

Hearing Date Aug 18, 2014, 1:30 p.m.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Penalty Assessment  
against,

WASHINGTON WATER SUPPLY, INC.

NO.: UW-140598

MOTION FOR SUMMARY JUDGMENT

**I. INTRODUCTION AND RELIEF REQUESTED**

Washington Water Supply, Inc. ("WWS"), through its undersigned counsel at the address below, moves for an order of summary judgment pursuant to WAC 480-07-380 (2) dismissing the penalties assessed against WWS for failing to file either an application for transfer of property, or revisions to its tariff as required by WAC 480-110-433. Given the fact that WWS never owned the two water systems in question, Silent Sky and Bainbridge 1, it had no duty or other responsibility under Washington law to file an application for approval of the transfer of property or revise its tariff. Moreover, no Washington law prohibited WWS from informally operating the two water systems during the period it considered acquiring the systems.

**II. FACTUAL BACKGROUND**

As an accommodation to the customers of the Silent Sky and Bainbridge 1 water systems, which are owned by an entity that abandoned them, WWS agreed to informally operate the systems for a period of time during which it would evaluate the systems while studying the potential of acquiring the systems. WWS received no assignment, lease, purchase and sale, or other form of transfer of the systems. Although WWS communicated its intent to the Utilities and Transportation Commission ("UTC") that it intended to eventually acquire the systems, WWS never proceeded to either acquire the systems or to

pursue formal approval from the UTC. WWS learned during its evaluation of the systems that documentation of current ownership either did not exist or could not be located, and it could not obtain free and clear title to the real and personal property assets comprising the systems. WWS' representation to the UTC that it owned the systems was mistaken and based on its aspiration to eventually own the systems once all concerns regarding title and their suitability and fit within WWS' assets were resolved. The lack of clear title of ownership made the acquisition impractical if not impossible. Regardless, WWS did not acquire the systems and had no obligation to apply for approval or revise its tariff.

## **II. STATEMENT OF ISSUES**

1. Given that WWS never owned the two water systems in question, Silent Sky and Bainbridge did it have a duty or other responsibility under Washington law to file an application for approval of the transfer of property or revise its tariff?
2. Did Washington law prohibit WWS from informally operating the two water systems during the period it considered acquiring the systems?

## **III. EVIDENCE RELIED UPON**

1. Declaration of Scott M. Ellerby.

## **IV. ARGUMENT AND AUTHORITY**

The UTC has cited RCW 80.12 and WAC 480-143 as the applicable legal authority governing WWS' acquisition or sale of water systems. Neither the statute nor the regulation concerning and applying it prevent a public company from operating a water system without formally acquiring it.

RCW 80.12.040 provides that a public company may not acquire a water system without advance UTC approval:

No public service company shall, directly or indirectly, purchase, acquire, or become the owner of any of the franchises, properties, facilities, capital stocks or bonds of any other public service company unless authorized so to do by the

commission. Nothing contained in this chapter shall prevent the holding of stocks or other securities heretofore lawfully acquired or prohibit, upon the surrender or exchange of said stocks or other securities pursuant to a reorganization plan, the purchase, acquisition, taking or holding by the owner of a proportionate amount of the stocks or other securities of any new corporation organized to take over at foreclosure or other sale, the property of the corporation the stocks or securities of which have been thus surrendered or exchanged. Any contract by any public service company for the purchase, acquisition, assignment or transfer to it of any of the stocks or other securities of any other public service company, directly or indirectly, without the approval of the commission shall be void and of no effect.

Nothing in this statute prevents a public company from operating a system during the process of evaluating its possible acquisition. Moreover, WAC 480-143-120 clearly states that a public company may not complete a transfer of property unless first obtaining UTC approval:

A public service company may not complete a transfer of property necessary or useful to perform its public duties unless the company first applies for, and obtains, commission approval. Transfers include sale, lease, assignment of all or part of a public service company's property, and merger or consolidation of a public service company's property with another public service company. Certain telephone utility leases are exempt under WAC 480-143-200. Applications must describe transfers in detail and must include the public service company's current financial statements and copies of all transfer instruments.

The definition of “transfer” expressly does not encompass or otherwise include the informal operation of a system during the process of evaluation for a potential acquisition.

The legal authority relied upon by the UTC in penalizing WWS is simply not implicated by these facts and has not been violated. Neither the RCW section nor the regulation is violated by a public company operating a private water system during an evaluation prior to acquiring the system. Even if there were an ambiguity in the RCW, and there is not, the UTC could have resolved the confusion when it wrote the regulations in the applicable WAC section. That neither the Legislature nor the UTC took action to prevent a public company from operating a system not owned by it is supported by a valid public policy rationale: a public company should not be prohibited from operating a property before

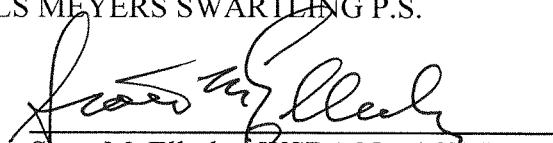
deciding to acquire it in order to be able to determine whether the property is a good fit with its other properties. WWS did exactly that, and determined that it would not proceed with formal acquisition. In short, there is nothing prohibiting this activity in either the RCW or the WAC sections relied upon by the UTC. It also follows that, having decided not to add the systems to its other properties, WWS was not required to amend its tariff.

For these reasons, WWS requests that the complaint and penalty imposed by the UTC, which lacks any basis under Washington law, be dismissed with prejudice.

Respectfully submitted this 15th day of July 2014.

MILLS MEYERS SWARTLING P.S.

By:



Scott M. Ellerby, WSBA No. 16277  
Counsel for Washington Water Supply, Inc.

**DECLARATION OF SERVICE**

I, Anna Armitage, declare that I am an employee of Mills Meyers Swartling, am over the age of eighteen and am competent to testify to the matters stated herein.

On this date I caused to be served a true and correct copy of the within and foregoing Motion for Summary Judgment on the following, in the manner indicated:

***Counsel for Washington Utilities and Transportation Commission Staff:***

Jennifer Cameron-Rulkowski  
Office of the Attorney General  
Utilities and Transportation Division  
1400 S. Evergreen Park Drive SW  
P.O. Box 40128  
Olympia, WA 98504-0128

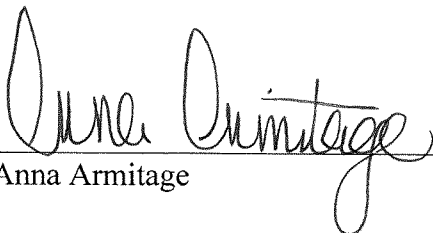
- Via first class mail, postage prepaid
- Via facsimile
- Via Legal Messengers
- Email:  
[jcameron@utc.wa.gov](mailto:jcameron@utc.wa.gov)

Kippi Walker  
UTC-Administrative Law Division  
P.O. Box 47250  
Olympia, WA 98504-7250

- Via first class mail, postage prepaid
- Via facsimile
- Via Legal Messengers
- Email:  
[kwalker@utc.wa.gov](mailto:kwalker@utc.wa.gov)

I declare, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 15<sup>th</sup> day of July 2014.

  
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 Anna Armitage