

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

SARAH HAND,

Complainant,

v.

**RAINIER VIEW WATER
COMPANY, INC.**

Respondent.

DOCKET UW-170924

POST-HEARING BRIEF ON BEHALF OF COMMISSION STAFF

August 24, 2018

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Table of Contents

I.	INTRODUCTION	1
II.	BACKGROUND.....	2
III.	DISCUSSION.....	9
	A. The Commission should find that RVWC supplied, and continues to supply, Ms. Hand with impure water and order a remedy that it deems just and reasonable ..	10
	1. The water RVWC sold, and currently sells, Ms. Hand is impure.....	10
	2. The Commission may order RVWC to take just and reasonable steps to work toward providing Ms. Hand with water that complies with the DOH’s drinking water standards.	13
	3. The Commission should decline to award Ms. Hand monetary damages or a refund related to the impure water	14
	B. The record indicates that RVWC did not misrepresent the health effects of its water or misrepresent its relationship with the Commission; regardless, however the Commission decides these claims, it should determine whether it regulated, permitted, or prohibited RVWC’s statements.....	15
	1. The record evidence indicates that RVWC did not make false or misleading misrepresentations about the healthiness of consuming its water.....	16
	2. The record indicates that RVWC did not make false or misleading misrepresentations about its relationship with the Commission.....	16
	3. The Commission should determine whether it permitted, prohibited, or regulated RVWC’s statements.....	17
	C. The Commission should largely decline to order RVWC to change its business practices, but should order RVWC to tell its customers to bring water quality complaints directly to the DOH.	19
	1. The Commission should find that Ms. Hand failed to prove the necessity of changes to RVWC’s testing and reporting procedures and decline to order changes	20
	2. The Commission should find that Ms. Hand failed to justify changes to RVWC’s complaint procedures and decline to order changes	20
	3. The Commission should grant Ms. Hand’s request that it order RVWC to inform its customer that they should bring water quality complaints directly to the DOH.....	21
	D. The Commission should decline to find that RVWC failed to follow the DOH’s design manual.	22
IV.	CONCLUSION.....	23

Table of Authorities

Cases

Hangman Ridge Training Stables v. Safeco Title Ins. Co.,
105 Wn.2d 778, 785, 719 P.2d 531 (1986)..... 18

Marquis v. City of Spokane,
130 Wn.2d 97, 111, 922 P.2d 43 (1996)..... 22

Schmidt v. Old Union Stockyards Co.,
58 Wn.2d 478, 364 P.2d 23 (1961)..... 17

Seattle Filmworks, Inc. v. Dep’t of Revenue,
106 Wn. App. 448, 456, 24 P.3d 460 (2001) 18

Vogt v. Seattle-First Nat’l Bank,
117 Wn.2d 541, 552, 817 P.2d 1364 (1991)..... 18

Statutes

Chapter 70.119 RCW 3

Chapter 70.119A RCW 3

RCW 19.86.020 18

RCW 19.86.093 18

RCW 19.86.130 18

RCW 19.86.170 17

RCW 19.86.920 18

RCW 43.20.050 16

RCW 43.20.050(2)..... 3

RCW 80.04.220 15

RCW 80.04.230 15

RCW 80.04.440 15

RCW 80.28.030(1)..... 11, 13

RCW 80.28.040	21
RCW 80.28.040(1).....	20

Other Authorities

RAYMOND CHANG, CHEMISTRY, at Inside Front Cover (4th ed. 1991).....	2
<i>The Phrase Finder</i> , available at https://www.phrases.org.uk/meanings/14400.html	1

Rules

RCW 480-110-215.....	15
WAC 246-290-310.....	10, 16
WAC 246-290-310(3)(a)	3, 10
WAC 246-290-310(3)(b)	11
WAC 246-290-72001 through -72012.....	19
WAC 40-110-385(1)(b), (c).....	18
WAC 480-110-385(1)(f).....	19
WAC 480-110-385(4).....	20
WAC 480-110-395(1).....	15
WAC 480-110-395(1)(a)	15
WAC 480-110-395(1)(b)	15
WAC 480-110-395(1)(c)	15
WAC 480-110-431.....	15
WAC 480-110-485.....	20

Commission Orders and Notices

<i>Hand v. Rainier View Water Co.</i> , Docket UW-170924, Notice Converting Informal Complaint to Formal Complaint; Calling For Answer; And Initiating Adjudicative Proceeding, at 1-2 ¶¶ 1-3 (Aug. 31, 2017).....	9
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Walla Walla County Club v. Pac. Power & Light Co.,
Docket UE-143932, Order 03, at 6 ¶ 27 (Jan. 15, 2016) 15

I. INTRODUCTION

1 “A place for everything, and everything in its place.”¹

2 The element manganese has its place. It is, for example, valuable in foodstuffs because
the human body must take in small amounts of the mineral to properly function. But manganese
has no place in the distribution systems run by water companies. Air and chemicals present
inside the pipes of those systems oxidize manganese dissolved in water, forming a brownish or
blackish sediment that discolors water and imparts an unpleasant taste and odor.

3 This case concerns manganese where it is unwelcome. Sarah Hand claims that Rainier
View Water Company (RVWC) sold her water contaminated with unacceptably high levels of
manganese and then misled her about the health effects of consuming that water. She requests
that the Commission: (1) find that the water RVWC sold her was impure, (2) order RVWC to
supply her with water that complies with state water quality regulations, (3) order RVWC to
compensate her for damages, (4) find that RVWC misrepresented the health effects of
consuming its water and also the nature of its relationship with the Commission, and (5) order
various changes to RVWC’s business practices.

4 RVWC admits that it had manganese problems with one of the wells it used to supply
water to Ms. Hand, but contends that it has already fixed the problem by installing a filtration
system to treat the manganese problem at the source. RVWC also denies misleading Ms. Hand
and denies Ms. Hand’s claims about its business practices. Accordingly, RVWC asks the
Commission to deny Ms. Hand’s requests for relief.

5 The Commission should agree that RVWC supplied, and continues to supply, Ms. Hand
with impure water. It should order RVWC to take whatever measures that it determines are just

¹ An aphorism attributed to, among others, Benjamin Franklin. *The Phrase Finder*, available at <https://www.phrases.org.uk/meanings/14400.html>.

and reasonable to supply Ms. Hand with water that complies with state drinking water standards. The Commission, however, should decline Ms. Hand's invitation to order RVWC to pay compensatory damages and also largely reject Ms. Hand's requests for changes to RVWC's business practices, although the Commission should order RVWC to inform customers to take water quality complaints directly to the Department of Health.

II. BACKGROUND

6 Manganese is a naturally occurring mineral.² Groundwater percolating through soil containing manganese deposits can dissolve the mineral and carry it into the water table.³ The Puget Sound region has these manganese deposits;⁴ accordingly, groundwater in the region is sometimes contaminated with manganese.⁵

7 While manganese has beneficial uses,⁶ it can cause difficulties when present in water pumped into distribution systems. Exposure to the air in pipes⁷ or the chemicals used to chlorinate water⁸ causes the dissolved manganese to oxidize, making it insoluble in water and causing it to precipitate as brown or black flakes.⁹ This precipitate settles at the bottom of distribution pipes in times of low flow.¹⁰ When the flow increases again, the precipitate kicks up and moves further down the distribution system, eventually entering end-users' pipes.¹¹

² Blackman, Exh. BB-1T at 6:3. Manganese's atomic symbol is Mn; its atomic number is 25. RAYMOND CHANG, CHEMISTRY, at Inside Front Cover (4th ed. 1991) (periodic table of the elements).

³ Hand, Exh. SH-38X at 2 ("Manganese is a dull grayish metal that is widely distributed in nature. It occurs naturally in both surface and ground water that come into contact with manganese-bearing soils.").

⁴ Hand, Exh. 15X at 6 (Mr. Blackman, explaining the commonality of manganese contamination).

⁵ Hand, Exh. 15X at 6 (Mr. Blackman, explaining the commonality of manganese contamination).

⁶ Hand, Exh. SH-18 at 8 (explaining that manganese is a required nutrient for humans).

⁷ Hand, Exh. SH-36X at 120.

⁸ Blackman, TR. at 146:17-147:2.

⁹ Blackman, Exh. BB-1T at 6:19-22.

¹⁰ Blackman, Exh. BB-1T at 6:21-24.

¹¹ Blackman, Exh. BB-1T at 7:1-3.

Customers drinking or using water containing the precipitate can notice an unpleasant color, taste, and smell.¹²

8 The Board of Health promulgates regulations to ensure safe drinking water for Washingtonians;¹³ the Department of Health (DOH) administers those rules.¹⁴ For Class A water systems, the Board of Health designated manganese as a secondary contaminant, meaning that DOH largely treats the mineral as an aesthetic problem in water systems.¹⁵

9 Nevertheless, the DOH recognizes that, at high concentrations, manganese in water can pose health risks.¹⁶ The United States Environmental Protection Agency (EPA) has issued a lifetime health advisory that provides that sustained exposure to water containing 300 micrograms of manganese per liter of water can adversely affect the health of certain individuals.¹⁷ The DOH is in the process of adopting the EPA's lifetime health advisory.¹⁸

10 RVWC is an investor-owned water company that supplies water to approximately 45,000 customers in the South Puget Sound.¹⁹ Ms. Hand takes water service from one of RVWC's Class A water systems, Southwood.²⁰

11 RVWC divides Southwood into five different pressure zones,²¹ each with its own sources of water.²² Roughly eight wells provide the water for the Ms. Hand's pressure zone.²³ A set of wells referred to as Fir Meadows serve as the "main source" for the zone.²⁴

¹² Hand, Exh. SH-1T at 4:4-12.

¹³ RCW 43.20.050(2).

¹⁴ See generally chapter 70.119 RCW; chapter 70.119A RCW.

¹⁵ WAC 246-290-310(3)(a).

¹⁶ See Blackman, Exh. BB-2T at 6:12-14.

¹⁷ Blackman, Exh. BB-2T at 6:12-14.

¹⁸ See Blackman, Exh. BB-2T at 6:9-10.

¹⁹ Blackman, Exh. BB-1T at 3:11-17.

²⁰ Hand, Exh. Sh-1T at 4:3-14; Hand, Exh. SH-36X at 34:4-7.

²¹ Hand, Exh. SH-36X at 17:15.

²² Hand, Exh. SH-16 at 2; Hand, Exh. SH-36X at 17:15.

²³ The zone serves between 400 and 500 homes. Hand, Exh. SH-36X at 34:4-7.

²⁴ Hand, Exh. SH-36X at 17:7-8.

12 RVWC currently draws water from three different Fir Meadows wells.²⁵ The first two came online in the 1970s.²⁶ RVWC dug the third, Well 4, around 2006.²⁷ Because RVWC dug that well deeper than the other two Fir Meadows wells, it draws water from a different aquifer than they do.²⁸

13 At some point, changes in the water table caused a spike in the concentration of manganese in the aquifer that Well 4 draws water from.²⁹ These elevated levels of manganese, and the problems associated with those levels, did not escape the notice of affected Southwood customers. They began posting about brown water and issues caused by that brown water on Facebook in 2015.³⁰ Many of these posts came from residents served by the same Southwood pressure zone as Ms. Hand.³¹ RVWC's customers posted a number of these complaints directly on the company's own Facebook page.³²

14 As RVWC noticed an increase in customer complaints concerning brown water, it attempted to track down the source of the problem.³³ Tests it performed at its wellheads showed that water from Well 4 exceeded state water quality standards for manganese.³⁴ This contamination was not insignificant, with manganese levels approximately three times the limit allowed by DOH regulations in the water.³⁵

²⁵ There are actually four wells at the Fir Meadows complex, but RVWC does not use Well 3 due to the technical difficulty of drawing water from it. Blackman, TR. at 139:19-22.

²⁶ Hand, Exh. SH-36X at 19:24-20:2.

²⁷ Hand, Exh. SH-36X at 20:2-9. Well 4 is occasionally mistakenly referred to as Well 3 or Well D in the record. *See* Blackman, TR. at 139:12-22. For simplicity's sake, Staff simply calls it Well 4.

²⁸ Hand, Exh. SH-36X at 21:6-14; Blackman, TR. at 148:17-21.

²⁹ *See* Hand, Exh. SH-15 at 4 (Mr. Finnigan, discussing the origin of the manganese contamination).

³⁰ Hand, Exh. SH-8.

³¹ *See* Hand, Exh. SH-8 at 4-13 (noting the search term Springwood, which references Ms. Hand's housing development, at the top of each page).

³² Hand, Exh. SH-9.

³³ Blackman, Exh. BB-1T at 7:4-19.

³⁴ Hand, Exh. SH-1T at 11:20-25; Hand, Exh. SH-11 at 6; Hand, Exh. SH-20 at 4; Hand, Exh. SH-21 at 4; Hand, Exh. SH-22 at 1, 2, 4, 10; Hand, Exh. SH-23; Hand, Exh. SH-38X at 3; Hand, Exh. SH-39X at 3; Hand, Exh. SH-40X at 3; Hand, Exh. SH-41X at 3.

³⁵ *E.g.*, Hand, Exh. SH-42X at 3.

15 RVWC moved to address the manganese problem it discovered in Well 4. It hired an engineering firm to evaluate installing a treatment system at the wellhead.³⁶ DOH approved the proposed system and later permitted its operation.³⁷ RVWC funded the treatment system with a surcharge on its service, which was approved by the Commission.³⁸

16 RVWC's treatment system appears to have addressed the wellhead manganese contamination. The company tests the water from Fir Meadows monthly;³⁹ those tests show the treatment has reduced the manganese concentrations of water from Fir Meadows significantly below the limit set by the Board of Health.⁴⁰

17 While the treatment plant addresses the manganese coming into the system from Well 4, it does nothing with regard to manganese already in the distribution system.⁴¹ Absent intervention, that manganese may take several years to work its way out of the system.⁴²

18 RVWC has at least three means of removing the manganese from the system: flushing, pigging, and pipe replacement.

19 RVWC appears to prefer continuing to deal with the manganese problem through flushing lines out when customers report problems.⁴³ Flushing involves forcing high-velocity water through RVWC's pipes in an attempt to blast the manganese precipitate out of the distribution system through opened fire hydrants or blow-off valves.⁴⁴ RVWC admits that flushing can sometimes worsen the manganese problem by kicking up precipitate that works its

³⁶ Blackman, Exh. BB-1T at 12:22-13:3; Hand, Exh. SH-33X.

³⁷ Blackman, Exh. BB-1T at 13:20-22; Blackman, TR. at 140:5-8.

³⁸ Blackman, Exh. BB-1T at 13:23-14:3.

³⁹ Blackman, TR. at 140:9-18.

⁴⁰ Blackman, TR. at 140:19-21; Blackman, Exh. BB-4; RVWC's Answer to Bench Request No. 2.

⁴¹ Blackman, TR. at 134:15-20, 140:22-141:12.

⁴² Blackman, TR. at 134:21-135:3, 144:11-19.

⁴³ See Blackman, Exh. BB-1T at 15:10-18.

⁴⁴ Hand, Exh. SH-1T at 8:1-7.

way into homes rather than out of the system as intended.⁴⁵ RVWC also acknowledges that flushing is a temporary fix: the brown water may return depending on the flow of manganese particulates in the distribution system.⁴⁶ Flushing does, however, have the virtue of dealing with customer-specific problems in a customer-specific way, causing no disruption to the service of other customers and seemingly at small cost to the customer or the utility.⁴⁷

20 RVWC’s least-favored solution also appears to be the most effective. The company could simply dig up the distribution pipes and replace them, carrying away any manganese precipitate remaining in the removed pipe.⁴⁸ The costs associated with this option, however, appear prohibitive,⁴⁹ and any replacement would seemingly impact numerous customers.⁵⁰

21 RVWC refers to the remaining option as “pigging.”⁵¹ Pigging involves inserting a small Styrofoam “bullet-shaped” object into the distribution pipes.⁵² As it travels through the pipe, the object scours the pipes, removing manganese precipitate.⁵³ Pigging can prove more effective at eliminating built-up manganese than flushing.⁵⁴ And RVWC can pig segments of the distribution pipe, meaning it can target the effort somewhat.⁵⁵ Pigging, however, disrupts service for roughly a day, and affected customers would need to boil their water prior to consuming it for two days after that.⁵⁶ Pigging the line serving Ms. Hand would cause this disruption for roughly 50 homes.⁵⁷

⁴⁵ Hand, Exh. SH-15 at 7 (“Sometimes it works, sometimes it can actually make it worse because it does get into the home. Then you have to flush out the home as well.”).

⁴⁶Hand, Exh. SH-36X at 111:14-21.

⁴⁷ See Blackman, TR. at 159:14-25.

⁴⁸ Blackman, TR. at 143:3-5.

⁴⁹ See Blackman, TR. at 143:3-8.

⁵⁰ Cf. Blackman, TR. at 142:18:24.

⁵¹ Blackman, TR. at 141:21-22.

⁵² Blackman, TR. at 141:25-142:1.

⁵³ Blackman, TR. at 141:24-142:1.

⁵⁴ Blackman, TR. at 142:25-143:2.

⁵⁵ Blackman TR. at 142:12-20.

⁵⁶ Blackman, TR. at 157:7-23.

⁵⁷ Blackman, TR. at 159:3-8.

22 Like other customers, Ms. Hand began noticing brown water in 2015, when she moved into her home.⁵⁸ She and her family live on a cul-de-sac at the end of a distribution line.⁵⁹ This geographical fact has apparently resulted in Ms. Hand's home being more affected by the manganese problem than some of her neighbors.⁶⁰

23 Ms. Hand claims that the brown water has caused a litany of problems for her family. Some of these allegations involve health harms. Ms. Hand's wife had a brief period of paralysis,⁶¹ one of her daughters has episodic seizures,⁶² one of her daughters breaks out in rashes after showing,⁶³ and another daughter has issues with her hearing aids.⁶⁴ Either Ms. Hand or her family's doctors ascribe these medical conditions to the manganese contaminated water supplied to the home.⁶⁵ Other allegations involve property damage or an inability to use the water in the household. The family, not unreasonably,⁶⁶ now refuses to drink the manganese contaminated water and therefore must purchase bottled water for their consumption.⁶⁷ While the family must use the contaminated water to shower or bathe, they report that they do not feel clean after showering.⁶⁸ Their dishes likewise do not become clean when washed.⁶⁹ Laundering the family's clothing in the water causes stains or causes odor problems.⁷⁰ Ms. Hand also alleges

⁵⁸ Hand, Exh. SH-1T at 3:25-26.

⁵⁹ Hand, Exh. SH-15 at 14 ("I'm on . . . a end of the line. I am a customer that is in a cul-de-sac on the end of the line. I'm directly on the end of the line."); Blackman, TR. at 117:4-6.

⁶⁰ See Hand, Exh. SH-15 at 14; Blackman, TR. at 117:4-6.

⁶¹ Hand, TR. at 215:2-3.

⁶² Hand, TR. at 215:2-4.

⁶³ Hand, Exh. SH-15 at 13.

⁶⁴ Hand, TR. at 218:11-15.

⁶⁵ See Hand, TR. at 215:1-12, 218:11-15, 221:20-222:3.

⁶⁶ See, e.g., Blackman, TR. at 101:22-102:12.

⁶⁷ Hand, Exh. SH-1T at 4:16-26.

⁶⁸ Hand, Exh. SH-1T at 5:3-7.

⁶⁹ Hand, Exh. SH-1T at 5:9-13.

⁷⁰ Hand, Exh. SH-1T at 5:14-20.

that the water supplied by RVWC has stained her sinks and toilets and caused physical damage to fixtures in her home, including a pressure relief valve, some piping, and a toilet.⁷¹

24 Ms. Hand brought her complaints to RVWC.⁷² The company responded by flushing her lines.⁷³ Ms. Hand reports mixed results from this flushing,⁷⁴ and as mentioned above, RVWC admits the solution is neither permanent nor a panacea.

25 Ms. Hand, when complaining about the brown water, demanded that RVWC pay for damages to her house that she attributed to the manganese in her water, a demand that RVWC's operations manager declined.⁷⁵ Ms. Hand alleges that in doing so he told her that RVWC was "protected by a Commission' and could not be sued in court."⁷⁶ The operations manager denies this, stating that that he merely told Ms. Hand that courts usually dismissed actions filed against RVWC on the grounds that the complaints belonged before the Commission.⁷⁷

26 Ms. Hand also alleges that RVWC's operations manager "guaranteed" that the company's water "was perfectly safe to drink and would have no adverse health effects no matter what it looked like."⁷⁸ That guarantee was similar to ones made by the company in its annual water quality report to its customers.⁷⁹

27 Ms. Hand became dissatisfied with RVWC's inability to fix the manganese issues affecting her family and refusal to pay for damages to her home allegedly caused by RVWC. She lodged an informal complaint with the Commission in an effort to find a solution.⁸⁰ An

⁷¹ Hand, Exh. SH-1T at 5:21-5:5; Hand, TR. at 187:23-188:19.

⁷² Hand, Exh. SH-1T at 7:15-20.

⁷³ Hand, Exh. SH-1T at 8:1-7.

⁷⁴ Hand, Exh. SH-1T at 9-12.

⁷⁵ Blackman, Exh. BB-1T at 11:5-21.

⁷⁶ Hand, Exh. SH-1T at 8:2-5.

⁷⁷ Blackman, Exh. BB-1T at 12:1-9.

⁷⁸ Hand, Exh. SH-1T at 7:22-23.

⁷⁹ Hand, Exh. SH-10 (RVWC's "Message from Our Water Quality Control Manager").

⁸⁰ Stark, Exh. RS-1T at 3:1-4; Stark, Exh. RS-2.

investigator from the Consumer Protection Section of the Commission’s staff (“Staff”) processed the complaint and contacted RVWC and the DOH to investigate.⁸¹ The DOH informed Staff that it considered manganese an aesthetic contaminant,⁸² that DOH had no other complaints concerning Southwood or RVWC,⁸³ and that it would not take action to deal with manganese contamination unless a majority of the customers on the system agreed to fund treatment.⁸⁴ Staff closed Ms. Hand’s complaint.⁸⁵

28 Ms. Hand then filed suit in superior court. The superior court dismissed that suit based on the Commission’s primary jurisdiction over some of Ms. Hand’s claims,⁸⁶ and the Commission converted Ms. Hand’s informal complaint to the Commission into a formal one.⁸⁷ This brief results from the hearing held on that formal complaint.⁸⁸

III. DISCUSSION

29 The Commission, to resolve Ms. Hand’s complaint, must determine whether: (1) RVWC sold her impure water; (2) it should order RVWC to make improvements in the quality of its water and, if so, how; (3) RVWC misrepresented the healthiness of its water or the nature of its relationship with the Commission to Ms. Hand; (4) it should order changes in RVWC’s business practices; and (5) RVWC violated the DOH design manual when it installed treatment without surveying its customers.

⁸¹ Stark, Exh. RS-1T at 4:1-8:3; Stark, Exh. RS-2; Stark, Exh. RS-3; Stark, Exh. RS-4; Stark, Exh. RS-5; Stark, Exh. RS-6.

⁸² Stark, Exh. RS-1T at 7:11-15.

⁸³ Stark, Exh. RS-1T at 7:21-23; Stark, Exh. RS-6.

⁸⁴ Stark, Exh. RS-1T at 23-24:2; Stark, Exh. RS-6.

⁸⁵ Stark, Exh. RS-1T at 8:5-18.

⁸⁶ See Hand, Exh. SH-37X at 10 (Mr. Finnigan explaining the defenses raised in superior court).

⁸⁷ *Hand v. Rainier View Water Co.*, Docket UW-170924, Notice Converting Informal Complaint to Formal Complaint; Calling For Answer; And Initiating Adjudicative Proceeding, at 1-2 ¶¶ 1-3 (Aug. 31, 2017).

⁸⁸ See generally, TR. 55:1-226:14.

30 The Commission should answer the first question in the affirmative, answer the third and fifth questions in the negative, order any improvements to the quality of RVWC’s water that it deems fair and just, and decline to order RVWC to change its business practices with one exception. As discussed below, the Commission should order RVWC to tell its customers to bring water quality complaints directly to the DOH.

A. The Commission should find that RVWC Supplied, and Continues to Supply, Ms. Hand with Impure Water and Order a Remedy that it Deems Just and Reasonable

31 The primary dispute between Ms. Hand and RVWC concerns whether the water it sold her is impure and, if so, what to do about that. The Commission should agree that the water RVWC sold her before the installation of the treatments system on Well 4 was impure, agree that RVWC continues to sell her impure water, and order RVWC to make any improvements to the quality of Ms. Hand’s water that the Commission deems just and reasonable.

1. The water RVWC sold, and currently sells, Ms. Hand is impure.

32 The legislature tasked the Commission with adjudicating complaints about the purity of water sold by jurisdictional water companies. A violation of DOH water quality standards constitutes “prima facie evidence that the water supplied is . . . impure.”⁸⁹

33 The DOH’s water quality standards provide for the regulation of both primary and secondary contaminants.⁹⁰ Manganese is a secondary contaminant, one for which the Board of Health set a Maximum Contaminant Level (MCL) of 50 micrograms per liter of water.⁹¹

⁸⁹ RCW 80.28.030(1).

⁹⁰ WAC 246-290-310.

⁹¹ WAC 246-290-310(3)(a).

a. The water RVWC sold Ms. Hand before the treatment system went online was impure.

34 The water sold to Ms. Hand by RVWC before the treatment system went online was presumptively impure because it violated the DOH's water quality standards. The company's own tests show that the water it pumped from Fir Meadows Well 4 for provision to customers, roughly between 2015 and when the treatment facility went online in 2017, exceeded the MCL for manganese.

35 The Commission should reject RVWC's attempts to rebut the presumption that its water was impure. RVWC states that it blended water from a number of wells to sell to Ms. Hand and that the water reaching Ms. Hand's house would therefore have significantly lower concentrations of manganese than the water pumped from Well 4.⁹² There are two problems with RVWC's argument, one legal and one factual. Per DOH regulation, if water from any well (a sampling point) violates an MCL, "the system is in violation of the MCL."⁹³ The DOH thus appears to have ruled out the argument RVWC presents to the Commission as a matter of law: the SMCL exceedance by Well 4 means that the entire system, regardless of the presence of other sources of water, violates the SMCL. Further, RVWC did not include the test results for other wells along with those wells' proportionate contribution to the water sold to Ms. Hand. The Commission therefore cannot calculate whether the water served to Ms. Hand's house actually met the water quality standards in WAC 246-290. The Commission should therefore reject RVWC's argument that the water it sold Ms. Hand was not impure.

⁹² Blackman, TR. at 148:12-149:2.

⁹³ WAC 246-290-310(3)(b).

b. RVWC continues to sell Ms. Hand impure water.

36 Chemical tests do not show that RVWC continues to sell Ms. Hand water whose manganese concentration exceeds the MCL. RVWC has no test data for the levels of manganese in the water in its distribution system,⁹⁴ but Ms. Hand does. One of the three samples she took shows an MCL exceedance, two others do not.⁹⁵ As RVWC notes, the DOH generally requires water companies to use a running average of samples from a sampling point to determine whether water exceeds the MCLs.⁹⁶ The test results for the samples taken inside Ms. Hand's house, when averaged together, do not show an MCL exceedance.⁹⁷

37 The Commission, however, should disregard the results for water quality tests taken inside Ms. Hand's home for purposes of determining whether RVWC continues to sell her impure water. Mr. Blackman testified that those results are unreliable because the manganese has precipitated out of the water once it is in the distribution system.⁹⁸ Tests of the water from a home, therefore, underestimate the amount of manganese contamination unless the sample captures manganese flakes.

38 The Commission should rely on other evidence of impurity and find that RVWC continues to sell Ms. Hand impure water. While the public service laws make evidence of a violation of a DOH water quality standard prima facie evidence of impurity, they do not limit the Commission to consider only such evidence.⁹⁹ And here there is evidence that Ms. Hand's water continues to be impure. Ms. Hand has testified that installation of the treatment system has not solved the manganese problem: her house still has intermittent brown water problems.¹⁰⁰ That

⁹⁴ Blackman, TR. at 141:1-13.

⁹⁵ Hand, Exh. SH-29.

⁹⁶ Blackman, Exh. BB-2T at 4:8-25; WAC 246-290-310(b).

⁹⁷ Blackman, Exh. BB-2T at 4:20-25.

⁹⁸ Blackman, TR. at 141:1-9.

⁹⁹ See RCW 80.28.030(1).

¹⁰⁰ Hand, TR. at 193:4-22, 217:16-219:7.

testimony is consistent with RVWC's testimony that the manganese in the system will continue to work its way out of the system periodically over the next two to three years.¹⁰¹ Water that continues to be brown in color and unpleasant in taste and smell is water that continues to be impure.¹⁰²

2. The Commission may order RVWC to take just and reasonable steps to work toward providing Ms. Hand with water that complies with the DOH's drinking water standards.

39 The Commission has significant discretion in ordering RVWC to take steps toward fixing Ms. Hand's manganese problem. The public service laws provide that "[w]henver the commission finds, after such a hearing, that . . . the purity, quality, volume, and pressure of water . . . supplied by any . . . water company . . . is impure . . . it shall order such improvement . . . in the storage, distribution, or supply of water, or in the methods employed by such . . . water company . . . as will in its judgment be efficient, adequate, just and reasonable."¹⁰³ The Commission must consult with the DOH, which possesses expertise in dealing with water quality issues, when ordering a water company to improve the quality of its water.¹⁰⁴ The record supports several steps the Commission could order RVWC to take.

40 The Commission could order RVWC to stay the course and simply flush customers' lines when they have brown water complaints. The company has seemingly solved the problem of manganese entering the system. Flushing on an as-needed basis would deal with the remaining manganese in the system in a way that would theoretically keep costs down¹⁰⁵ and allow for some relief for affected customers without affecting other customers. Flushing, however, does

¹⁰¹ Blackman, TR. at 134:21-135:3, 144:11-19.

¹⁰² See Hand, TR. at 193:4-22, 217:16-219:7.

¹⁰³ RCW 80.28.030(1).

¹⁰⁴ RCW 80.28.030.

¹⁰⁵ Staff assumes that RVWC would attempt to recoup any expenses associated with remedying brown water complaints through rates. It expresses no opinion here as to the prudence of those expenses.

not appear to be the most effective means of dealing with the manganese problem and will likely mean that Ms. Hand will experience two to three years of intermittent brown water problems.

41 The Commission could also order RVWC to pig the distribution line serving Ms. Hand. This would affect a number of other customers for up to three days. However, it seems like the most effective way of eliminating manganese in the pipes serving Ms. Hand. Further, Ms. Hand testified that a number of her neighbors are similarly affected by the brown water, meaning that, although they would be affected by the pigging, they would also benefit.

42 The Commission could also simply order RVWC to dig up the distribution pipes serving Ms. Hand. This would be the most expensive method of addressing the manganese problem, but also likely the most effective. RVWC, however, would likely attempt to recover the associated costs in a general rate case. If the Commission approved, the rates of other customers could be significantly affected.

3. The Commission should decline to award Ms. Hand monetary damages or a refund related to the impure water.

43 The public service laws do not provide the Commission with the authority to award compensatory damages.¹⁰⁶ To the extent that Ms. Hand seeks compensation for damages caused by the manganese in RVWC's water, whether for damage to her property or diminution in the value of her home, the Commission cannot grant her the relief she seeks.

44 The Commission does, however, have jurisdiction to order refunds or reparations,¹⁰⁷ and the Commission's rules provide for refunds when a water company provides "poor . . . quality"

¹⁰⁶ RCW 80.04.440; see *Walla Walla County Club v. Pac. Power & Light Co.*, Docket UE-143932, Order 03, at 6 ¶ 27 (Jan. 15, 2016).

¹⁰⁷ RCW 80.04.220, .230.

water.¹⁰⁸ These refunds are available through an order from the Commission after a formal adjudication¹⁰⁹ wherein the complainant shows an MCL violation¹¹⁰ for which the water company failed to take the follow up steps set out in WAC 246-290-320.¹¹¹ While Ms. Hand has shown an MCL exceedance, she has not shown that RVWC failed to take any steps directed by DOH.¹¹² This means that the Commission cannot order a refund to Ms. Hand without an exemption from its rules, and the Commission has no exemption request before it.¹¹³

B. The Record Indicates that RVWC did not Misrepresent the Health Effects of its Water or Misrepresent its Relationship with the Commission; Regardless, however the Commission Decides these Claims, it should Determine Whether it Regulated, Permitted, or Prohibited RVWC's Statements

45 Ms. Hand also claims that RVWC misrepresented the health impacts of consuming its water and the nature of its relationship with the Commission. The record indicates that it did not.¹¹⁴ Nevertheless, given the likelihood of further litigation in the superior court, the Commission should determine whether it permitted, prohibited, or regulated RVWC's statements to assist the superior court with any Consumer Protection Act (CPA) claim filed by Ms. Hand.

¹⁰⁸ WAC 480-110-395(1). RVWC has raised the limitations on liability in its tariff as a defense to Ms. Hand's claims, but that limitation cannot override the Commission's rules without express written permission from the Commission, WAC 480-110-431, something RVWC has not shown. The tariff therefore cannot bar refunds.

¹⁰⁹ WAC 480-110-395(1)(a).

¹¹⁰ WAC 480-110-395(1)(b).

¹¹¹ WAC 480-110-395(1)(c).

¹¹² Blackman, TR. at 152:8-153:9, 156:21-24.

¹¹³ See RCW 480-110-215.

¹¹⁴ Ms. Hand does not ask the Commission to adjudicate other components of negligent misrepresentation or fraud claims. RVWC asks the Commission to apply the limitations on liability found in its tariff and bar the claims. Blackman, Exh. BB-5 at 13 (Tariff WN U-2, Subst. Sheet No. 14, Rule 20). Given that the Commission cannot award compensatory damages, it should not wade into the claims or RVWC's defenses and simply decide whether to make the findings requested by Ms. Hand.

1. The record evidence indicates that RVWC did not make false or misleading misrepresentations about the healthiness of consuming its water.

46 The Board of Health sets the standards for potable drinking water in Washington.¹¹⁵ It has designated manganese a secondary contaminant.¹¹⁶ This designation means that the DOH currently treats manganese as an aesthetic problem, not a health issue.¹¹⁷ The DOH is in the process of adopting the EPA's lifetime health advisory for manganese; that lifetime health advisory provides that long-term exposure to water containing more than 300 parts per billion of manganese begins to pose health concerns.¹¹⁸

47 The record suggest that RVWC did not misrepresent the healthiness of its water. While RVWC sold water containing manganese in excess of the DOH's SMCL, nothing shows that RVWC's water contained manganese in excess of the 300 parts per billion limit set by the EPA's lifetime health advisory that the DOH will soon adopt.¹¹⁹ Under that advisory, RVWC's water does not raise health concerns and RVWC did not misrepresent the health effects of consuming its water.

2. The record indicates that RVWC did not make false or misleading misrepresentations about its relationship with the Commission.

48 RVWC, like all water companies, has filed a tariff with the Commission governing the terms upon which it offers service to customers.¹²⁰ That tariff contains a provision limiting the company's liability and disclaiming certain warranties that form the basis for contract claims.¹²¹ As discussed further below, the Commission's regulation also eliminates some bases for CPA

¹¹⁵ RCW 43.20.050.

¹¹⁶ WAC 246-290-310.

¹¹⁷ Hand, Exh. SH-19 at 14:17-18.

¹¹⁸ Hand, Exh. SH-18 at 7:21-8:21, 9:22-25.

¹¹⁹ Hand, TR. at 213:3-5.

¹²⁰ Blackman, Exh. BB-5.

¹²¹ Blackman, Exh. BB-5 at Subst. Sheet No. 14 (Rule 20 – Limitation on Liability).

claims against a utility.¹²² Neither of those provisions immunizes RVWC from suit or completely eliminates the company's liability.

49 The record suggests that RVWC did not misrepresent its relationship with the Commission. RVWC's operations manager testified that he simply told Ms. Hand that courts often dismiss claims filed against the company by its customers on the basis that those claims belong before the Commission or the DOH. That testimony somewhat accurately describes how the doctrine of primary jurisdiction works and the Commission should find no misrepresentation based on it.¹²³

3. The Commission should determine whether it permitted, prohibited, or regulated RVWC's statements.

50 However it adjudicates Ms. Hand's misrepresentation claims, the Commission should state whether or not it permitted, prohibited, or regulated RVWC's statements. Ms. Hand's requested findings relate to an element of a CPA claim if and when this action returns to superior court, and the Commission's interpretation will assist the court in adjudicating any such claim.

51 Washington's CPA proscribes "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."¹²⁴ The CPA includes a private right of action, allowing citizens to enforce this proscription.¹²⁵ A plaintiff asserting a CPA claim must prove, among other things, an unfair deceptive act or practice.¹²⁶

¹²² RCW 19.86.170.

¹²³ *Schmidt v. Old Union Stockyards Co.*, 58 Wn.2d 478, 364 P.2d 23 (1961) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1952)).

¹²⁴ RCW 19.86.020.

¹²⁵ RCW 19.86.093.

¹²⁶ *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986).

52 The CPA exempts certain actions or transactions from its sweep. These exempted actions or transactions include “actions of transactions otherwise permitted, prohibited, or regulated under laws administered . . . by the Washington utilities and transportation commission.”¹²⁷

53 The CPA contains a liberal construction clause.¹²⁸ Courts, accordingly, construe the CPA’s exemptions narrowly.¹²⁹

54 In keeping with the narrow construction given CPA exemptions, a transaction is likely not permitted, prohibited, or regulated by the Commission unless the public service laws or the Commission’s rules actually touch on some aspect of the conduct. Interpreting the CPA exemption for Commission regulation otherwise would impermissibly allow the exemption to swallow the rule.¹³⁰

55 Staff finds nothing in the public service laws governing the statements by RVWC’s operations manager guaranteeing that RVWC’s water is healthy to drink. However, the Commission’s rules require a water company to take certain actions upon receiving a complaint. These steps include investigating the complaint and informing the complainant about the results of that investigation.¹³¹ The Commission could theoretically determine that the operations manager’s statements were made while discharging the obligation to inform Ms. Hand about the results of the investigation. If so, Ms. Hand cannot maintain a claim for relief under the CPA based on the alleged statement.

56 Staff also finds nothing in the public service laws or the Commission’s rules governing the written statements that RVWC made in its customer water quality reports guaranteeing

¹²⁷ RCW 19.86.130.

¹²⁸ RCW 19.86.920.

¹²⁹ *Vogt v. Seattle-First Nat’l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991).

¹³⁰ *See Seattle Filmworks, Inc. v. Dep’t of Revenue*, 106 Wn. App. 448, 456, 24 P.3d 460 (2001) (avoiding a construction that would allow an exemption to swallow the rule where narrow construction applies).

¹³¹ WAC 480-110-385(1)(b), (c).

healthy water. The reports are required and governed by DOH regulations, not by the Commission's rules or the public service laws.¹³² If the Commission agrees, Ms. Hand would have the ability to seek relief under the CPA based on these alleged statements.

57 Finally, Staff finds nothing in the public service laws governing RVWC's statements about its relationship with the Commission, but the Commission's rules may again regulate the statements. A water company must tell a complaining customer that the Commission can review a complaint if he or she is dissatisfied with the company's resolution of a complaint.¹³³ The Commission could conclude that RVWC's operations manager made the statement at issue to discharge that duty. If so, Ms. Hand may not seek relief under the CPA based on the alleged statement.

C. The Commission should Largely Decline to Order RVWC to Change its Business Practices, but should Order RVWC to Tell its Customers to Take Water Quality Complaints Directly to the DOH

58 Ms. Hand asks the Commission to order RVWC to make certain changes to its business practices. These include ordering the company to test its water monthly and report those test results to the DOH and post them on its website, and also ordering the company to store records of complaints in a certain manner for a certain length of time. Ms. Hand also asks the Commission to order RVWC to tell its customers to lodge water quality complaints with the DOH. The Commission should grant Ms. Hand the latter request, and reject the others.

59 The Commission has significant discretion to regulate the acts, practices, and services of a regulated company. "Wherever the commission finds, after hearing, that any . . . practices, acts or services of any . . . water company are unjust, unreasonable, improper, insufficient, inefficient, or inadequate . . . the commission shall fix the reasonable . . . practices, acts or service to be

¹³² WAC 246-290-72001 through -72012.

¹³³ WAC 480-110-385(1)(f).

thereafter furnished, imposed, observed, and followed, and shall fix the same by order or rule.”¹³⁴ The Commission must consult with the DOH before ordering service improvements, much like it must do before ordering water quality improvements.¹³⁵

1. The Commission should find that Ms. Hand failed to prove the necessity of changes to RVWC’s testing and reporting procedures and decline to order changes.

60 Ms. Hand first requests that the Commission order RVWC to change its water quality testing and reporting procedures. The Commission should find that Ms. Hand failed to carry her burden of showing the deficiency of RVWC’s current testing regime or a breach of its duty to self-report violations.

61 Testimony in the record indicates that RVWC complies with the relevant testing protocols,¹³⁶ meaning that RVWC already tests the water from Well 4 monthly and reports those results to the DOH. Ms. Hand did not produce evidence to contradict that testimony.¹³⁷ And Ms. Hand fails to show that the testing regime deemed appropriate by DOH is somehow deficient. The Commission should not order RVWC to change its practices on that record.¹³⁸

2. The Commission should find that Ms. Hand failed to justify changes to RVWC’s complaint procedures and decline to order changes.

62 Ms. Hand further asks the Commission to order RVWC to keep customer complaints in secure storage for five years. Again, the Commission should decline to do so.

63 By Commission rule, water companies retain records for certain periods.¹³⁹ Ms. Hand does not explain why RVWC should keep complaints for longer than that, nor does she explain

¹³⁴ RCW 80.28.040(1).

¹³⁵ RCW 80.28.040(1).

¹³⁶ Blackman, TR. at 155:2-18.

¹³⁷ Hand, TR. at 202:24-204:23. Ms. Hand alleges in her complaint that the DOH ordered RVWC to test its water for manganese more frequently, but that directive appears to have only applied to treated water. Hand, Exh. SH-16 at 4.

¹³⁸ See RCW 80.28.040.

¹³⁹ WAC 480-110-385(4); WAC 480-110-485.

why the Commission should order the company to keep its complaints in secure storage.¹⁴⁰ The Commission should find that she failed to carry her burden of showing the need to change RVWC's practices, and deny her request for relief.

64 As Ms. Hand notes, Staff has had past issues with RVWC's complaint logging procedure.¹⁴¹ But Staff's concern in those past dockets related to RVWC's inability to provide a register of complaints, not with the length or method of storage.¹⁴² RVWC has apparently remedied the problem noted by Staff and can now search its records for complaints meeting certain criteria. RVWC's changes moot Ms. Hand's claim to the extent that it incorporates Staff's 2014 investigation as providing a basis for her claim to relief.

3. The Commission should grant Ms. Hand's request that it order RVWC to inform its customer that they should take water quality complaints directly to the DOH.

65 Ms. Hand also requests that the Commission order RVWC to alert its customers to the fact that DOH is the agency primarily responsible for addressing water quality complaints. The Commission should order RVWC to do so.

66 DOH's knowledge of complaints has significant consequences. The DOH will, consistent with its design manual, order a water company to take remedial action to address manganese contamination if five or more different customers complain to DOH about water quality in a 12-month period.¹⁴³ Specifically, the DOH will order the water company to study treatment

¹⁴⁰ Ms. Hand alleges that RVWC is not logging all the complaints it receives, but she asks for no relief in this regard. This allegation is troubling. If the Commission credits Ms. Hand's claims, it should consider ordering a Staff investigation of the company complaint-logging procedures.

¹⁴¹ Hand, Exh. SH-31.

¹⁴² Hand, Exh. SH-31 at 7-8, 15.

¹⁴³ Hand, Exh. SH-43X at 1. The DOH design manual is ambiguous as to where the five complaints must be lodged. It first states that a water company must take action if it receives 5 or more complaints during a 12-month period, but in the next sentence states that the complaints must come to DOH, not the water company. Hand, Exh. SH-34X at 1. DOH interprets the provision to require 5 complaints to DOH, Hand, Exh. SH-18 at 10:20-13; Hand, Exh. SH-19 at 15:21-17:12, and the Commission should defer to DOH's interpretation of its own regulations. *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996).

alternatives and present those alternatives to its customers; if a majority of them agree to pay for a treatment, the utility must implement that treatment.¹⁴⁴

67 The Commission should grant Ms. Hand's request that it order RVWC to inform customers that they should send water quality complaints directly to DOH. Currently, RVWC tells its customers that they should complain to the Commission, and Staff forwards those complaints on the DOH.¹⁴⁵ The record here shows significant confusion about whether complaints were reaching the DOH.¹⁴⁶ Ordering RVWC to tell its customers to contact DOH will ensure that the agency is aware of all water quality complaints and that its procedures for improving water quality are properly deployed.

D. The Commission should Decline to Find that RVWC Failed to Follow the DOH's Design Manual

68 Finally, Ms. Hand contends that RVWC failed to comply with the requirements of DOH's Water System Design Manual. The Commission should disagree because DOH never required RVWC to begin the process set out in the design manual for remediating manganese contamination problems.

69 As noted above, the DOH has issued a manual governing the design of water systems. That manual sets out a process for remediating manganese contamination problems. That process is triggered when the DOH receives complaints about manganese problems from five or more different customers served by the same water system within a 12-month period.¹⁴⁷

70 The evidence does not show that the DOH received a sufficient number of complaints to trigger the design manual process. DOH representatives testified that they had not received five

¹⁴⁴ Hand, Exh. SH-34X.

¹⁴⁵ Staff's Response to Bench Request No. 1, Attachment A, at 4, Attachment B at 6.

¹⁴⁶ Compare Hand, Exh. SH-10 (service quality complaints work orders log); Hand, Exh. SH-44X at 2; Hand, Exh. SH-45X at 3-4; Exh. SH-48X; with Stark, Exh. RS-1T at 6:20-8:3; Stark, Exh. RS-6.

¹⁴⁷ Hand, Exh. SH-18 at 21:18-21, 22:13-23.

complaints about the Southwood system.¹⁴⁸ RVWC testified that the DOH did not order it to take any action about Well 4, which allows the inference that the DOH had not received a sufficient number of complaints. Ms. Hand could not testify from personal knowledge that at least five customers on Southwood complained to the DOH about manganese problems during a 12-month period.¹⁴⁹

71 Because the DOH did not receive the necessary number of complaints, the requirements of the design manual did not apply. RVWC did not violate any provision of the design manual by installing a treatment facility on Well 4 without surveying its customers.

IV. CONCLUSION

72 The record shows that RVWC sold Ms. Hand and her family water that violated the DOH's water quality standards for manganese for several years. Though RVWC has installed wellhead treatment that prevents more manganese from entering its distribution system, the manganese already in the system may cause Ms. Hand and her family (and potentially her neighbors) problems for some time to come. The Commission should determine that water is impure, and order RVWC to make whatever improvements to the water quality the Commission determines are just and reasonable. When issuing that order, the Commission should require Staff and RVWC to consult with the DOH as required by RCW 80.28.030.

73 The Commission should also order RVWC to inform customers to make water quality complaints directly to the DOH. In doing so will insure that their voices are heard by the DOH, to which the legislature has given primary responsibility for water quality regulation.

¹⁴⁸ Hand, Exh. SH-18 at 51:9-52:5.

¹⁴⁹ Hand, TR. at 206:12-208:17.

74 The Commission should reject Ms. Hand’s other claims and requests for relief. She fails to justify changes to the way RVWC tests its water, reports the results of those tests, or stores complaints made by customers. She also fails to show that RVWC failed to follow the procedures set out in the design manual when installing treatment at Well 4.

DATED this 27th day of August 2018.

Respectfully submitted,

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