

BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,  
Complainant,

v.

NEWAUKUM WATER SYSTEM, INC.,

Respondent.

DOCKET UW-143181  
*(Consolidated)*

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,  
Complainant,

v.

NEWAUKUM WATER SYSTEM, INC.,

Respondent.

DOCKET UW-143330  
*(Consolidated)*

STAFF'S RESPONSE TO  
NEWAUKUM'S MOTION FOR  
SUMMARY DETERMINATION AND  
STAFF'S MOTION FOR SUMMARY  
DETERMINATION OF  
COMMISSION'S JURISDICTION

**I. STAFF'S MOTION FOR SUMMARY DETERMINATION**

1 Commission Staff ("Staff") provides the following response to Newaukum Water System, Inc.'s ("Newaukum" or "Company") motion for summary determination. Staff further moves for summary determination of the Washington Utilities and Transportation Commission's ("Commission") jurisdiction over Newaukum. Staff's response and motion rely on the Parties' joint Stipulation of Facts submitted to the Commission.

## II. BACKGROUND

2 On September 11, 2014, the Commission entered Order 01 in Docket UW-143181  
setting forth a complaint against Newaukum's rates and alleging that the Company's rates  
may be excessive.

3 On September 15, 2014, Newaukum filed a petition in Docket UW-143330  
requesting to be removed from Commission jurisdiction.

4 On October 28, 2014, the Commission issued an order consolidating Dockets UW-  
143181 and UW-143330.

5 Staff now asks the Commission to resolve Newaukum's request for removal from  
regulation, which was initially filed in Docket UW-143330. Newaukum's operations fall  
within the Commission's jurisdiction under the relevant statutes and Commission rules.  
Moreover, neither the relevant statutes nor the Commission's rules exempt Newaukum from  
regulation. Therefore, the Commission should summarily reject Newaukum's petition for  
removal from regulation, grant Staff's cross-motion for summary determination, and allow  
the Parties to proceed to hearing and discovery regarding the fairness of the Company's  
rates.

## III. WAC 480-07-380(2)

6 Under WAC 480-07-380(2), a party may move for summary determination of one or  
more issues where there is no genuine issue as to any material fact and the moving party is  
entitled to judgment as a matter of law. In considering a motion for summary determination,  
the Commission will consider the standards applicable under CR 56 of the Washington  
Superior Court Civil Rules.

7           The Parties have submitted a Stipulation of Facts for the Commission’s acceptance.  
On the basis of the Parties’ proposed Stipulation of Facts, Staff posits that there are no  
genuine issues of material fact relating to a determination the Commission’s jurisdiction  
over Newaukum.

#### IV. ARGUMENT

##### A. **Newaukum is a water company subject to regulation under RCW Title 80**

8           A plain reading of RCW Chapter 80.04.010 demonstrates that Newaukum is a water  
company subject to Commission regulation. First, RCW 80.04.010(30)(a) defines the term  
“water company” to include virtually any legal entity or individual owning, controlling,  
operating, or managing any water system in the state of Washington. Moreover, RCW  
80.04.010(30)(a) expressly includes “every corporation” within the definition of water  
company. Newaukum is a non-profit corporation that owns, controls, operates, and manages  
a water system for hire in Washington State.<sup>1</sup> Therefore, the statute expressly applies the  
Commission’s jurisdiction to Newaukum.

9           Second, Newaukum does not fall under the statutory exemptions listed in RCW  
80.04.010(30)(b). Under RCW 80.04.010(30)(b), a water company is exempt from  
Commission jurisdiction if that company does not serve more than 100 customers or charge  
greater than \$300 per customer per year.<sup>2</sup> Newaukum does not have 100 customers, but the  
Company does charge its customers more than the regulatory threshold.<sup>3</sup> Therefore,

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<sup>1</sup> Stipulation of Facts, *UTC v. Newaukum Water System, Inc.*, Dockets UW-143181 and UW-143330  
(consolidated), December 2, 2014 (hereafter “Stipulation of Facts”).

<sup>2</sup> RCW 80.04.010(30)(b) allows the Commission to adjust the \$300 threshold annually in rules, which the  
Commission has done in WAC 480-07-255. As of this writing, the regulatory threshold is \$557 per customer,  
per year.

<sup>3</sup> Stipulation of Facts.

Newaukum does not fall under the statutory exemption and Title 80 grants the Commission jurisdiction over the Company.

**B. Commission rules do not exempt Newaukum from regulation**

**1. WAC 480-110-245**

10 In WAC 480-110-245, the Commission's rules effectively adopt RCW 80.04.010(30)(a)'s definition of "water company." Thus, under the Commission's rules, a "water company" includes every corporation owning, controlling, operating, or managing a water system for hire in Washington State. WAC 480-110-245. Newaukum is a non-profit corporation that owns, controls, operates, and manages a water system for hire in Washington State.<sup>4</sup> Therefore, the Commission's rules define Newaukum as a "water company" subject to regulation.

**2. WAC 480-110-255(1)**

11 Under WAC 480-110-255(1), the Commission regulates investor-owned water companies that serve more than 100 customers *or* have average revenue greater than \$557 per customer per year (emphasis added). "Investor-owned utility", or "investor-owned water utility," is a longstanding regulatory term that distinguishes publicly-owned utilities from privately managed utilities.<sup>5</sup> Publicly-owned utilities include municipal utilities,

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<sup>4</sup> Stipulation of Facts.

<sup>5</sup> See generally JAMES C. BONBRIGHT, PRINCIPLES OF UTILITY RATES, Chapter 1 The Public Utility Concept, at pp. 3-25 and p. 10 ¶2 (1961) (describing the public utility, purpose of public utility regulation and general choice between government regulation of a privately-organized entity versus direct governmental ownership); see also 16 U.S.C. § 832b (defining "public bodies" and "cooperatives") and 16 U.S.C. 839c (describing investor-owned utilities as all non-public bodies and cooperatives, federal agencies, or direct industrial users); P.U.R. GLOSSARY FOR UTILITY MANAGEMENT, p. 81 (1992) (defining Investor-Owned Utilities as distinct from government or cooperative-type ownership).

public utility districts, or cooperatives where the public directly owns the utility; an investor-owned utility is a privately-managed utility not owned by the government or a cooperative.<sup>6</sup>

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Newaukum is a privately managed, non-profit corporation.<sup>7</sup> The Company serves customers who do not own Newaukum or in anyway partake in the Company's internal operations.<sup>8</sup> Therefore, Newaukum is neither 1) a governmental agency, nor 2) a cooperative. Therefore, the Company meets the definition of an investor-owned water company. Because Newaukum also charges its customers more than the regulatory threshold,<sup>9</sup> the Company is subject to the Commission's regulatory authority under WAC 480-110-255(1).

**3. WAC 480-110-255(2) exemptions from regulation do not apply to Newaukum.**

**a. WAC 480-110-255(2), subsections (a) through (d) not applicable**

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As a registered corporation, the exemptions listed in WAC 480-110-255(2)(a) through (d) plainly do not apply to Newaukum. The Company is not a: (a) city, town, or county; (b) public utility district; (c) water district; or (d) local improvement district.

**b. WAC 480-110-255(2)(e) and WAC 480-110-255(2)(f) not applicable because Newaukum provides service to nonmembers.**

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For the exemptions listed in WAC 480-110-255(2)(e) and (f), the operative question is whether Newaukum serves nonmembers.<sup>10</sup> Newaukum provides service to two

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<sup>6</sup> See *supra* footnote 2, above.

<sup>7</sup> Stipulation of Facts.

<sup>8</sup> See Stipulation of Facts.

<sup>9</sup> Stipulation of Facts.

<sup>10</sup> WAC 480-07-255(2)(e) exempts "homeowners associations, cooperatives and mutual corporations or similar entities that provide service only to their owners or members." WAC 480-110-255(2)(f) exempts "Homeowner associations, cooperatives and mutual corporations or similar entities that provide service to nonmembers unless they serve one hundred or more nonmembers or charge nonmembers more than five hundred fifty-seven dollars average annual revenue per nonmember." By its express terms, the exemption in subsection (e) does

nonmembers.<sup>11</sup> Thus, the Company is not exempt from regulation under either WAC 480-110-255(2)(e) or WAC 480-110-255(2)(f).

**1) Forced transfer of membership interest violates law and should not be recognized by the Commission**

15 Newaukum has two customers who have not accepted membership in the Company.<sup>12</sup> Those same two customers have not participated in the Company's decision-making process or operational functions.<sup>13</sup> It is a basic tenet of law, fairness, and common sense that an entity or individual cannot forcibly transfer anything to another entity or individual; acceptance is a legally necessary condition of any transfer.<sup>14</sup> Therefore, the two customers who have not accepted membership status are, by law, nonmembers.

16 Forced ownership transfers are particularly concerning in the area of utilities, where longstanding regulatory principles are intended to avoid unilateral, monopolistic behavior that leads to unfair results and harms the public interest.<sup>15</sup> Forced transfers do not protect the public interest, and the Commission should refuse to recognize any utility's unilateral, forced transfers of ownership. Therefore, Newaukum serves nonmembers, and the

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not apply if entities serve customers who are not owners or members. Newaukum receives more than \$557 in annual average revenue per customer, so the exemption in subsection (f) does not apply if the Company serves nonmembers. Thus, the operative question for both exemptions to apply in this case is whether Newaukum serves nonmembers.

<sup>11</sup> Newaukum refers to nonmembers as "non-voting members." Stipulation of Facts.

<sup>12</sup> Stipulation of Facts.

<sup>13</sup> Stipulation of Facts.

<sup>14</sup> For discussion of the acceptance requirement for gifts, *see, e.g. In re Gallinger's Estate*, 31 Wash. 2d 823, 833 (Wash. 1948)(execution of a gift requires acceptance by the donee); for transfers in exchange for consideration, *see, e.g. Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 388 (Wash. 1993).

<sup>15</sup> For an historical understanding of the Commission's regulatory authority to act in the public interest under RCW 80.01.040, *see generally* JAMES C. BONBRIGHT, ET AL., PRINCIPLES OF PUBLIC UTILITY RATES, pp. 1-67 (2d ed. 1988) (discussing in consecutive chapters The Public Utility Concept, Alternative Paradigms to Regulation, and The Public Interest as the Assumed Goal of Ratemaking).

Company does not qualify for exemption from regulation under WAC 480-110-255(2)(e) or WAC 480-110-255(2)(f).

**2) Transfer of ownership not approved by UTC and void as a matter of law**

17 Under RCW Chapter 80.12, the Commission regulates public service companies' transfers of property. Under RCW 80.12.010, a public service company includes any entity operating as a utility subject to Commission regulation of rates and services. Under RCW 80.12.030(1), transfer of ownership without Commission approval is void as a matter of law.

18 Newaukum is a public service company subject to Commission jurisdiction.<sup>16</sup> The prior owner's transfer of the water system and its associated debts to the customers was not approved by the Commission. Thus, the Company's transfer of ownership to its customers through forced memberships is void as a matter of law under RCW 80.12.030(1).<sup>17</sup> Therefore, Newaukum's serves nonmembers and the Company does not qualify for an exemption from regulation under WAC 480-110-255(2)(e) or WAC 480-110-255(2)(f).

**V. CONCLUSION**

19 The Commission should reject Newaukum's motion for summary determination, and grant Staff's motion that the Commission find the Company subject to Commission jurisdiction as a matter of law. The Commission should allow the Parties to proceed to

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<sup>16</sup> In the Matter of Determining the Proper Classification of, and Complaint for Penalties against Newaukum Water System, Inc., Docket UW-132281, Order 02 ¶8 (March 11, 2014).

<sup>17</sup> Although Staff does not object to the transfer of membership interests to those customers who willingly accepted, the Commission must, at the very least, refuse to recognize forced transfers to those customers who have not accepted membership.

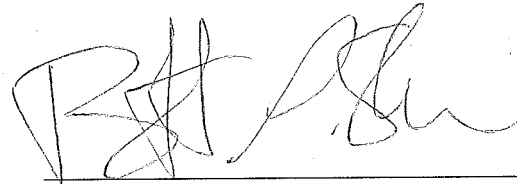
hearing on the remaining, non-jurisdictional matters in this consolidated docket in accordance with the previously-determined procedural schedule.

DATED this 2<sup>nd</sup> day of December 2014.

Respectfully submitted,

ROBERT W. FERGUSON

Attorney General

A handwritten signature in black ink, appearing to read "Brett P. Shearer", is written over a horizontal line.

BRETT P. SHEARER

Assistant Attorney General

Counsel for Washington Utilities and

Transportation Commission Staff