FIRGROVE
MUTUAL WATER COMPANY

September 23, 2013

Mr. Steven King
Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250

Re: Comments of Firgrove Mutual Water Company in the Matter of the Pre-proposal Statement of Inquiry Petition, Docket No. 131386, to Consider the Need to Evaluate and Clarify Jurisdiction of Water Companies, WAC 480-110-225, related rules.

I. Introduction

Firgrove Mutual Water Company is a private, non-profit public water utility provider governed by a Board of Trustees and authorized to provide a public water supply under the rules and regulations established by the State of Washington and Pierce County. Firgrove owns and operates a franchised municipal water supply and delivery system that treats and purchases potable water supply for consumption by the member residents and businesses located in its designated retail water service area. Firgrove currently serves 8,300 member/customers and a total population of 23,000.

Firgrove is recognized as a tax exempt mutual/cooperative organization under section 501(c)(12) of the federal Internal Revenue Code. As a consumer owned, locally regulated utility, Firgrove is categorically exempt from regulation by the WUTC under WAC 480-110-255 and has operated free from regulation by the WUTC for decades. Accordingly, Firgrove has a direct interest in this proceeding because it would be adversely impacted by the change of law that is proposed by the amendments to WAC 480-110-255.

Firgrove has taken action to file these comments because it believes, among other considerations and arguments, the following:

(1) the WUTC is without the requisite legislative authority to propose this amendment;
(2) the proposed amendment is unnecessary, overbroad, and predicated on a prior and dismissed WUTC complaint (involving a small homeowner association) improperly extrapolated to the operation of cooperatives and mutuals;
(3) the proposed amendment is based on faulty analysis of applicable case law and statutes;
(4) the proposed amendment seeks to reverse long standing law exempting cooperative and mutual utilities from WUTC regulation;

(253) 845-1542 • Fax: (253) 845-4728 • 10408 - 144th Street East • Puyallup, Washington 98374

(5) the proposed amendment is based on wholly speculative claims by WUTC staff, without substantive factual or legal foundation, of risk of potential mistreatment or injury to cooperative/mutual shareholders/members.
(6) the proposed amendment overreaches the appropriate authority and interests of the WUTC, and is contrary to established law and public policy.

Firgrove would therefore respectfully request the Commission to withdraw the proposed amendment in its entirety.

II. Background

The Washington Supreme Court in the case of Inland Empire Rural Electrification, Inc. v. Dep't of Public Service, 199 Wash. 527, 92 P.2d 258 (1939) (hereafter *Inland)*, reaffirmed in West Valley Land Co., Inc. v. Nob Hill Water Ass'n, 107 Wn.2d 359, 729 P.2d 42 (1986) (hereafter *Nob Hill)*, held that non-profit mutual or cooperative corporations, are categorically exempt from the jurisdiction of the WUTC. The specific language used by the Supreme Court in *Nob Hill* cannot be lawfully ignored by the WUTC. The Supreme Court held that Nob Hill is a non-profit cooperative and therefore exempt. The Supreme Court did not attempt to create different categories of non-profit cooperative and mutual companies, with some exempt and some not exempt from the WUTC's jurisdiction. The plain language of the Supreme Court's decisions in *Nob Hill* and *Inland* clearly exempts Washington's non-profit mutual and cooperative utility companies from the WUTC's jurisdiction.

Until now, the WUTC has complied with the Supreme Court's mandate. To this end, WAC 480-110-255(1) currently states that the WUTC "only regulates investor-owned water companies." WAC 480-110-255(2)(e), in turn, states the inverse proposition i.e., that the WUTC does not regulate cooperative and mutual companies. The WUTC proposed rule to "clarify the jurisdiction over water companies, homeowner associations, cooperatives, mutual corporations, or similar entities, under Washington Administrative Code (WAC) 480-11-245 and WAC 480-110-255" is in direct conflict the Supreme Court's mandate. Moreover, it would, without proper legal authority, overturn 75 years of settled law embodied in the Supreme Court decisions in *Inland* and *Nob Hill*, decades of interpretation by the WUTC, and multiple acts of the Legislature, which has acquiesced in and ratified the categorical exemption from WUTC regulation applicable to cooperative and mutual utilities. For the reasons stated herein, Firgrove strongly objects to the proposed rulemaking.

III. Comments/Argument

(1) The WUTC does not possess the requisite legal authority to eliminate the existing categorical exemption from regulation for Cooperative and Mutual Corporations.

The proposed amendments to WAC 480-110-255 constitute legislative rulemaking under the Washington Administrative Procedure Act. RCW 34.05. An administrative agency of state government has only those powers conferred on it by the legislature, either expressly or by necessary implication. *See, e.g. Washington Independent Telephone Ass'n v. Washington Utilities & Transportation Commission,* 148 Wn. 2d 887, 901, 64 P. 3d 606 (2003); *Human*

Rights Comm'n ex rel Spangenberg v. Cheney School Dist. No. 30, 97 Wn. 2d 118, 125, 641 P.2d 163 (1982). Therefore, before adopting legislative rules, the WUTC must have the requisite authority from the legislature to do so. The WUTC lacks that authority.

The subsections of the WAC proposed for amendment were specifically intended to create a categorical exemption for cooperative and mutual corporations incorporated under RCW 23.86 and RCW 24.06. In fact, since 1939 when the Supreme Court of Washington decided *Inland*, holding that an electric distribution cooperative is not a "public service company," that is exactly how the WUTC and its predecessor agency, the Department of Public Service, have interpreted the applicable statutory law and case law. This interpretation by the WUTC was appropriate, given the Washington Supreme Court's clear mandate in *Inland.*

The foregoing proposition was further confirmed in *Nob Hill,* wherein the Washington Supreme Court noted that the WUTC, ...historically has not regulated nor asserted jurisdiction over and presently does not regulate nor assert jurisdiction over cooperatives or nonprofit water providers. *Nob Hill*, 107 Wn.2d at 363 (emphasis added). The legislature has long been aware of the *Inland* and *Nob Hill* decisions and the WUTC's interpretation of the case law. The legislature has acquiesced, and repeatedly ratified and, in fact, expanded the categorical exemption from WUTC regulation applicable to utilities organized under RCW 23.86 and RCW 24.06. The legislature has done so by reenacting and repeatedly amending applicable provisions of the WUTC's jurisdictional statute RCW 80.04, and other applicable statutes, including RCW 23.86, RCW 24.06, RCW 54.48, RCW 19.29A, and RCW 19.280, without any effort to limit, rescind or repeal the exemption. In fact, if anything, the exemption has been expanded by those laws.

In addition, RCW 19.285 (I-937), which was approved by the voters of the state of Washington in 2006, also recognizes and ratifies the exemption of mutual and cooperative utilities from WUTC regulation. For these reasons, the proposed amendment to the WAC is contrary to well established and settled Washington law which the legislature has acquiesced in, ratified and approved. For that reason, the WUTC lacks authority to eliminate the categorical exemption as it now proposes.

(2) The WUTC Lacks Legislative Authority to Adopt the Proposed Rule Due to Legislative Acquiescence and Ratification

It is a long standing and settled principle of law that in the case of a widely known judicial decision or agency practice, the Legislature is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. *See, e.g. Leonard v. Baker,* 120 Wash.2d 538, 843 P.2d 1050 (1993):

> Legislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence in that construction. *See* Seattle Sch. Dist. 1, 116 Wash.2d at 361, 804 P.2d 621. Here, subsequent to the interpretation of former RCW 30.20.015 by the *Douglas* court in 1965, the Legislature amended that section in 1967, but did not alter the wording of the

conclusive presumption provision. Consequently, the Legislature is presumed to have acquiesced in the judicial construction that a change in the signature card acts as a deposit for purposes of the statute.

The Legislature has amended and re-enacted the WUTC's jurisdictional statutes RCW 80.04 and RCW 80.28 numerous times since *Inland* and *Nob Hill* were decided. The Legislature thereby acquiesced in the Court's determination that cooperative and mutual utilities are not "public service companies", and it adopted by "acquiescence" the WUTC's own long-standing interpretation that cooperative and mutual utilities are outside of the WUTC's jurisdiction.

The Legislature is presumed to be aware of the WUTC's own long standing interpretation, which is now codified in part in WAC 480-110-255. The above examples show that whenever confronted with the issue of whether the WUTC should be given authority to regulate cooperative and mutual utility operations, the **Legislature has explicitly affirmed that cooperative and mutual utilities are "locally regulated" and has explicitly stated that nothing gives the WUTC any authority to regulate cooperative and mutual utilities**. In short, the Legislature has never shown the slightest interest in changing the long standing interpretation (and the Washington Supreme Court's unequivocal holdings in *Nob Hill* and *Inland Empire*) that cooperative and mutual utilities are categorically exempt from WUTC regulation.

By its silence and by its amendment and reenactment of applicable parts of Title 80.04 and 80.28 RCW and by its extension of the exemption from WUTC jurisdiction for cooperative and mutual utilities in other laws, the Legislature has acquiesced in, adopted and ratified the interpretation that cooperative and mutual utilities are categorically exempt. For that reason, the WUTC lacks legislative authority for the amendment to WAC 480-110-255 that it now proposes.

(3) The Proposal to Amend WAC 480-110-255 Is Unnecessary As A Matter of Public Policy

The WUTC staff paper offers no concrete examples of any problem that their proposed amendment would solve. Indeed, a review of WUTC's own docket indicates that the fact pattern driving the proposed rule involves a complaint, subsequently dismissed, involving a small homeowner association, not a mutual or cooperative. *WUTC v. Sandy Point Improvement Company, Docket UW 121408.*

For all intents and purpose, it appears that the WUTC staff have employed the (above) case to engage in an unwarranted and highly attenuated assertion that absent the proposed rule, cooperative and mutual members/shareholders are at risk of mistreatment. This assertion is wholly speculative and unsupported by any form of credible facts or evidence by WUTC staff. The fact is that WUTC staff has not made a compelling argument that preserving existing legal exemption for cooperatives and mutuals poses an actual risk of harm or injury to its members/shareholder.

From a facial standpoint, the amendment appears to be a gratuitous, overbroad effort to extend the WUTC's authority and jurisdiction where it is not wanted or needed to protect the

public interest. As noted above, the WUTC proposed rulemaking at issue is a solution seeking a problem. To the extent that there is any member or other person purchasing service from a self-regulated cooperative or mutual utility who claims that the utility is not operating in accordance with RCW 23.86 or RCW 24.06, that member or person may do what the member in *Nob Hill* did, i.e. file a lawsuit against the utility seeking relief from the Court.

The members of non-profit cooperative and mutual utilities have a voice in the operation of the company through the democratic process. *See e.g.*, Nob Hill, 107 Wn.2d at 369 ("all that is requisite is a voice in the cooperative. Since all members are directly or derivatively represented, the requirement is met.") For example, non-profit mutual and cooperative company members: (i) vote for their Board of Directors (who, in turn, establish policy for the company); (ii) may express their opinions and concerns to their Board of Directors if they choose; (iii) may examine the company's records; and (iv) receive low cost utility service compared to the for-profit company market because their mutual or cooperative company exists only to serve them and not to turn a profit (unlike an IOU).

If a member of a cooperative or mutual utility has a complaint that: (i) rates are not "just and reasonable," (ii) the utility is not operating on a not-for-profit basis, (iii) the entity is not democratically governed, (iv) excess revenues should be distributed to the membership, or (v) even a complaint that the utility should be subject to WUTC oversight as occurred in *Nob Hill*, such claims can all be addressed by the governing body of the utility or by a lawsuit in superior court. There is simply no need for the WUTC to attempt to insert itself into the business affairs of all other cooperative and mutual utility companies to determine if a particular utility is not operating appropriately.

(4) The Proposed New Definition of "To the Public" Would Improperly Expand the Statutory Definition of a "Public Service Corporation in Inland and Nob Hill by Narrowing the Definition of an Exempt Cooperative or Mutual Water Company."

The proposed amendment adds a definition of when service is provided "to the public." This is an improper effort to narrow the exemption from being a "public service company" now available to cooperatives and mutual utilities as defined in *Inland* and *Nob Hill.*
The specific language in the definition of "to the public" is actually taken from *Inland* and *Nob Hill*, but it presents only a narrow part of the Court's rationale. Further, it largely ignores the Court's rationale as to *why* a cooperative or mutual corporation is not a public service corporation. The WUTC's draft amendment focuses solely on whether the utility serves "the public as a class," or rather only "particular customers of its own selection." Service to the "public as a class" is equated with being a "public service corporation."

The proposed new definition suggests that only if a cooperative or mutual utility is routinely arbitrary, discriminatory and selective in whom it chooses to serve will it NOT be a "public service corporation" and entitled to exemption from WUTC oversight. This tactic is a patent attempt by the WUTC to inappropriately narrow the scope of the exemption. In addition, it is also a misleading definition, which improperly narrows the scope of the test applied by the

Court in *Inland* and *Nob Hill* and, in fact, turns the Court's reasoning upside down rather than honoring the principle of *stare decisis*.

The ability to be selective in admitting members is an attribute of cooperative and mutual corporations under RCW 23.86 and RCW 24.06 because the Boards of such corporations must approve applicants for membership. But, the fact that cooperative and mutual utilities choose not to be arbitrary and discriminatory in deciding who to admit as a member and to whom to provide service, does not exclude them from NOT being "public service corporations" under *Inland*. Being willing to admit to membership and provide service to all persons that the utility is capable of serving on a non-discriminatory basis was not the determinative factor in either *Inland* or *Nob Hill* and does not automatically result in a cooperative or mutual utility becoming a "public service corporation." Indeed, the Court in *Nob Hill* specifically rejected this idea, stating:

> Nob Hill will provide water service to any property within its service area upon request and without discrimination unless there is a technical reason that adequate service cannot be provided or the property owner fails to pay the necessary connection and membership fee. Although many in the Nob Hill area are serviced, the criteria for service are set forth by Nob Hill and there are instances where service has been denied. Nob Hill has chosen to serve particular individuals of its own selection, and does not serve the public as a class or that portion of it that could be served by Nob Hill. *Nob Hill*, 107 Wash.2d at 367 (emphasis added).

In other words, the willingness to provide what is generally referred to in the cooperative utility world as "area service[1]" does not cause a cooperative or mutual utility to become a "public service company," but that is the implication of the proposed definition of "to the public" in the WUTC staff draft.

It was not a willingness to arbitrarily deny service to applicants that the *Inland* court considered to be the rationale for exempting cooperatives from regulation. More important to the determination that a cooperative or mutual corporation is not a public service corporation is the relation in which the corporation stands to its member/consumers. As noted by the *Inland* court (and quoted with approval by the *Nob Hill* court),

> "But, more important than that is the controlling factor that it has not dedicated or devoted its facilities to public use, nor has it held itself out as serving, or ready to serve, the general public or any part of it. **It does not conduct its operations for gain to itself, or for the profit of investing stockholders, in the sense in which those terms are commonly understood. It does not have the character of an independent corporation engaged in business for profit to itself at the expense of a consuming public which has no voice in the management of its**

[1] The concept that a cooperative utility will provide "area service" to all persons within the reach of its distribution system on a non-discriminatory basis goes back at least to the expansion of the rural electric movement in the 1930s. The old REA mortgage contained a provision requiring borrowers to agree to provide "area service." Such a provision was probably contained in the Inland Empire mortgages from the REA that are discussed in *Inland*. A willingness to provide non-discriminatory service to all persons in the area obviously did not in the slightest impede the *Inland* court from determining that Inland Empire Cooperative was not a public service company.

> **affairs and no interest in the financial returns. Its member[s] do not stand in the relation of members of the public needing the protection of the public service commission in the matter of rates and service supplied by an independent corporation.**
>
> On the contrary, it functions entirely on a cooperative basis, typifying an arrangement under and through which **the users of a particular service and the consumers of a particular product operate the facilities which they themselves own.** The service, which is supplied only to members, is at cost, since surplus receipts are returned ratably according to the amount of each member's consumption. There is complete identity of interest between the corporate agency supplying the service and the persons who are being served. **It is a league of individuals associated together in corporate form for the sole purpose of producing and procuring for themselves a needed service at cost. In short, so far as the record before us indicates, it is not a public service corporation."**

Inland Empire, 199 Wash. at 539-40 (emphasis added).

As the above excerpts show, what was determinative in *Inland* and *Nob Hill* as to whether cooperative and mutual utilities were "public service corporations" was not whether they were arbitrarily selective about membership and made it a routine practice to deny service to particular applicants. It was that they were non-profit, democratically governed and operated entities in which there is an identity of interest between the corporation and its members receiving service from the corporation.

The member/owner/consumer in a cooperative stands in a fundamentally different relation to the utility than an IOU customer. In an IOU, the shareholder owners have a fundamental conflict of interest with the customers because the interest of the shareholders is to maximize profit by charging as much as possible for service, while, as noted by the court in *Inland,* a cooperative is a non-profit "league of individuals associated together in corporate form for the sole purpose of producing and procuring for themselves a needed service at cost." Corporations established under RCW 24.06 and RCW 23.86 must operate on a non-profit basis and it is the members who elect the board of directors, or other governing body. There is an identity of interest between the member/owners and the member/consumers, because they are the same persons.

In the draft amendment to WAC 480-110-255, the proposed definition of "to the public" would effectively and improperly turn cooperatives and mutual corporations into public service companies because they operate on a non-discriminatory basis and generally provide service to all persons who meet the eligibility criteria for membership and desire to purchase service within the area served by the cooperative/mutual utility. That turns the meaning of *Inland* and *Nob Hill* upside down and would constitute, therefore, an unlawful *ultra vires* act by the WUTC.

D. Conclusion

In closing, it is the position of Firgrove that the WUTC's proposed amendments to WAC 480-11-245 and WAC 480-110-255 are overbroad and unnecessary, are based on unsupported and unfounded speculation of public harm and WUTC regulatory interest, and would prove counterproductive and impose additional and unnecessary costs upon the non-profit mutual and cooperative utilities. Such costs are ultimately borne, of course, by these non-profit companies' members. Firgrove does not need, or want, to bear the costs that would result from an unwarranted additional layer of regulation by the WUTC.

Respectfully Submitted,

Larry D. Jones

Larry D. Jones
General Manager
Firgrove Mutual Water Company