

January 4, 2013



David Danner
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7250

RE: Docket UW-121408
Sandy Point Improvement Company

Dear Mr. Danner:

Enclosed please find the following documents for filing in the subject adjudication:

1. Respondent Sandy Point Improvement Company's Motion to Bifurcate and for Stay (original and 12 copies, 3-hole punched);
2. Declaration of Sharon J. Thompson with attached Declaration of Faxed/Electronic Document (original and 12 copies, 3-hole punched); and
3. Certificate of Service (original and 12 copies, 3-hole punched).

Sincerely,

Joseph A. Rehberger
Direct Line: (360) 786-5062
Email: jrehberger@cascadialaw.com
Fax: (360) 786-1835
Office: Olympia

JR:en

Enclosures

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STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION
COMMISSION

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

SANDY POINT IMPROVEMENT
COMPANY,

Respondent.

DOCKET UW-121408

RESPONDENT SANDY POINT
IMPROVEMENT COMPANY'S MOTION
TO BIFURCATE AND FOR STAY

1. Respondent Sandy Point Improvement Company ("Sandy Point"), by and through its counsel of record, Joseph Rehberger and Cascadia Law Group PLLC, files this Motion to Bifurcate and for Stay. This docket proceeding arises under the Washington Utilities and Transportation Commission's (the "Commission") initiation of a special proceeding to determine the jurisdictional status of Sandy Point, and ancillary claims, if deemed jurisdictional, related to Sandy Point's lack of tariff filing and rates and charges. Sandy Point respectfully requests the Commission bifurcate and stay the Commission's complaint against Sandy Point's rates and charges and complaint against Sandy Point for penalties pending resolution of the jurisdiction question. Sandy Point brings this motion pursuant to WAC 480-07-320 and WAC 480-07-385 and this Commission's inherent authorities.

RESPONDENT SANDY POINT IMPROVEMENT COMPANY'S
MOTION TO BIFURCATE AND FOR STAY
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606 COLUMBIA ST. NW, SUITE 212
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RELIEF REQUESTED

2. Sandy Point moves the Commission for an order (1) bifurcating into two separate hearings the issues of (a) whether Respondent Sandy Point is subject to regulation by the Commission under chapter 80.28 RCW (the “Jurisdiction Question”) and (b) in the event the Commission determines Sandy Point is subject to regulation, whether Sandy Point’s rates or charges are unfair, unjust, discriminatory or unduly prejudicial, or in violation of any other provisions of law; whether Sandy Point failed to file tariffs with the Commission in violation of RCW 80.28.050 and whether Sandy Point is subject to any penalties for failure to file a tariff with the Commission (the “Rate and Penalty Questions”), and (2) staying consideration of the Rate and Penalty Question until such time as the Commission has determined that Sandy Point is subject to Commission jurisdiction and regulation under chapters 80.04 and 80.28 RCW.

STATEMENT OF FACTS

3. Sandy Point is not a new community. Sandy Point was established and first began providing water service to its members in 1965.¹ The Sandy Point community is located in Whatcom County approximately 13 miles northwest of Bellingham, and abutting the Straight of Georgia and Lummi Bay. The Sandy Point community (largely comprised of three neighborhoods and developments sometimes referred to as Sandy Point Heights, Neptune Heights, and Sandy Point Shores) is a residential community, and Sandy Point was created in conjunction with these communities and is organized and operated in a manner very similar to a homeowners association or a cooperative association. Sandy Point owns and manages common

¹ See Commission Investigation Report, Sandy Point Improvement Company, UW-121408 (Nov. 2012) (“Investigation Report”) at 1.

real and other property, including water rights, well site parcels, and the community associated water system infrastructure for the benefit of its shareholder members.²

4. Sandy Point has been serving water to its members as a member-managed entity for nearly 50 years. Sandy Point has no outside investors. Sandy Point's membership includes two types of shareholders, Class A and Class C shareholders.³ All shares are appurtenant to residential lots within the larger Sandy Point community, and the organization's by-laws specifically provide that no transfer of shares shall be recognized except as incident to the transfer of real property. Class A shareholders, of which there are approximately 780, and Class C shareholders, of which there are approximately 120, have equal rights with respect to water service and water rights. Class A shareholders additionally have rights to use Sandy Point's other recreational amenities, such as a pool and golf course. In addition to the shareholders, Sandy Point also separately serves approximately 43 outside non-member customers. Sandy Point's average annual revenue per customer, across and regardless of class or shareholder status, is below the jurisdictional threshold for Commission regulation set forth in WAC 480-110-255 (\$557 per customer), and the Commission's Order Initiating Special Proceedings does not allege otherwise.

5. Approximately 12 months ago now, in January 2012, the Commission began inquiring into Sandy Point's water service and status. The Commission previously investigated Sandy Point's jurisdictional status in 2006 and determined Sandy Point was not subject to Commission jurisdiction and regulation.⁴ As it did in 2006, in 2012, Sandy Point again

² See *id.* at 2; see also Declaration of Sharon J. Thompson ("Thompson Decl.") at ¶¶2.

³ See Investigation Report at 2; see also Thompson Decl. at ¶ 3.

⁴ See Investigation Report at 1.

cooperated with the Commission in voluntarily responding to data requests. Sandy Point also requested an in-person meeting with Commission staff and counsel, and Sandy Point's volunteer representatives travelled down from Whatcom County. After nearly a year of informally investigating Sandy Point, and contrary to the Commission's 2006 findings, on November 13, 2012, the Commission initiated this special proceeding under RCW 80.04.015 against Sandy Point to determine whether Sandy Point is a water company subject to the Commission's regulatory jurisdiction and, if so, whether Sandy Point has violated any pertinent laws such that it is liable for monetary penalties to the Commission.

STATEMENT OF ISSUES

6. Whether the Commission should bifurcate and stay the Rate and Penalty Question pending resolution of the Jurisdiction Question.

EVIDENCE RELIED UPON

7. The evidence relied upon for this Motion is included in the accompanying Declaration of Sharon J. Thompson, together with the pleadings and filings already on file with the Commission in this matter.

ARGUMENT AND AUTHORITY

8. Under WAC 480-07-320, the Commission may sever consolidated proceedings in its discretion. Similarly, under CR 42(b), a court "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate

issue or of any number of claims, cross claims, counterclaims, third party claims, or issues.”⁵ In this matter, bifurcation would alleviate undue prejudice to Sandy Point and also further the interests of judicial economy, efficiency, and fairness to the parties.

9. First, Sandy Point would be prejudiced in having to defend the Rate and Penalty Question prior to resolution of the Jurisdiction Question. As described in the attached Declaration of Sharon J. Thompson (“Thompson Declaration”), Sandy Point is a relatively small community-run organization governed by a community elected but entirely volunteer and unpaid board of directors and with only two full-time office staff.⁶ As such, its resources are limited and the organization would be prejudiced by the time and expense it would have to incur in order to defend, among other claims, the Commission’s claims that its rates are unfair and unreasonable without a determination that the Commission has jurisdiction to impose such requirements in the first instance. This is especially true in this case, where, despite nearly a year of investigation, the Commission’s Complaint as to the Rate and Penalty Question does not even assert how or in what manner Sandy Point’s rates or charges may be unfair, unjust and unreasonable, or unreasonably discriminatory. Sandy Point has not been apprised of the claims the Commission makes against it.

10. Second, and moreover, practical consideration supports full resolution of the Jurisdiction Question prior to and separate from the Rate and Penalty Question. Public interests, including avoidance of unnecessary use of public time and resources, support the notion that the Commission should not expend its resources in investigating and prosecuting such claims if it

⁵ WAC 480-07-375(2) provides that the Commission may refer to Washington superior court rules for civil proceedings in handling motions.

⁶ See Thompson Decl. at ¶ 4.

has no underlying jurisdiction or enforcement capability; nor should Sandy Point be compelled to defend such questions. Sandy Point asserts here that for the past nearly 50 years it has operated as a non-jurisdictional member-managed entity, and is not engaged in business as a “water company” subject to the Commission jurisdiction, as that term is defined in RCW 80.04.010 and WAC 480-110-255. Sandy Point affirmatively asserts, among other defenses, that it is a “similar entity” to both a homeowners association and a cooperative association such that it would not be subject to regulation by the Commission under WAC 480-110-255. Pursuant to WAC 480-110-255(2)(f), the Commission does not regulate “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” (emphasis added). Here, all but approximately 43 of Sandy Point’s customers are also members and shareholders in Sandy Point and it is undisputed that that Sandy Point does not charge nonmembers (or members for that matter) more than \$557 average annual revenue per nonmember (or member).⁷ All shareholders (both Class A and Class C) are shareholders and members in the company and are entitled to serve on the company’s board of directors, and possess shareholder rights established under the company’s governing documents.⁸ If Sandy Point is deemed non-jurisdictional, the Rate and Penalty Question becomes entirely moot and unnecessary. Because there is a material and bona fide dispute as to whether Sandy Point is jurisdictional in the first instance, interests of

⁷ See Investigation Report at 1-2.

⁸ See *id.* at 2 (describing Sandy Point’s Articles of Incorporation) and Attachment G (Sandy Point Articles of Amendment to Articles of Incorporation); see also Thompson Decl. at ¶ 3.

judicial economy and efficiency strongly favor bifurcation. Both Sandy Point and the Commission would benefit from bifurcation of this issue.

11. Finally, fundamental notions of fairness to Sandy Point suggest resolution of the Jurisdiction Question should be severed from and precede any questions regarding challenges to Sandy Point's rates and charges. In addition to the reasons outlined above, the same rationales supporting the bifurcation of liability and damages phases in negligence trials or coverage and liability phases in insurance coverage disputes, supports bifurcating the Jurisdiction Question from the Rate and Penalty Question.

12. Sandy Point looks forward to resolution of the Jurisdiction Question and requests the Commission bifurcate and stay the ancillary Rate and Penalty Question.

CONCLUSION

13. In the interests of efficiency and in order to avoid prejudice to Sandy Point and unnecessary expense to both Sandy Point and the Commission, Sandy Point respectfully requests the Commission bifurcate the Jurisdiction Question and the Rate and Penalty Question in order to first determine whether Sandy Point is subject to the Commission's jurisdiction and regulation.

DATED this 4th day of January 2013.

CASCADIA LAW GROUP PLLC



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Attorneys for Sandy Point Improvement Company

RESPONDENT SANDY POINT IMPROVEMENT COMPANY'S
MOTION TO BIFURCATE AND FOR STAY
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STATE OF WASHINGTON
UTIL. AND TRANSPORTATION
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BEFORE THE WASHINGTON
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DOCKET UW-121408

DECLARATION OF SHARON J.
THOMPSON

I, Sharon J. Thompson, hereby declare and state as follows:

1. I am employed by the Sandy Point Improvement Company ("Sandy Point" or the "Company") as its Office Manager, and I have held this position since July 6, 2011. I make this declaration based on my personal knowledge and on review of Sandy Point's records and files in this matter. I am over the age of 18 and competent to testify herein.

2. The Sandy Point neighborhood is a residential community on Lummi Bay with approximately over 750 active water service connections. Sandy Point manages and oversees common facilities, including a well and the community's water system.

3. Sandy Point has two types of shares, Class A and Class C. All shares are appurtenant to residential lots within the Sandy Point community and the corporation's by-laws specifically provide that no transfer of shares shall be recognized except as incident to the

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transfer of real property. Class A shareholders, of which there are approximately 780, have water rights and the right to use various recreational amenities, such as the pool and golf course. Class C shareholders, of which there are approximately 120, have equal water rights. In addition to the shareholders, Sandy Point serves approximately 43 outside non-member customers. The above shareholder and customer numbers reflect the fact that two non-shareholder customers have recently converted to Class A or Class C shareholder status, and one connection has been removed.

4. Sandy Point is overseen by a seven (7) member Board of Directors (the "Board"). Any Class A or Class C shareholder is eligible for election to the Board, and all Company shareholders are eligible to vote for the Board. The Board is entirely volunteer and unpaid. Sandy Point employs only two full-time office staff, a golf course grounds manager, and employs and contracts with Brad Ferris and Northwest Water Works, Inc. (SMA No. 126; Operator No. 006768) for operation of the water system.

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

DATED this 3 day of January, 2013, at Whatcom County, Washington.


SHARON J. THOMPSON

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
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DOCKET UW-121408

DECLARATION OF FAXED/
ELECTRONIC DOCUMENT

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile/electronic transmission for filing.
2. My address is 606 Columbia St. NW, Suite 212, Olympia, Washington 98501.
3. My phone number is (360) 786-5057.
4. The facsimile number/email where I received the document is (360) 786-1835 and/or jrehberger@cascadialaw.com.
5. I have examined the foregoing document, determined that it consists of four (4) pages, including this Declaration page, and excluding exhibits, and that it is complete and legible.

6. I certify under penalty of perjury under the laws of the State of Washington that the above is true and correct.

DATED: January 4th, 2013, at Olympia, Washington.

Signature: *JAR*

Print Name: Joseph A. Rehberger

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UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
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CERTIFICATE OF SERVICE

STATE OF WASHINGTON
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RECORDS MANAGEMENT

I hereby certify that I have this day served Respondent Sandy Point Improvement Company's Motion to Bifurcate and For Stay, Declaration of Sharon J. Thompson, and this Certificate of Service upon all parties of record in this proceeding, by:

David Danner
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
PO Box 47250
Olympia, WA 98504-7250

- Via facsimile
- Via overnight courier
- Via hand delivery
- Via first-class U.S. mail
- Via email

Donald T. Trotter
Assistant Attorney General
1400 S. Evergreen Park Drive S.W.
PO Box 40128
Olympia, WA 98504-0128

- Via facsimile
- Via overnight courier
- Via hand delivery
- Via first-class U.S. mail
- Via email

DATED at Olympia, Washington this 4th day of January, 2013.



Eleanor Nickelson
Legal Assistant

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