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Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
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via First Class Mail
and email attachment:
comments@utc.wa.gov

**Re: CCoGDP Comments: Surcharge Filing by Aquarius Utilities, LLC;
Docket 081416**

Dear Commissioners:

I am an attorney representing Concerned Citizens of Greater Diamond Point (CCoGDP), a sponsored program of Greater Diamond Point, a nonprofit corporation devoted to the betterment of living conditions in the Diamond Point area of Clallam County. CCoGDP represents the interests of Aquarius Utilities' customers in the company's Diamond Point water system (DOH Id. 19210). I would raise for your consideration several points regarding the pending surcharge.

Action on Filing Premature. In Mr. Shutler's August 4, 2008 letter to CCoGDP and other interested parties, he discusses "the steps of a rate proposal". He states, at his fourth bullet point, that "the commission may decide to approve the request as filed ..." However, any such affirmative decision taken at the August 28 meeting would be premature. RCW 80.28.060 states in relative part:

Unless the commission otherwise orders, no change shall be made in any rate or charge or in any form of contract or agreement or in any rule or regulation relating to any rate, charge or service, or in any general privilege or facility which shall have been filed and published by a gas company, electrical company or water company in compliance with the requirements of RCW 80.28.050 except after thirty days' notice to the commission and publication for thirty days ...

August 28 is not thirty days after Aquarius Utilities' filing on July 29. Our Supreme Court, interpreting similar language in a notice-of-claim statute ("RCW 4.96.020(4) forbids the commencement of a tort action 'until sixty days have elapsed after' the filing of the notice of claim ..."), found that "[o]ur plain language analysis comports with the general rule that, "[w]here it is provided that a certain result shall not accrue *until after the expiration of a given number of days* from a stated

date, then both the first and last days must be excluded, so that the full number of days will be allowed." 74 AM.JUR.2D *Time* § 15 (2001 & Supp.2004) (emphasis added)...” *Troxell v. Rainier Public School Dist. No. 307*, 154 Wn.2d 345, 353, 111 P.3d 1173, 1177 (2005). This means that unless the Commission exercises its discretion to order otherwise, thereby waiving its own rules, the soonest affirmative action could be taken on this filing is August 29, as the last, uncounted day of the thirty day period is August 28.¹

Perhaps the Commission will want to extend itself in this manner. That appears to be its right. However, allow me to briefly review how this need for extraordinary action came about. In order to potentially qualify for this round of DWSRF loans Aquarius needed its Water System Plan approved by January 31, 2008. After extremely late submission by Aquarius, DOH staff pushed its approval process and finally did approve the Plan, although without the required prior public meeting, on January 30 for the Diamond Point Plan and on January 14 for the Umbrella Plan. The import of this astounding lack of diligence can only be appreciated fully when one notes that these very Plans were due on May 11, 2003. But approved they were. And just in time.

Moving on from DOH, PWB has had to extend additional time for Aquarius to get its finances in order, waiting now through the company's second filing with this Commission, whose turn it now is to hurry its process in response to Aquarius's behavior.

Finally on this point, I see from your staff's proposed order for the August 28 meeting that the notice to customers was mailed on July 28. Assuming *arguendo* that such a mailing satisfies the RCW 80.28.060 publication requirement, the notice itself is dated July 29, 2008. It therefore seems unlikely it was mailed on the 28th. But even if it were mailed on the July 28, it could not have received before the 29th, resulting in less than the full thirty days' notice to customers. And while the Superior Court's Civil Rules may not be applicable to the Commission here, those rules do require an addition of three days for documents served by mail.

Previous Filing. While reviewing Aquarius's previous tariff filing (Docket 080926), which your Staff found excessive, Staff was certainly aware of the impending

¹ There appears to be some doubt about when this filing was made. The online docket says July 29, but the proposed order just provided to me by my client states July 30. Aquarius itself states in the filing Narrative that the filing was made on July 30. The result is the same in either case.

DWSRF loans. For example, on page 4 of Staff's memorandum for your July 10, 2008 meeting one finds this comment in response to customer complaints:

Commission staff works closely with the DWSRF staff in evaluating loan applications. DWSRF staff is knowledgeable and capable of administering the agency's program.

Aquarius failed to obtain a rate increase from the UTC by the June 4, 2008, due date as a condition for approval by the Public Works Board (PWB) on the four new 2008 DWSRF Loan requests. The PWB Board of Commissioners granted an extension of another three months at their meeting on June 3, 2008.

Having found Aquarius's 080926 filing for a 24.7% rate increase excessive, Staff recommended a 7.3% increase, presumably enough to also cover the loan servicing costs. The 7.3% increase was acceded to by Aquarius. *If* this assentation was obtained by an understanding that the Commission would be inclined to look favorably upon a subsequent surcharge filing to service DWSRF loans, then ¶¶ 4 and 5 of your Final Order 02 of August 14 , which state

4 On July 10, 2008, the Commission entered a Complaint and Order Suspending Tariff Revisions and allowed temporary revised rates to go into effect on July 14, 2008, on less than statutory notice, subject to refund, to allow customers the opportunity to comment on the revised rate design before determining whether the proposed changes are fair, just, reasonable, and sufficient.

5 Commission Staff sent all customers who previously commented on the company's filing a letter advising them of the Staff's recommended revised rates. No customers have commented on the revised rates and rate design.

are frankly disingenuous, *as it is my understanding* that the notice to customers – the one that none commented on -- did not mention the follow up punch of a \$8.70 per month surcharge to satisfy PWB's concerns about loan repayment.

Is This A Suitable Candidate For A Mandatory Surcharge? RCW 80.28.022 clearly allows for surcharge-funded reserve accounts; and WAC 480-110-455 discusses the situations where a surcharge can be used. However, neither mentions

mandatory versus voluntary surcharges. That appears to be only discussed in the Commission's online fact sheet.²

The fact sheet describes voluntary surcharges as appropriate for "water system improvements that are not required by DOH or Safe Drinking Water Act requirements." While mandatory surcharges may be appropriate for "Department of Health (DOH) require[d] water system improvements for quality and quantity standards or to comply with Safe Drinking Water Act requirements", CCoGDP argues that just because a putative improvement is mentioned within a DOH approved water system plan does not mean that the improvement is "required" by DOH. It simply reflects the fact that DOH has no reason to say no to any possible improvement in a system. This is especially true when there is no mention in the plan of the purveyor needing to impose a surcharge on all customers to pay for the improvement. And the only surcharge mentioned in Aquarius's Water System Plan is a surcharge for pipe replacement in the Diamond Point system, something not (yet) before the Commission.

Certainly the Commission recognizes a qualitative difference between the three types of improvements mentioned in WAC 480-110-455(2)(a)(i). A project that "must be approved by the department of health as a part of a long-range plan" falls into a different category from improvements "required by the department of health to assure compliance with federal or state drinking water regulations, or to perform construction or maintenance required by the department of ecology to secure safety to life and property under RCW 43.21A.064(2)." The first is suitable for a voluntary surcharge, if approved by a vote of the customers, while only the latter two are suitable for the imposition of a mandatory surcharge.

Thank you for your attention in this matter. CCoGDP respectfully requests that you dismiss this filing or, at the least, suspend the filing pending a full investigation into these and other issues the customers are raising.

² <http://wutc.wa.gov/webimage.nsf/0/5AC82D1BEDD1F6BE88256E54006E8450>

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Very truly yours,



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cc: via email only

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