24 believe we just -- the first -- the first instance of
 25 a claim of privilege or protection was in Ms. Hand's

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1 reply, which came in late last week.
 2 I believe that to the extent Ms. Hand is not
 3 compelled to answer those requests for production, a
 4 privilege log should be ordered.
 5 JUDGE KOPTA: Okay.
 6 And let's make sure that we speak into the
 7 microphone since we have somebody on the bridge
 8 line --
 9 MR. RANKIN: Sorry.
 10 JUDGE KOPTA: -- and it's hard to hear.
 11 And that the red light is on the microphone.
 12 Sometimes you just have to basically swallow it to
 13 make sure you can be heard.
 14 All right. One question that I have as I look
 15 at Mr. Malden's response is that he refers several
 16 times to documents that have been produced in the
 17 Pierce County Superior Court case. Are those not
 18 responsive to your request?
 19 MR. RANKIN: Essentially, these requests
 20 ask for everything from the period when the superior
 21 court proceeding ended through the present, and so
 22 inherently, no, those are not responsive to these
 23 requests. Through the superior court matter, Ms. Hand
 24 had a continuing obligation to supplement discovery.
 25 That ended when her case was dismissed.

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1 I am essentially trying to make sure there is
 2 nothing new coming up. So as these claims are
 3 proceeding through this process as well, there is no
 4 information available about appraisals, ongoing
 5 concerns about water quality, any other types of
 6 damages she is claiming. For all I know, the remedies
 7 that she seeks could be moot if there are no longer
 8 any problems, but we don't know that without
 9 discovery.
 10 JUDGE KOPTA: Okay.
 11 And that reminds me to clarify that damages is
 12 not something the Commission can award. Anything that
 13 goes to calculating damages is not something that I am
 14 going to require the Company to provide because it is
 15 not anything the Commission can do anything about,
 16 that's up to the court. But as I understand it, the
 17 issue is the quality of the water that is being
 18 provided to Ms. Hand, both historically and presently.
 19 So I take your point, that anything that she
 20 has with respect to the current state of water quality
 21 or the quality since she has filed her complaint or
 22 her testimony is fair game for you to inquire into.
 23 So with that, I will go through these requests
 24 one by one and we will allow each of you to say
 25 anything more than what is already in the record.

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1 With respect to Document Request No. 1, which
 2 I am paraphrasing and don't mean to make any
 3 substantive changes, essentially anything written or
 4 graphically that relates to -- it refers to the
 5 incident alleged in the complaint. Is it just
 6 anything having to do with her complaint?
 7 MR. RANKIN: Yeah, I guess I would
 8 consider her complaint to be an ongoing incident.
 9 JUDGE KOPTA: Okay.
 10 Mr. Malden, is there anything more than what
 11 you have provided to the Pierce County Superior Court
 12 action, in terms of support from Ms. Hand's complaint,
 13 that has happened since that court action ended?
 14 MR. MALDEN: Well, that request is so
 15 broad and general I don't know how to respond to it.
 16 You know, if I may make my central point, which is
 17 that I am representing a consumer who made a complaint
 18 that Rainier View is selling water with excess levels
 19 of manganese in it. The Company does not deny it.
 20 I can't understand why I would be required to
 21 spend hours and hours and hours and hours looking for
 22 documents like what he is asking for. We haven't yet
 23 got to it, but he is asking for statements, anything
 24 my client has ever said to anyone about the water.
 25 How is that possibly relevant? The time and expense

1 and hassle to my client is enormous and they are doing
2 it purposefully. There is no legitimate reason for
3 any of this, for the hearing, given the scope of the
4 issues.

5 I was told at the very beginning that there is
6 no way you can award any damages, compensatory
7 damages, you can't order any relief. We can't make a
8 factual determination of a number of issues. So the
9 legal issue in this hearing is very narrow, the scope
10 of review as I understand it is very narrow, and his
11 requests go way, way beyond anything.

12 I have spent plenty of time, I have answered
13 interrogatories, we went to a deposition, spent hours
14 there, all over a consumer complaint. It's excessive.
15 I don't think we should be required to spend one more
16 minute fooling around with their discovery.

17 JUDGE KOPTA: Well, thank you
18 Mr. Malden.

19 I have looked at the prefiled testimony and
20 exhibits that you have filed on Ms. Hand's behalf and
21 there is quite an extensive amount of documentation of
22 what has occurred in her home, allegedly, as a result
23 of the water that she has received, and I think that
24 to the extent that there is anything further that she
25 could have, by way of pictures or something else, that

1 something that she should have to require -- that she
2 should be required to do, so I am going to deny that
3 one.

4 No. 4. It seems like that has been answered,
5 that she is not aware of any others outside of hers,
6 so I think that is moot.

7 No. 5. As I indicated before, Mr. Malden, I
8 don't know whether you have anything further, but if
9 she has done any water tests on the quality of the
10 water in her home, then I think that is something that
11 the Company is entitled to have access to.

12 MR. MALDEN: And that's even if I have
13 retained a consultant and had it tested as an
14 undisclosed consultant? I have to give that to him if
15 I have retained someone?

16 JUDGE KOPTA: The Commission's concern
17 is the water quality that Ms. Hand is receiving right
18 now. If there is information that goes to that, then
19 that is something that we want to see.

20 MR. MALDEN: Okay. There is -- there is
21 a concept called attorney work product privilege in
22 the state of Washington. When I am an attorney and I
23 go hire someone to do something for me, unless that
24 person is disclosed as an expert witness or I waive
25 the privilege, it's protected. I can't understand for

1 substantiates what is currently happening or what has
2 been happening, I think that the Company is entitled
3 to see that.

4 If you have anything further, then I would
5 require that you provide that to the Company,
6 basically in the form of what you have provided in
7 exhibits to Ms. Hand's testimony. If you have
8 anything to update with respect to that type of
9 information, then I think the Company is entitled to
10 it.

11 All right. Request No. 2, written or recorded
12 statements from any witnesses. In this case,
13 Mr. Malden, I agree with you. I don't see any benefit
14 to requiring that to be provided, so I will deny that
15 request.

16 MR. RANKIN: If I may, Judge Kopta. In
17 our motion we mentioned that we already previously
18 agreed to withdraw Nos. 2, 7, and 11.

19 JUDGE KOPTA: Okay. And remind me if I
20 get to those and start talking about them.

21 No. 3, I am not sure that I see how this is
22 going to be beneficial. Inspection -- there is a
23 difference on testing the water quality, but
24 inspections of the home are -- if we are not dealing
25 with damages, I don't really see that that is

1 the life of me, why would Rainier View have the right,
2 unlike any other litigant in the state of Washington,
3 to obtain work product privileged information?

4 JUDGE KOPTA: Well, I am familiar with
5 the work product privilege doctrine. I hope that you
6 are familiar that this is quasi-judicial litigation
7 and it's not your normal superior court litigation.

8 Here the Commission tries to build the best
9 record it can to make -- have the information that it
10 needs to make a determination as to what is fair,
11 just, reasonable and sufficient when it comes to the
12 quality of, in this case, water service that is
13 provided to your client. So what we want to do is to
14 help you help us to make that determination.

15 What I want is to be able to know all the
16 information that is available in terms of what the
17 quality of the water is. If you have information that
18 is relevant to that inquiry, then I believe that the
19 Company is entitled to see it and I would like to see
20 it.

21 MR. MALDEN: All right.

22 And do I get reimbursed the cost then? If I
23 paid for a test by a third party and they want it,
24 should they not be required to pay for it?

25 JUDGE KOPTA: Well, this is discovery.

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1 This is something that you have paid for, if you have
 2 paid for it, and I don't know. We are not here to
 3 decide who gets to pay for what. Right now, if you
 4 have this in your possession, then this is something
 5 that the Company should be able to have.
 6 MR. MALDEN: So you are making that
 7 ruling. You are saying that that -- you are
 8 eliminating the work product privilege. In a sense,
 9 you are saying that Rainier View's right to get a test
 10 report outweighs the attorney work product privilege.
 11 JUDGE KOPTA: I am saying that the
 12 Commission's need for that information outweighs the
 13 work product privilege, and through Rainier View, I am
 14 assuming, if it has any relevance, that it will come
 15 before us, it just won't happen indirectly. I could
 16 issue a bench request for that if you would prefer.
 17 One way or the other I want to see it, if you have
 18 something.
 19 Does that make sense?
 20 MR. MALDEN: Yes. I think it is
 21 completely contrary to the law, but yes, I understand
 22 your ruling.
 23 JUDGE KOPTA: Okay.
 24 No. 6 also appears to be moot, since Ms. Hand
 25 said that she knows of no such responses.

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1 No. 7 you have withdrawn.
 2 No. 8. Again, this goes to damages or
 3 appraisals or assessments. I am not going to require
 4 those to be provided.
 5 No. 9. Again, I think this goes to damages,
 6 which is not something that we are here to address, so
 7 I will deny that one.
 8 No. 10. Ms. Hand has not put forward any
 9 experts as witnesses and therefore I will not require
 10 her response to No. 10.
 11 No. 11, I believe you said you withdrew.
 12 MR. RANKIN: Correct.
 13 JUDGE KOPTA: And No. 12. Again, that
 14 goes to damages, and no, I am not going to require
 15 that.
 16 So are we clear, Mr. Malden, on what you are
 17 required to provide, or the Company, as a result of
 18 our discussion this morning?
 19 MR. MALDEN: Yes.
 20 JUDGE KOPTA: All right. Then we will
 21 turn to your motion, which is essentially to require
 22 the Company to provide information about complaints
 23 that it has received. I have reviewed the response,
 24 which seems to explain what the Company's terminology
 25 means, and that they have provided the information

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1 that you have asked for.
 2 Do you disagree with that, Mr. Malden?
 3 MR. MALDEN: Well, yes, I disagree with
 4 it on a number of levels, including, they have
 5 indicated they don't have any complaints beyond a
 6 certain date, and they come up with their own
 7 definition of complaint. No, I don't -- I don't trust
 8 that they have honestly or accurately answered those
 9 questions or produced the complaints they have.
 10 JUDGE KOPTA: Well, I don't know how I
 11 can assess that. I have to take the Company's
 12 representation for what it is. They said they have
 13 provided the information, they have explained the
 14 information that they have provided. Unless you can
 15 demonstrate that -- give me some indication that you
 16 have reason to believe otherwise, that you have
 17 documents that they have said -- that they didn't
 18 provide to you, or somehow have some other way of
 19 knowing that they are not telling the truth, then I
 20 have no reasonable alternative but to accept their
 21 representation.
 22 MR. MALDEN: Yes, I do understand that
 23 we all have to just believe what they say and trust
 24 whatever they say. I think that what they have
 25 testified to in front of the Commission is false. I

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1 think I have already established that. I understand
 2 that there may be nothing further you are able to do.
 3 JUDGE KOPTA: All right. I think that's
 4 where we are, so I will deny that motion based on the
 5 Company's representations.
 6 While we are here there are a couple of things
 7 that I wanted to address. One of them is that under
 8 our procedural schedule Ms. Hand was due to file any
 9 reply testimony on June 3rd and we did not receive
 10 any. Did you not prepare any testimony for her in
 11 response to the Company's testimony?
 12 MR. MALDEN: I actually wasn't sure
 13 whether I was going to need to do that. I was looking
 14 at a couple things, including the potential testimony
 15 of the UTC representative.
 16 If I may take the opportunity to ask for seven
 17 days, since I don't believe we are going to go forward
 18 with the deposition of the UTC. If I may request
 19 seven days from today to submit supplemental or reply
 20 testimony by Ms. Hand, I would like to request that.
 21 JUDGE KOPTA: And why would you need to
 22 do that when it was almost month ago -- well, three
 23 weeks ago that you were supposed to have filed it
 24 under the schedule?
 25 MR. MALDEN: I am doing the best that

1 I -- I am doing the best that I can to pursue this
2 case with the resources that we have. That's the best
3 I can do. I have been looking at a number of
4 different issues involving discovery with both
5 parties, trying to figure out can I get by without
6 doing discovery, can I get by trying to be as
7 efficient as possible. That's just how it worked out.

8 JUDGE KOPTA: Well, the issue that I
9 have is that if you were to file additional testimony,
10 which would amount to essentially one month after the
11 procedural schedule required you to file it, then I am
12 assuming that the Company, and potentially Commission
13 Staff would want to file responsive testimony, which
14 would necessitate extending the schedule in this case.
15 Is that acceptable to you?

16 MR. MALDEN: Extending the schedule how?

17 JUDGE KOPTA: Well, the hearing date
18 would have to move, number one, because if you file
19 testimony next week, then we would need to give the
20 Company two or three weeks to respond, and that's when
21 the hearing date is.

22 MR. MALDEN: Well, the problem that I --
23 well, the question that I have in regard to this is, I
24 am unclear on what scope of testimony people are going
25 to be permitted to testify to. If the idea is that my

1 supplemental declaration on Ms. Hand's behalf, so long
2 as in fact the rule to be enforced is that she will
3 not be permitted to testify to anything unless it is
4 on that written testimony, which is what I understand
5 the rule to be.

6 JUDGE KOPTA: Well, first, your
7 understanding is correct. All direct examination
8 comes through prefiled testimony. The only additional
9 testimony that we allow is in response to
10 cross-examination. That is our process.

11 With respect to your request, I agree with
12 you, that the Commission shares your desire to have a
13 complete record. If we need to extend the schedule,
14 then I would be inclined to do that so that we can
15 have a complete record. We want to give her a full
16 opportunity to present the information that she has to
17 us so that we can make a fully informed decision.

18 But with that, I need to ask the other parties
19 what your position is on Mr. Malden's request.

20 Mr. Rankin?

21 MR. RANKIN: I don't inherently have a
22 problem with allowing Ms. Hand more time to file
23 rebuttal testimony, but I absolutely agree with you,
24 that we would want a two- or three-week extension
25 beyond that to file whatever reply we would see fit.

1 client cannot say anything unless it is in writing,
2 unless it is in cross-examination to something
3 Mr. Rankin asks, then yes, I am in a position where I
4 do want to supplement the record because I don't see
5 how a consumer can have their case properly presented
6 in that manner.

7 If the -- so I guess I need to clarify the
8 rule, which is, the way I currently understand it,
9 that you will not accept direct exam from any witness
10 for any purpose, the written testimony is it.
11 Mr. Rankin will be permitted to cross-examine Ms. Hand
12 and that is it, there will be no other questions
13 taken. And if that is the standard, then yes, I would
14 ask to supplement the record in a reply.

15 I actually can't image that Rainier View would
16 need a large amount of time to respond. The issues
17 here again are very narrow, they are very limited, and
18 I don't think it should be necessary to continue the
19 hearing. If that's something that Rainier View
20 thought was necessary, to continue it for a few weeks,
21 I guess that wouldn't really make any difference to
22 me.

23 My interest is in having the record such as it
24 is, complete. I think in light of things that have
25 developed, I need to ask to supplement or file a

1 JUDGE KOPTA: Staff, do you have
2 anything?

3 MR. ROBERSON: Staff has no objection.
4 I don't -- I am fairly sure we won't be filing
5 response -- surrebuttal testimony. I think Mr. Malden
6 is correct, the issues are fairly narrow. I think at
7 most Rainier View would need two weeks. I am not even
8 sure we have to push out the schedule, I guess is what
9 I am saying.

10 JUDGE KOPTA: All right.

11 MR. RANKIN: We do need more time, at
12 least to keep an option open, to see what Ms. Hand
13 presents. I don't want to commitment to a short time
14 frame not knowing what that will be. For all I know,
15 there may be something that we want to ask, additional
16 interrogatories or document requests. We need time to
17 allow for that as well.

18 JUDGE KOPTA: Well, I think that's
19 reasonable. So this is what I will do: I will grant
20 your request, Mr. Malden, for a one-week time period
21 in which to determine whether you are going to file
22 additional testimony on behalf of Ms. Hand. That
23 testimony would be due a week from today, Monday,
24 July 2nd.

25 After that testimony comes in, then I would

1 ask the Company to let me know, file a -- or by letter
2 inform the Commission how much time you would need. I
3 would prefer, actually, that you consult with the
4 other parties and come up with an agreed time by which
5 you would provide additional response. If necessary,
6 we can move the hearing, but we will keep it where it
7 is for right now.

8 MR. RANKIN: Understood.

9 JUDGE KOPTA: All right.

10 And the only other thing is the additional --
11 in the prehearing conference order, or actually the
12 scheduling order, we did not include a date for filing
13 cross-examination exhibits, which is another thing,
14 Mr. Malden, I am sure that is unusual for you, and
15 probably for you, too, Mr. Rankin. That is one of the
16 Commission's requirements, is to file
17 cross-examination exhibits in advance of the hearing,
18 usually three or four days.

19 I will wait to issue a notice of the deadline
20 of that filing until we find out whether we are going
21 to have the hearing on the 25th of July or we need to
22 push it out.

23 I am just giving you some advanced warning,
24 since I am sure neither of you are terribly familiar
25 with Commission process, not doing too much before

1 this Commission, just so that you know what's coming.

2 MR. RANKIN: I appreciate that.

3 JUDGE KOPTA: All right. Is there
4 anything further that we need to discuss?

5 MR. ROBERSON: No.

6 MR. MALDEN: No.

7 MR. RANKIN: No.

8 JUDGE KOPTA: All right. Then we are
9 adjourned. We are off the record. Thank you.

10 (Adjourned at 9:59 a.m.)
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1 CERTIFICATE

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3 STATE OF WASHINGTON
4 COUNTY OF KING
5

6 I, Sherrilyn Smith, a Certified
7 Shorthand Reporter in and for the State of Washington,
8 do hereby certify that the foregoing transcript is
9 true and accurate to the best of my knowledge, skill
10 and ability.
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SHERRILYN SMITH, CCR# 2097



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