

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

SARAH HAND,

Complainant,

v.

RAINIER VIEW WATER COMPANY, INC.,

Respondent.

Docket No. UW-170924

RESPONDENT RAINIER VIEW WATER
COMPANY'S CLOSING BRIEF

RESPONDENT RAINIER VIEW WATER COMPANY'S

CLOSING BRIEF

AUGUST 28, 2018

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I. INTRODUCTION

This matter arises from a dispute between Rainier View Water Company, Inc. ("Rainier View") and a customer, Sarah Hand, regarding the quality of the water Rainier View provides. Ms. Hand first filed an informal complaint with the Utilities and Transportation Commission (the "Commission"), which was resolved with a disposition of "company upheld" in favor of Rainier View. During the Superior Court litigation that followed, the Commission converted Ms. Hand's informal complaint into a formal complaint and commenced this adjudicative proceeding.

Ms. Hand presents numerous claims, including that Rainier View provided her with substandard water, failed to respond appropriately to her complaint, failed to undertake required testing, made misrepresentations and breached warranties, failed to report test results to the Department of Health, and failed to obtain public input before fixing the problem she complains of. Ms. Hand's claims are largely based on anecdotal evidence or merely her own personal opinion. To the contrary, the evidence clearly shows that Rainier View has complied with the applicable laws and regulations. To the extent Ms. Hand remains unsatisfied, her problem is with the laws and her remedy lies with the legislature.

II. RELEVANT FACTS

Rainier View is an investor-owned water utility company serving over 35,000 customers in Graham, Spanaway, Puyallup, Gig Harbor, and additional outlying areas in Pierce County. Ms. Hand is one of Rainier View's customers serviced by its Southwood Sound water system. The Southwood Sound system is a large system, drawing groundwater from 23 wells. Transcript of Docket No. UW-170924 – Vol. III (hereinafter "Tr.") at 109:24–25. Ms. Hand's residence generally receives water from the three blended wells at the Fir Meadows well site. Tr. at 110:1–3, 148:12–149:2.

Manganese is a naturally occurring element present in a variety of foods and is not uncommon in this region's groundwater. BB-1T, at 6:2–6. When it meets the disinfectant within

1 the water system, it oxidizes, creating a flock that settles to the bottom of water pipes. *Id.* at 6:18–
2 22. From there, the manganese sediment tends to rest, dormant, until a change in water pressure
3 (such as from a water main break or a fire hydrant being opened) stirs up the flock, pushing some
4 downstream. *Id.* at 6:22–7:1. The manganese sediment works its way through the distribution
5 system, generally in spurts. As such, when a customer experiences a spurt of manganese,
6 running the tap for a couple minutes typically clears the problem. *Tr.* at 146:21–147:20. When a
7 customer calls to inform Rainier View that the customer is experiencing a spurt of manganese,
8 Rainier View sends a technician to that residence to flush from the meter or from a neighborhood
9 blow-off valve until the problem is resolved. *Id.*

10 The Environmental Protection Agency and Washington State Department of Health
11 regulate manganese as a secondary contaminant, with a Secondary Maximum Contaminant
12 Level (“SMCL”) of 0.05 mg/L. See WAC 246-290-301. Secondary contaminants are regulated on
13 the basis of consumer acceptance and confidence based on aesthetic concerns. SH-18, at 10:1–
14 19. Unlike primary contaminants, secondary contaminants carry no known health risks at
15 commonly encountered levels. *Id.* Although new research indicates that manganese may impact
16 health at very high levels, manganese “at the concentration of exceedance [at issue here] is not
17 a threat to public health.” *Id.* at 16:4–10.

18 In early 2016, Rainier View noticed an increase in service requests relating to discolored,
19 brown water on the Southwood Sound system. BB-1T, at 12:14–18. Rainier View identified the
20 problem as elevated levels of manganese and traced the source of the manganese to the Fir
21 Meadows 4 well.¹ *Id.* at 12:21–25. By August 2016, Rainier View had commissioned a pilot study
22 to test a filtration treatment system at Fir Meadows 4. BB-1T, at 13:9–17. Test results showed the
23 pilot treatment to be successful and the Department of Health (DOH) and Rainier View agreed to
24 relegate Fir Meadows 4 to “emergency only” status until the permanent treatment system went

25 ¹ This well is referred to by various names, but will be referred to herein as Fir Meadows 4.

1 online. Tr. at 139:23–140:21.

2 Rainier View sought and received funding approval from the Commission, after notice and
3 an open hearing in December 2016. See SH-15. Rainier View obtained design approvals from
4 the DOH in April 2017. SH-35x, at ¶ 8. Construction began thereafter, and the treatment system
5 went online in June 2017. Every test thereafter has shown the water entering the system from Fir
6 Meadows 4 contains levels of manganese significantly below the SMCL. BRR-2. Additionally,
7 Rainier View implemented a schedule of flushing to expedite the removal of manganese sediment
8 lingering in the distribution system. Tr. 134:11–13.

9 Sarah Hand became one of Rainier View's customers in May 2015 when she purchased
10 a house located in the Springwood Estates subdivision of Spanaway. *Id.* at 178:13–20. She
11 alleges that before she closed on her home, she attended a home inspection with her real estate
12 agent. *Id.* at 178:21–179:3. During this home inspection, the inspector allegedly ran water from
13 every faucet and flushed every toilet, and noticed brown water, yet advised Ms. Hand that no
14 further investigation was necessary and that there was no cause for concern. *Id.* at 179:18–
15 180:11. Ms. Hand did not inquire further of the inspector, her real estate agent, or the seller's
16 agent. *Id.* at 180:14–182:16.

17 Ms. Hand alleges that immediately upon moving into her home, she experienced
18 consistent brown water from every faucet, every day. *Id.* at 182:17–19. The water quality
19 improved when she drained her water heater or ran her faucet or the outside hose bib for several
20 minutes before using the water. *Id.* at 182:20–24. Nonetheless, she did not bother to inform
21 Rainier View of her concern. *Id.* She later learned, at a homeowners' meeting, that some
22 neighbors occasionally shared her concern, and would call Rainier View to flush their pipes when
23 a problem arose. *Id.* at 219:17–220:14. Still, Ms. Hand did not inform Rainier View that she was
24 having a problem with her water.

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1 In November 2016, Ms. Hand replaced the pressure reducing valve on her home, at a cost
2 of about \$600. SH-1T, at 5:23–27. After this repair was complete, she demanded that Rainier
3 View reimburse her for this expense, or else she would bring suit. *Id.* Rainier View declined to
4 reimburse Ms. Hand for this expense. *Id.* This interaction – 18 months after she moved into her
5 house -- was the first notice to Rainier View that Ms. Hand had concerns about her water, despite
6 her allegation that she experienced consistent brown water all day, every day.

7 After several similar interactions, Ms. Hand filed an informal complaint with the
8 Commission. RS-2. The Commission investigated and closed the complaint with a disposition of
9 “company upheld,” finding in favor of Rainier View. During the Superior Court litigation that
10 followed, the Commission converted Ms. Hand’s complaint into a formal complaint and
11 commenced the instant adjudicative proceeding.

12 III. RELIEF REQUESTED

13 Rainier View requests the following relief from the Commission:

- 14 1. That the Commission find in favor of Rainier View on all Ms. Hand’s claims.
- 15 2. That the Commission award Ms. Hand nothing.
- 16 3. That the Commission enter the following findings of fact and conclusions of law:
 - 17 3.1 Water is not “impure” as a matter of law as a result of Secondary MCL
18 exceedances.
 - 19 3.2 Water exceeding the Secondary MCL for Manganese is not unsafe as a
20 matter of law.
 - 21 3.3 Water exceeding the Secondary MCL for Manganese is not unfit for human
22 consumption as a matter of law.
 - 23 3.4 Water exceeding the Secondary MCL for Manganese is not unfit for normal
24 household use as a matter of law.

1 3.5 The water Rainier View provided Complainant was, and is, safe and fit for
2 human consumption and for normal household use.

3 3.6 The water provided Complainant meets State safe drinking water
4 requirements.

5 3.7 Rainier View's tariff is valid and operates with the force and effect of law.

6 3.8 Rainier View's tariff bars recovery of consequential or incidental damages.

7 3.9 Complainant's requested damages, including for permanent diminution in
8 property value, cost of home water cooler equipment, cost of replacement bottled water, cost to
9 replace pressure reducing valve, cost of indoor water filters, cost of private water testing, and cost
10 of indoor plumbing inspection are consequential or incidental damages.

11 3.10 Rainier View's tariff limits recovery except for Rainier View's gross
12 negligence, willful misconduct, or violations of Chapter 19.122 RCW.

13 3.11 Rainier View was not grossly negligent and Rainier View did not engage in
14 willful misconduct. Complaint does not allege violations of Chapter 19.122 RCW.

15 3.12 Rainier View made no warranties, but if it did, Rainier View did not breach
16 any such warranty.

17 3.13 Rainier View made no misrepresentations to Ms. Hand.

18 3.14 Rainier View's tariff expressly disclaims all warranties except those
19 warranties set forth in the tariff.

20 3.15 Rainier View engaged in no illegal conduct.

21 3.16 Rainier View engaged in no unfair or deceptive acts.

22 3.17 Rainier View complied with all statutory reporting requirements related to
23 water testing.

24 3.18 Rainier View complied with all DOH reporting requirements.

25 3.19 Rainier View complied with all Commission orders related to water testing.

1 3.20 Rainier View complied with all statutory requirements prescribing what
2 information must be given to customers regarding complaint procedures.

3 3.21 Rainier View complied with all complaint-handling statutes, rules, and
4 regulations.

5 3.22 The requirements of the DOH Water System Design Manual cited in
6 paragraph 4.33 of the Complaint are not applicable to the facts of Ms. Hand's complaint.

7 3.23 Rainier View has already taken reasonable and satisfactory steps to
8 comply with DOH requirements as to water quality.

9 3.24 The filtration system Rainier View implemented effectively reduces
10 manganese levels substantially below Washington's Secondary MCLs.

11 3.25 Further remedial treatment of the water is unnecessary.

12 3.26 Additional remedial action by Rainier View is unnecessary.

13 3.27 Any further remedial treatment or action would impose costs and burdens
14 to Rainier View and its customers disproportionate to the benefits to Ms. Hand.

15 **IV. ARGUMENT AND AUTHORITY**

16 Ms. Hand fails to carry her burden of proof on each and every claim she asserts against
17 Rainier View. At best, Ms. Hand relies on evidence that is purely anecdotal, and often is logically
18 inconsistent with other facts and testimony. At other times, her best evidence is admittedly only
19 conjecture and personal opinion. As she has consistently failed to carry her burden of proof, the
20 Commission should find for Rainier View on all claims.

21 **A. THE WATER RAINIER VIEW PROVIDED TO SARAH HAND IS NOT IMPURE.**

22 **1. Ms. Hand Provides No Evidence That Her Water Was Consistently**
23 **Substandard.**

24 Ms. Hand relies on two pieces of evidence in support of her allegations that she
25 consistently received substandard water from Rainier View beginning immediately upon her

1 receiving service from Rainier View and continuing to the present day. First, she provides a few
2 anecdotal photographs of brown water in her house. These photographs are undated, unverified,
3 and untested and provide no evidence of the frequency, duration, or severity of her alleged
4 problem. See SH-2–SH-7.

5 Second, Ms. Hand presents her own testimony, which carries suspect credibility, at best.
6 She admits to carrying a personal distrust of Rainier View, and admits that many of her claims
7 are based purely on personal opinion and are unsupported by evidence. See e.g. Tr. at 204:14–
8 23. Most notably, as to her claim of substandard water, Hand’s claim of consistent substandard
9 water cannot be logically reconciled with the following facts:

- 10 • Ms. Hand allegedly saw brown water during the pre-closing home inspection, but
11 she did not ask her inspector to investigate further. Ms. Hand believed that this
12 issue would clear up in time, and resulted from stagnant pipes during the home’s
13 unoccupied period.
- 14 • Ms. Hand similarly did not ask her real estate agent or the seller’s agent about
15 water quality in the area, despite allegedly seeing brown water during the pre-
16 closing home inspection.
- 17 • Ms. Hand allegedly experienced brown water immediately when her family moved
18 into the house, but she chose to purchase bottled water for her house instead of
19 contacting Rainier View, still apparently believing that this problem resulted from a
20 period of non-use as the house sat unoccupied.
- 21 • Ms. Hand allegedly learned through the homeowners’ association that her
22 subdivision occasionally experienced spurts of brown water arising from
23 manganese deposits. Yet, after learning that this problem was not isolated to her
24 home or due to a period of non-use, Ms. Hand still decided not to contact Rainier
25 View to alert it of a problem.

- 1 • After eighteen months of allegedly consistent brown water, Ms. Hand finally
2 contacted Rainier View to demand payment for a plumbing repair, under threat of
3 lawsuit. This was Rainier View's first notification that Ms. Hand had a problem with
4 her water.

5 Ms. Hand's assertion that her family spent eighteen months unable to use their water for
6 normal household purposes because it was consistently brown every time they turned on the tap,
7 yet never informed the water utility supplier, is wholly incredible.

8 Following her first contact with Rainier View, when Bob Blackman suggested Ms. Hand
9 call Rainier View when she experienced brown water, Ms. Hand called to request flushing service
10 on a handful of occasions over the next months, suggesting these were the times she received
11 brown water. See BB-3. Such would be more consistent with Rainier View's broader customer
12 base, although still far more than any other individual customer. See SH-10. On average in 2015
13 and 2016, Rainier View received calls about water quality from five to ten of its 15,500 customers
14 on the Southwood Sound water system each week, and would respond by pulling those
15 customers' meters and flushing until the problem cleared. See SH-10. During several of the
16 service order visits to Ms. Hand's house, the technicians reported that the water ran clear upon
17 their arrival. But in every case, the technicians remained at Ms. Hand's house and ran additional
18 water to be sure. RS-2.

19 When Ms. Hand and her attorney commissioned tests to prove excess levels of
20 manganese in her water, the tests failed to verify her allegations. These test samples were
21 collected in such a way as to show an unrepresentatively high concentration of manganese. BB-
22 2T, at 1:16–2:16. Nonetheless, they disproved Ms. Hand's allegations. These three tests showed
23 manganese concentrations of 0.00 mg/L (non-detect), 0.03 mg/L, and 0.08 mg/L. SH-29. The
24 average of these tests is 0.037 mg/L – below the 0.05 mg/L SMCL. These tests should be taken
25 as an average, if considered at all, because of the nature of the sampling, and which would be

1 consistent with the testing process prescribed by the WACs. See WAC 246-290-300. It would be
2 unjust and inaccurate to find in favor of Ms. Hand based on one solitary test showing a slightly
3 high concentration of manganese (as her sampling methodology was designed to achieve).

4 Finally, Ms. Hand relies on Rainier View's Consumer Confidence Report ("CCR") data in
5 support of her claim that she was provided substandard water, however, this evidence similarly
6 fails to support her claim. The CCR data fails to prove Ms. Hand's case for two reasons. First, the
7 manganese concentration identified in the CCR for the Southwood Sound system is the highest
8 of all samples drawn from the 23 wells on that system – it is not representative of the water
9 throughout the water system. Tr. at 155:25–156:16.

10 Further, the water flowing to Ms. Hand's residence primarily comes from the Fir Meadows
11 well. The Fir Meadows site provides water from three blended well heads. *Id.* at 148:12–149:2.
12 The test results from one well did show a higher manganese concentration (0.13 mg/L). However,
13 when blended with the other two wells at Fir Meadows, which is how the water is delivered, the
14 manganese concentration in the water entering the system is substantially less. *Id.* Importantly,
15 contrary to Staff's assertion, each Fir Meadows wellhead is not its own sampling point. For
16 purposes of inorganic testing, which includes manganese, DOH treats the blended Fir Meadows
17 output as one sampling point.² See *id.* at 148:16–149:6. Therefore, the tests show that the Fir
18 Meadows sampling point is not in violation of the MCL, and no calculation of proportionate
19 contribution is necessary. By extension, under WAC 246-290-310(3)(b), the system is not in
20 violation of the MCL.

21 **2. Ms. Hand Should Not Recover Where She Knew Of An Alleged Problem With**
22 **Her Water But Opted Not To Inform Rainier View.**

23 To the extent Ms. Hand successfully convinces the Commission that Rainier View
24 provided her substandard water, she should be estopped from recovering anything for the period

25 ² Each Fir Meadows wellhead can be sampled individually, and is sampled individually for certain tests, however, for DOH's inorganic tests, the blended Fir Meadows output constitutes one sampling point.

1 of time during which Ms. Hand knew about her allegations, but willingly chose not to inform or
2 notify Rainier View. Equity precludes an aggrieved complainant or plaintiff from accruing months
3 or years of increasing damages claims before providing the potential defendant an opportunity to
4 remedy the alleged offending conduct. Instead, Ms. Hand knew (or should have known, if the
5 condition and consistency of her water is as she claims) that she was accruing alleged damages,
6 yet, she chose not to give Rainier View notice of any problem until Rainier View was several
7 months into putting a solution into effect. Rainier View deserved to be given an opportunity to
8 address the problem, while Ms. Hand knew about it, before it reached the levels she now
9 complains of.³ She should be estopped from recovering for that period of time.

10 Ms. Hand admits that her water quality improved when, after she complained to Rainier
11 View, Rainier View increased its schedule of flushing the lines on the Southwood Sound system.
12 Tr. at 192:10–193:16. She admits that her water quality has continued to improve. SH-32X at
13 97:2–17. Accordingly, even if Ms. Hand persuades the Commission that Rainier View previously
14 provided her substandard water, she should not be able to recover for the time during which she
15 knew of a problem with her water, but willingly chose not to notify her water utility provider.

16 **3. The Evidence Shows That Ms. Hand's Water Is Not Consistently**
17 **Substandard.**

18 Six months before Ms. Hand contacted Rainier View, Rainier View initiated the process of
19 undertaking a pilot filtration treatment program, procuring funding to implement the filtration, and
20 obtaining regulatory approvals. Tr. 149:14:21. That filtration (despite Ms. Hand's opposition) was
21 approved and has been online for more than a year. Post-treatment testing shows that water
22 entering the system through this filtration consistently contains non-detectable or the lowest
23 detectable levels of manganese. BRR-2.

24 ³ Although Ms. Hand produces no credible evidence suggesting she replaced her pressure reducing valve
25 because of manganese build-up, such accumulation would have occurred over a sustained period of time.
Had she timely informed Rainier View of a problem with her water, and engaged in a proactive approach
to resolving this dispute, the pressure-reducing valve may never have needed replacing.

1 Rainier View acknowledges that manganese sediment likely remains in the water delivery
2 system and will take some time to work its way out, due to its unpredictable downstream
3 movement. Tr. at 147:9--20. To assist that process, Rainier View has implemented a process of
4 routine flushing -- the lowest-impact means of removing manganese sediment from the distribution
5 system. *Id.* at 141:14. Ms. Hand admits that this process has improved the quality of her water.
6 SH-32X at 97:2--17.

7 Ms. Hand provides no evidence that she currently receives water exceeding the SMCL for
8 manganese. To the contrary, the evidence clearly shows that the water entering the system at Fir
9 Meadows complies with State drinking water standards and Rainier View is proactively flushing
10 the distribution system to ensure the water reaching the consumers also complies with those
11 standards.

12 **B. EVEN IF THE COMMISSION FINDS THAT RAINIER VIEW PROVIDED SARAH
13 HAND WITH SUBSTANDARD WATER, NO REMEDIAL MEASURES ARE
WARRANTED.**

14 If the Commission finds that Rainier View is providing, or has provided, Ms. Hand with
15 substandard water, the inquiry turns to Ms. Hand's compensation for substandard water received
16 in the past and how to remedy the problem moving forward. If the Commission finds that Ms.
17 Hand received, or is receiving, substandard water from Rainier View, the Commission should
18 grant no remedy because 1) she fails to meet the requirements for a water quality refund, and 2)
19 the most appropriate remedial action is already in place.

20 **1. Damages Are Only Recoverable In Accordance With WAC 480-110-395.**

21 Ms. Hand's means of monetary recovery is WAC 480-110-395; however, she fails to meet
22 the criteria contained therein:

- 23 (1) Each water company may be required to refund water charges due to poor
water quality only:
24 (a) Upon commission order resulting from a formal proceeding before the
commission; and
25 (b) When there are violations of the Washington department of health water quality

standards in WAC 246-290-310 (Maximum contaminant levels (MCLs) and maximum residual disinfectant levels (MRDLs)); and
(c) If the company does not take follow up steps outlined in WAC 246-290-320 (Follow up action).

WAC 480-110-395. All three elements of this rule must be met. Thus, even if the Commission finds an exceedance of a SMCL under WAC 246-290-310, satisfying points (a) and (b), point (c) remains unsatisfied.

WAC 246-290-320 identifies the remedial action required for a manganese exceedance: "When a secondary violation occurs, the purveyor shall notify the department and take action as directed by the department." WAC 246-290-320(1)(c). The Department of Health ("DOH") received notification and results from every test of the wells in question, including those containing SMCL exceedances. Tr. at 155:2-15. DOH did not direct Rainier View to take any action.

When Rainier View voluntarily began the process of implementing filtration at Fir Meadows, DOH visited the well site with Rainier View. SH-19, at 10:12-23. DOH agreed with Rainier View's plan to improve water quality, but imposed no formal directive. *Id.* at 14:21-15:8 ("...So I felt the situation was pretty well in hand."). DOH has never directed Rainier View to take any action at Fir Meadows; thus, Rainier View never failed to take action as directed by DOH. *Id.* at 104:17-105:19. Accordingly, Ms. Hand cannot recover under WAC 480-110-395.

Further, even if the above criteria were satisfied, Ms. Hand still failed to present any evidence of the value of her alleged damages. Ms. Hand submitted no evidence of her water utility bills during the time she alleged received substandard water, and she submitted no evidence to indicate what proportion of her water was allegedly substandard. A bald allegation that the entirety of the water Rainier View provided her failed to meet State safe drinking water standards is unsupported by the evidence. Without such evidence, Ms. Hand cannot prove a claim for a water quality refund.

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1 **2. Effective Remedial Measures Are Already In Place.**

2 Rainier View put an effective filtration system online at Fir Meadows over a year ago. The
3 results have been overwhelming: tests consistently show non-detectable or the lowest detectable
4 levels of manganese since the filtration went online. BRR-2. The water entering the distribution
5 system meets all State safe drinking water requirements. *Id.*

6 To move existing manganese out of the distribution system in a more controlled and
7 expedited manner, Rainier View undertakes systemic flushing. There is no more efficient or
8 effective means of moving this sediment out.

9 Although other options do exist, they impose substantial burdens and disruptions to large
10 amounts of Rainier View customers that disproportionately exceed their benefit. Rainier View
11 could “pig” the lines to force the sediment downstream, but such a process would render 50+
12 customers in Ms. Hand’s neighborhood without water for an entire day, as well as impose a boil
13 warning for those customers for another two days. Tr. at 140:24–142:24, 157:7–159:8.
14 Importantly, even such an intrusive means of forcing sediment out of the system would not fully
15 solve the problem because it would not include pigging of the water mains feeding into Ms. Hand’s
16 neighborhood, nor the one-inch service lateral going to Ms. Hand’s house. *Id.* at 158:8–18.
17 Another alternative is to dig up and replace the pipes in the distribution system, although such a
18 process comes with an obvious extreme disruption, burden, and expense. *Id.* at 143:3–8.

19 The flushing program Rainier View implemented is the most effective means of removing
20 manganese sediment from the distribution system without imposing undue disproportionate
21 expense on Rainier View or burden and disruption on Rainier View’s other customers.
22 Accordingly, no further remedial action is justified or appropriate.

23 **3. Other Damages Are Disclaimed By Rainier View’s Tariff.**

24 To the extent Ms. Hand seeks damages for other items, such as replacement of her
25 pressure reducing valve, repairs to her plumbing or appliances, or for bottled water she purchased

1 in lieu of tap water, such claimed damages are not recoverable. These alleged damages are
2 incidental or consequential to Rainier View's providing water utility service to Ms. Hand. Rainier
3 View's tariff expressly disclaims liability for incidental or consequential damages. BB-5, at Rule
4 20(a).

5 To the extent the Commission finds that such claimed damages are not incidental or
6 consequential damages, Ms. Hand's damages are limited to "the proportionate part of the monthly
7 recurring charge for the service for the period during which the service was affected." *Id.* Ms. Hand
8 presents no evidence of her monthly charges or any indication of the proportion of her service
9 that was allegedly substandard. As Ms. Hand cannot prove any amount of damages, and the
10 claimed categories of damages are expressly disclaimed by Rainier View's tariff, the Commission
11 should award Ms. Hand no damages.

12 Such limitations of liability are expressly upheld by Washington court, as explained in a
13 similar dispute between a Commission-regulated utility and an unhappy customer in *Allen v.*
14 *General Telephone Co. of Northwest, Inc.:*

15 Defendant was required to file and did file its schedule containing all rules which
16 affect charges for services rendered. Further, the defendant, as a public utility,
17 cannot charge what the market will bear for yellow-page listings as it is required to
18 limit its charges to those which are "fair and reasonable," and, once its tariff
19 schedule is filed and approved, the defendant cannot enter into any agreement at
20 variance with it. The rule which disclaims or limits the telephone company's liability
21 for damages resulting from a failure to print this initial listing is one which affects
22 the charges for basic services rendered. Without such a rule, the company would
23 have to raise its rates commensurate to its increased liability risk. When so filed
24 and approved by the Commission and when proper notice is given that the tariff is
25 available for public inspection, the rules becomes a part of the law of this State.
... Consequently, plaintiff's remedy, if any, lies with the legislature.

20 Wn.App. 144, 151, 578 P.2d 1333 (1978) (internal citations omitted).

23 To move outside the tariff's limitation of liability, Ms. Hand must prove that Rainier View
24 was grossly negligent or engaged in willful misconduct.⁴ BB-5, at Rule 20. She cannot do so.

25 ⁴ Ms. Hand makes no allegation that Rainier View violated Chapter 19.122 RCW.

1 Gross negligence is "negligence substantially and appreciably greater than ordinary negligence."
2 *Nist v. Tudor*, 67 Wn.2d 322, 331, 407 P.2d 798 (1965). Ms. Hand presents no evidence of any
3 negligence, much less gross negligence. Likewise, "to constitute willful misconduct, there must
4 be actual knowledge ... of the peril to be apprehended, coupled with a conscious failure to avert
5 injury. ... Strictly speaking, willful misconduct is characterized by intent to injure..." *Adkisson v.*
6 *City of Seattle*, 42 Wn.2d 676, 684, 258 P.2d 461 (1953) (*quoting* 38 Am.Jur. 693, Negligence,
7 § 48). Ms. Hand similarly presents no evidence of willful misconduct. Accordingly, Rainier View's
8 limitation of liability contained in Rule 20 of its tariff applies.

9 **C. MS. HAND IS NOT ENTITLED TO RECOVER COSTS OF WATER TESTING.**

10 Ms. Hand is not entitled to recover her costs of water testing incurred in previous Superior
11 Court litigation under the pretext of RCW 80.04.110. The testing conducted was not intended to
12 guide the Commission's determination of Ms. Hand's complaint, was not conducted in a
13 scientifically reasonable method, and despite flawed sampling methodology, did not prove Ms.
14 Hand's claim that her water failed to meet state drinking water standards. Thus, reimbursement
15 is inappropriate.

16 **1. RCW 80.04.110 Is Not Intended To Reimburse Expert Witness Costs**

17 RCW 80.04.110 provides that:

18 The customer may, at the customer's option and expense, obtain a water quality
19 test by a licensed or otherwise qualified water testing laboratory, of the water
20 delivered to the customer by the water system or company, and provide the results
21 of such a test to the commission. If the commission determines that the water
22 does not meet state drinking water standards, it shall exercise its authority over
23 the system or company as provided in this title, and may, where appropriate, order
24 a refund to the customer on a pro rata basis for the substandard water delivered
25 to the customer, and shall order reimbursement to the customer for the cost
incurred by the customer, if any, in obtaining a water quality test. RCW
80.04.110(5).

1 Ms. Hand, through her counsel, retained Susan Evans, an industrial hygienist, to take
2 water samples from three locations in Hand's house, pursuant to the prosecution of her claims in
3 the prior Superior Court litigation. See SH-29. Ms. Hand never intended to present these results
4 to the Commission and, in fact, opposed producing them to the Commission under the attorney
5 work product doctrine.

6 Under Washington law, parties in litigation bear their own costs, absent an agreement or
7 statute to the contrary. See 16 Wash. Prac., Tort Law and Practice, § 6:14 (4th ed) *and numerous*
8 *cases cited therein*. RCW 80.04.110 allows the Commission to order reimbursement for a
9 customer who takes, and uses, a water sample to successfully show the Commission that the
10 customer is receiving substandard water. The statute does not contemplate reimbursement of an
11 expert witness's fees and/or costs, as Ms. Hand seeks here.

12 If the Commission is persuaded to order Rainier View to reimburse Hand for costs
13 pursuant to RCW 80.04.110(5), these costs should be limited to testing costs, and not the expert
14 witness consultations and other fees. The Laboratory Analysis Requests identify the price as
15 \$59.00 per sample (for a total of \$177.00). See SH-29. The remainder of the fees to the expert
16 witness for items such as "Site Inspection," "Regulatory Research," "Preparation for Testing," and
17 "Senior Consultant" are not appropriate for reimbursement under RCW 80.04.110(5).⁵ SH-62X.
18 Further, the itemized lab fees far exceed the quoted prices, presumably because the lab ran
19 batteries of tests inapplicable to Ms. Hand's complaint and her water. See SH-29. It appears that
20 the lab ran tests relevant to treated surface water sources, which Fir Meadows is not. BB-2T,
21 5:15-22. Rainier View should not be forced to pay for such unnecessary tests.

22 ///

23
24 ⁵ Further, the Laboratory Analysis Request contains instructions directing a lay person to "Rinse and shake
25 bottle thoroughly (with the lid on) three times using the water to be tested," then "Fill Bottle Completely,"
and package it and send it into the lab for analysis. It is unclear why an industrial hygienist's expertise and
expense are necessary to fill up a bottle with water and ship it to a lab.

1 **2. Rainier View Should Not Be Ordered to Reimburse Ms. Hand For**
2 **Unrepresentative Results.**

3 Ms. Evans drew her water samples in a manner that was intended to produce an
4 unrepresentative test sample. She drew two samples from the upstairs bathtub and a third sample
5 from the water heater, after the house sat empty for at least 24 hours. The sample notes suggest
6 the water from the tub was hot water ("Sample Description – HW-MTub Faucet"). Thus, all three
7 samples came from the water heater – the location in the house commonly known to contain the
8 highest concentration of contaminants, and not representative of the water flowing into the house.
9 See BB-2T, at 1:16–2:16.

10 Unfortunately, Ms. Evans provided no declaration, and was not presented to testify to her
11 sampling methodology. Instead, Ms. Hand offered herself to testify to the sampling methodology
12 on the basis that she was present at the sampling and could identify the methods used.
13 Unfortunately, she could not. Tr. at 194:12–197:11. Ms. Hand could not identify the temperature
14 of the water drawn from the tub faucet and could not identify how much water ran between
15 samples. *Id.* She could not identify how full her water heater was before or after the sampling.
16 *Id.* She could not explain why Ms. Evans chose those two locations. *Id.* She could not explain why
17 Ms. Evans did not draw from a hose bib or have the meter pulled to test the water as it enters the
18 house. *Id.*

19 To the contrary, Mr. Blackman testified that "A water heater is not a sampling location that
20 is likely to give a sample accurately representing the water entering the house. The water heater,
21 especially if unused for a period of time, contains stagnant water. The hot water heater also tends
22 to collect contaminants over time." BB-2T, 3:8–11. The net effect is that these samples were all
23 drawn from the location of the house likely to contain the highest level of manganese and is not
24 representative of the water flowing into the house. When Rainier View samples water, it must
25 (and does) follow procedures outlined in the WACs to obtain an accurate test result. Tr. at 154:14–
155:6. Ms. Hand's expert witness did not.

1 In Superior Court, these test results would lack the foundation necessary for admission as
2 expert testimony. Similarly, here, too many questions about the sampling process loom for the
3 Commission to consider them reliable. RCW 80.04.110(5) does not contemplate a company
4 reimbursing a customer for that customer's expert witness fees and lab sampling performed in
5 such a way as to achieve a pre-determined outcome.

6 **3. Hand's Test Results Do Not Prove That The Water Fails To Meet State Drinking**
7 **Water Standards.**

8 Importantly, despite sampling methods intended to produce an unrepresentatively high
9 contaminant lab result, Ms. Hand's water meets State drinking water standards. On that basis
10 alone, the commission should deny her claims.

11 Ms. Evans took three samples from Ms. Hand's house using sampling methods she did
12 not explain, but which appear intended to produce an unrepresentatively high manganese
13 concentration. These test results do not support Ms. Hand's claim that her water fails to meet
14 state drinking water standards. The manganese concentrations in the three samples are 0.00
15 (non-detect), 0.03, and 0.08, against a SMCL of 0.05. See SH-29. Two of these samples are
16 below the SMCL, while the third is slightly above. Taken as an average, as Rainier View does
17 pursuant to the WACs, they average 0.037 mg/L of manganese, which is below the SMCL. Thus,
18 the water in Ms. Hand's home, by her own favorable testing methodology, meets state drinking
19 water standards.

20 Ms. Hand's assertion that her water fails to meet state drinking water standards because
21 its turbidity is too high should be disregarded. Surface water sources must test for turbidity
22 because of their potential for organic contaminants; groundwater sources are not subject to the
23 same potential contamination, and thus, do not have an MCL or SMCL for turbidity. WAC 246-
24 290-310. Fir Meadows is a groundwater source, and thus, Ms. Hand's assertions regarding
25 turbidity do not apply to her complaint.

1 Ms. Hand's request for Rainier View to reimburse her costs for testing her water should
2 be denied because 1) her water sampling costs are actually expert witness expenses incurred in
3 litigation, not in contemplation of RCW 80.04.110(5); 2) the testing methodology used is unknown,
4 but appears designed to achieve a less-than-representative result to advance a litigation purpose;
5 but 3) even despite the improper testing methods, the results show that Ms. Hand's water meets
6 state drinking water standards. Accordingly, Ms. Hand should not recover these costs.

7 **D. MS. HAND'S OTHER CLAIMS SHOULD BE DISMISSED.**

8 Ms. Hand's various other claims against Rainier View should be dismissed because they
9 are outside the scope of the Commission's jurisdiction and/or fail on their merits.

10 **1. Rainier View Neither Made, Nor Breached Any Warranty, But Even If It Did, Such**
11 **Warranties Are Expressly Disclaimed.**

12 Ms. Hand claims that several statements by Rainier View constitute warranties, which
13 Rainier View allegedly breached. Additionally (or alternatively), she alleges some or all of these
14 statements are misrepresentations for which she is entitled recovery under tort law. These claims
15 are without merit.

16 First, Ms. Hand alleges that statements made in the 2016 CCR (SH-11) constituted
17 express warranties which Rainier View subsequently breached and were (presumably negligent)
18 misrepresentations. Ms. Hand provides no support for the contention that such statements are
19 enforceable warranties. For example, Ms. Hand alleges the statement that "it is of the utmost
20 importance to us to remain in compliance with all State and Federal guidelines regarding water
21 quality" is an enforceable warranty. It plainly is not.

22 Further, she provides no evidence that any such warranty was breached. The evidence
23 consistently shows that Rainier View complied with all State and Federal guidelines regarding
24 water quality. Thus, there is no breach. Ms. Hand will likely argue that any exceedance of a SMCL
25 is a violation of State and Federal guidelines, however such an argument turns WAC 246-290-

1 310 into strict liability, which it is not. Rather, a water purveyor is complaint with State and Federal
2 guidelines so long as it follows DOH directives in the event of a SMCL exceedance. As DOH has
3 not issued any directive regarding the Fir Meadows wells, Rainier View remains compliant. Thus,
4 even if the above statement was an enforceable warranty, it was not breached.

5 To prove a prima facie claim for misrepresentation, the complainant must prove her
6 reasonable reliance on the alleged misrepresentation. See *Ross v. Kirner*, 162 Wn.2d 493, 499,
7 172 P.3d 701 (2007). Ms. Hand twice admitted that she first saw the alleged warranties and
8 misrepresentations at her attorney's office a week or two before her deposition – after she had
9 filed suit for the alleged breach of warranty and misrepresentation. Tr. at 198:9–199:13. Thus,
10 she cannot have relied on such statements during any of the events giving rise to her claims.

11 Ms. Hand additionally alleges that some statement Rainier View made to a local “news
12 guy” also constitutes an actionable misrepresentation. Tr. at 189:15–17. This is without merit. It
13 is unclear what alleged statement was made, who made it, in what context, and to whom. This
14 allegation is premised upon multiple layers of unreliable hearsay and deserves no consideration.

15 Finally, Rainier View's tariff expressly “disclaims all warranties, express or implied, except
16 those expressly set forth in this tariff, including, but not limited to, implied warranties of
17 merchantability and fitness for a particular purpose.” BB-5, at Rule 20. Accordingly, even if Ms.
18 Hand persuades the Commission that any of Rainier View's statements are warranties and have
19 been breached, they are expressly disclaimed by Rainier View's tariff, and such disclaimer is
20 directly related to the charges for services rendered under the tariff. Thus, like in *Allen*, Ms. Hand
21 cannot recover.

22 **2. Rainier View Conducts All Required Testing.**

23 Ms. Hand's allegations that Rainier View fails to conduct its required testing are meritless
24 – a fact Ms. Hand admits. Rainier View is, and has been, fully compliant with the DOH testing
25 schedule. BB-1T, at 7:20–8:10. Further, since treatment went online at the Fir Meadows wells,

1 Rainier View was required to increase its testing, and it has done so. BRR-2. When confronted
2 with this evidence, Ms. Hand admitted that this allegation lacks any evidence and is premised
3 solely on her personal distrust of the Company. Tr. at 203:3–204:23 (“Q. So, again, this paragraph
4 and the assertions contained therein are purely based on your personal belief? A. Right.”).
5 Accordingly, the Commission should find in favor of Rainier View on this claim, too.

6 **3. Failure To Report To The DOH (WAC 246-290-320(1)(c)).**

7 Ms. Hand alleges that Rainier View failed to report test results to the DOH in violation of
8 WAC 246-290-320. This allegation is unsupported by evidence and is directly contrary to the facts.

9 DOH’s Northwest Regional Manager, Bob James, testified that “typically we get results
10 from the laboratories. So oftentimes, for most contaminants, we typically get notified through the
11 lab result that comes in...” SH-19, at 96:17–19. He went on to testify that:

12 A: ... So with many of our contaminants, that’s how we become aware. Often there
13 is confusion between the water utility and what its responsibility is and what the
14 laboratory’s responsibility is, and many of them rely on the laboratory to submit the
15 results to us, and sometimes that’s inferred as being notification.

16 Q: That would shift all of the responsibility onto you at the DOH to carefully study
17 each test result and determine whether there’s been an exceedance; is that right?

18 A: Well, we accept the responsibility, and we focus our attention primarily on the
19 primary standards. ...

20 SH-19, at 96:22–97:7. As shown above, there is no serious allegation that Rainier View failed to
21 complete the required testing. Consistent with Mr. James’ testimony, Rainier View testified that
22 its testing laboratory provides results directly to DOH. Tr. at 155:2–15. Accordingly, as Rainier
23 View completed all of its required testing and notified DOH of the results via a method expressly
24 acceptable to DOH, Ms. Hand’s claim fails.

25 **4. Rainier View Does Not Misdirect The Public Where To Submit Complaints.**

Ms. Hand alleges Rainier View misdirects the public where and how to submit water quality
complaints. However, there can be no legitimate argument that Rainier View did not do as the
WACs command.

1 WAC 480-110-385 clearly identifies the steps a water company must take if it receives a
2 complaint or dispute from a customer. Specifically, a water company must acknowledge the
3 complaint, investigate and report back to the customer, and take any corrective action necessary
4 under the circumstances. Then, the company must inform the customer that the complaint
5 may be appealed to a higher level representative at the company. If the complainant is still
6 dissatisfied, the company must "Inform the complainant ... of the commission's availability for
7 review of the complaint" and "Provide the complainant with the commission's address and toll-
8 free telephone number." WAC 480-110-385(1).

9 There is no dispute that Rainier View followed this process. Ms. Hand's opinion that some
10 different process should exist does not impose liability on Rainier View. Accordingly, the
11 Commission should find for Rainier View on this claim.

12 **5. Rainier View Appropriately Processes And Retains Complaints.**

13 Ms. Hand further alleges Rainier View fails to process and maintain complaint records in
14 violation of WAC 480-110-385. Companies must keep a record of all complaints concerning
15 service or rates for at least one year, and on request, make them available for commission review.
16 The record must contain the complainant's name and address, date and nature of the complaint,
17 action taken, and final result. WAC 480-110-385(4).

18 This allegation is entirely unsubstantiated. Rainier View maintains a record of all
19 complaints and disputes by logging the information into the customer's information within Rainier
20 View's billing system, where it is retained beyond the one-year requirement. Tr. at 122:25–123:17.

21 Mr. Blackman testified that a 2014 investigation resulted in the Commission's Staff
22 providing a technical recommendation regarding recordkeeping. *Id.* at 156:25–157:3. Rainier
23 View adopted a different method of processing and maintaining complaint records, but which
24 provides the same functionality. *Id.* at 122:16–123:17. Ms. Hand presents no evidence to the
25 contrary, other than her own personal opinion, which is admittedly not supported by any evidence.

1 Accordingly, the Commission should find for Rainier View on this claim.

2 **6. RVWC Obtained All Required Approvals For Its Filtration System.**

3 Ms. Hand alleges that Rainier View failed to obtain public input or approval for funding for
4 the filtration system in violation of WAC 246-290-320 and the 2009 DOH Water System Design
5 Manual. This claim fails on both bases.

6 WAC 246-290-320 states that:

7 "the purveyor of any public water system providing service that has secondary
8 inorganic MCL exceedances shall take follow-up action as required by the
9 department. Follow-up action shall be commensurate with the degree of consumer
10 acceptance of the water quality and their willingness to bear the costs of meeting
11 the secondary standard."

12 WAC 246-290-320. This WAC provides two parallel instructions. First, the water purveyor must
13 do as the DOH instructs, if the DOH instructs the purveyor to do anything. Second, the DOH must
14 levy instructions based on consumer acceptance and willingness to bear costs.

15 The only duty imposed on Rainier View is to take action as required by the DOH. Here,
16 Rainier View and DOH agreed on a remedy to the elevated manganese at Fir Meadows 4 and
17 RVWC complied with this agreed resolution. In so doing, Rainier View satisfied its obligation under
18 WAC 246-290-320.

19 Further, to the extent any duty exists to seek customer input, the Commission held an
20 open hearing on Rainier View's request for surcharge extension on December 12, 2016, after
21 customer notice and a period for public comment. See SH-15. The Commission approved the
22 \$0.75 per month surcharge extension after receiving comments from five of Rainier View's 18,000
23 customers. SH-15, at p.2.

24 Finally, there can be no genuine argument that the 2009 DOH Water System Design
25 Manual applies to Rainier View. The plain language of the manual states that

"DOH will determine that a secondary contaminant problem may exist through
evidence provided in customer complaints or by reviewing information provided by

1 a purveyor. DOH will require action by the purveyor when the purveyor receives
2 five or more specific complaints ... in a 12-month period. DOH may receive the
3 complaints individually or through a petition signed by five or more customers.
4 When a problem is determined to be significant, the requirements below apply.”

5 SH-34X, at p.203. The “requirements below” include the steps Ms. Hand suggested Rainier View
6 was required to follow, including creating an engineering report with alternative options and
7 surveying customers. These requirements do not apply to Rainier View, here, because 1) DOH
8 did not receive five or more customer complaints about manganese in the Southwood Sound
9 system, and 2) DOH received every test report Rainier View was required to provide DOH, and
10 DOH took no action.

11 Bob James, DOH’s regional manager for the Northwest Region, reiterated these
12 requirements. SH-19, at 15:21–16:24. James also confirmed that the requirements Ms. Hand
13 references are inapplicable to the present case. See *e.g.* SH-19, at 18:21–19:6, 82:8–83:1,
14 102:24–104:16. From the DOH’s perspective, Rainier View acted appropriately in identifying an
15 opportunity to improve water quality and taking reasonable and responsible actions to effectuate
16 such improvements. See *e.g.* SH-19, at 23:25–28:3, 32:25–33:11, 35:23–37:1.

17 Accordingly, the Commission should find for Rainier View as to Ms. Hand’s claim that
18 Rainier View failed to obtain public input or approval in funding the Fir Meadows filtration system
19 because 1) Rainier View satisfied its obligations under WAC 246-290-320, and 2) Rainier View
20 had no such obligation under the 2009 DOH Water System Design Manual.

21 **V. CONCLUSION**

22 Ms. Hand has not carried her burden of proof and her complaint should be dismissed in
23 its entirety. Further, the reality is that like in *Allen*, above, Ms. Hand is personally and subjectively
24 unsatisfied with an aspect of the service she receives from a Commission-regulated utility
25 provider. As *Allen* explained, the legislature established a scheme of regulation and governance
that it believed best served the entire public. As to each of Ms. Hand’s claims, the evidence shows
that Rainier View complied with the laws and regulations governing its operations. To the extent

1 Ms. Hand remains unsatisfied, her problems are with the laws, and thus, her remedies lie with the
2 legislature.

3 DATED this 28th day of August, 2018.

4 PREG O'DONNELL & GILLETT PLLC

5
6 By 

Eric P. Gillett, WSBA #23691

Daniel W. Rankin, WSBA #49673

Attorneys for Respondent Rainier View Water
Company, Inc.