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7 BEFORE THE WASHINGTON
8 UTILITIES AND TRANSPORTATION COMMISSION

9 SARAH HAND,

10 Complainant,

NO. Docket No. UW-170924

11 v.

12 RAINIER VIEW WATER COMPANY, INC.,

RAINIER VIEW WATER COMPANY,
INC.'S PETITION FOR ADMINISTRATIVE
REVIEW

13 Respondent(s).

14
15 Respondent Rainier View Water Company, Inc. ("Rainier View") hereby petitions the
16 Utilities and Transportation Commission (the "Commission") for Administrative Review of Order
17 02, Initial Order, Docket UW-170924 (the "Order"). Specifically, Rainier View challenges the
18 following discussion, remedies, findings of fact, and conclusions of law contained in the Order:

19 **A. Discussion and Decision, Paragraphs 22 through 27: The Order's finding that**
20 **Rainier View has supplied and continues to supply Ms. Hand with water that is impure as**
21 **that term is used in RCW 80.28.030(1), fails to meet DOH drinking water quality standards,**
22 **and is not fit for human consumption or normal household use.**

23 1. The content of paragraphs 22 through 27 of the Order relies on sparse and
24 unreliable evidence and misconstrues facts to reach unsupportable conclusions. These
25 paragraphs exceed the Commission's legal and/or prudential authority by imposing liability where
the law does not and declining to follow the Department of Health's ("DOH") technical requirements
and methods.

1 2. First, the Order relies upon two pieces of evidence to show that water leaving Ms.
2 Hand's faucet was substandard. The testimony of Sarah Hand is exaggerated and unreliable.
3 She testified that since the day she first toured her home before she purchased it in May, 2015,
4 the water leaving the faucets was brown. Transcript of Docket No. UW-170924 – Vol. III
5 (hereinafter "Tr.") at 178:13–180:11. She testified that it was consistently and extremely brown,
6 nearly every time she turned on her tap, ran her dishwasher or used her clothes washing machine.
7 *Id.* at 182:17–19. Yet, she went eighteen months before she informed the water company – a
8 rational actor would have taken some steps to investigate or correct the problem if such a problem,
9 of the extent and frequency Ms. Hand describes, actually existed. Ms. Hand did neither. *Id.* at
10 182:25–183:4. On this basis alone, Ms. Hand's testimony warrants a closer look.

11 3. Ms. Hand testified that she originally thought the problem arose from her house
12 sitting unoccupied for a period of time, and that the problem would solve itself. *Id.* at 180:19–22.
13 However, she also testified that she learned that the problem was not exclusive to her home, but
14 rather, occasionally affected other homes in her subdivision. *Id.* at 183:7–11. She knew her
15 neighbors called Rainier View when they experienced a spurt of manganese-rich water and
16 Rainier View came out to their homes and flushed the pipes until the problem cleared. *Id.* Ms.
17 Hand still did not notify Rainier View of any problem or request any service, despite her testimony
18 that her water was consistently brown nearly every day. *Id.* at 183:17–18. If the problem was as
19 severe and frequent as Ms. Hand alleges, upon learning, that Rainier View can solve that problem,
20 a rational actor would have called Rainier View to request service. Ms. Hand did not. Her
21 testimony deserves serious scrutiny.

22 4. No rational or scientific explanation exists why Ms. Hand's home – and only her
23 home – experienced brown water as severe and often as she claims. During June 2015 – May
24 2016 (the period during which Ms. Hand alleges constant brown water), Rainier View received
25 about 180 service requests possibly related to manganese, coming from its approximately 15,500

1 residential connections. Exh. SH-10, p.5-7. On the average, about three or four customers a
2 week – of Rainier View's 15,500 residential customers, experienced a possible manganese-
3 related water quality problem. Still, somehow, Ms. Hand alleges she had brown water all day,
4 every day, for several years. There is no rational explanation to support this claim. Ms. Hand's
5 testimony is not credible.

6 5. Finally, Ms. Hand's water samples (discussed in detail, below) further discredit her
7 testimony. The water samples were taken from Ms. Hand's house during the time she testified
8 the water she received was consistently brown and murky. Yet, water at the levels demonstrated
9 in her own tests (below the SMCL¹) is not brown and murky. Ms. Hand's own evidence refutes
10 her testimony as to the severity and frequency of her alleged problem. See SH-29.

11 6. The Order also relies upon water testing conducted by Ms. Hand's industrial
12 hygiene litigation consultant. This testing is fatally flawed by sampling methodology intended to
13 obtain a pre-determined result. Importantly, Ms. Hand's water test results contain no explanation
14 of how her expert sampled the water. See SH-29. All inferences are deduced from notations on
15 the collection forms (i.e. "HW-MTub Faucet" is believed to represent a draw of hot water from the
16 faucet at the bathtub in the master bath). *Id.* at p.18. Rainier View had no opportunity to cross-
17 examine this consultant to understand the methodology she used or the rationale behind it.
18 Rather, Ms. Hand offered her own testimony to explain the consultant's methods, but she was
19 unable to answer basic questions:

20 Q: Why did she decide to test from the upstairs bathroom?

A: That's just where we started at.

21 Q: There's no scientific reason behind it?

A: I don't know. I'm not – like I said, I'm not a specialist in this water science stuff.

22 ... So I let her do her testing, watched her do the testing, watched her do the
23 draws. I'm not a water scientist, so I don't know why she chose where she chose.

24 Tr. 195:24-196:10. See also *id.*, at 194:12-197:11. Ms. Hand was not even sure which points in

25 ¹ Secondary Maximum Contaminant Level, as defined by WAC 246-290-310.

1 the house were sampled.² Even though the Commission may consider evidence not admissible
2 in a Superior Court proceeding, the Commission should not consider such blatantly unreliable
3 evidence.

4 7. Ms. Hand testified her consultant asked the Hands to vacate the house for 24 hours
5 prior to sampling. *Id.* at 194:12–15. This is not representative of normal circumstances; rather, it
6 artificially creates increased opportunity for dissolved inorganics to settle in the hot water tank
7 before sampling. Because the hot water tank is the largest (and often the only) potentially stagnant
8 point in a home’s water system, dissolved inorganic settlement is normal in every hot water heater
9 – which is why homeowners are recommended to drain their hot water heater annually. BB-2T,
10 at 3:8–16.

11 8. Dissolved inorganic sediment is stirred up by water pressure changes and sudden
12 flow events. Here, the consultant allowed any particulates in the hot water tank a full 24 hours to
13 settle. Then, the stagnant water was jolted by suddenly opening the highest-volume hot water
14 tap in the house. After this questionable action, the consultant collected her samples – two hot
15 water samples from the master bathtub faucet and one directly from the hot water heater. What
16 this really means is that all three samples came from a single source, the hot water heater.

17 9. Bob Blackman, who holds a Water Distribution Manager 3 certification and a Cross
18 Control Specialist certification, and who oversees water testing for Rainier View, testified to
19 myriad problems with the sampling methodology. BB-2T, at 2:17–3–16. Ms. Hand produced no
20 evidence or testimony to refute Mr. Blackman’s testimony. Rainier View had no opportunity to
21 depose or cross-examine Ms. Hand’s expert. Ms. Hand produced no description of the sampling
22 methodology her consultant employed and could not answer even basic questions about the
23 sampling. Weighing the evidence as to the reliability and accuracy of the sampling, all of the

24 ² Ms. Hand testified that her consultant drew a test sample from the kitchen sink. No such sample
25 documentation was provided. Tr. at 194:25–195:22. It is unclear whether Ms. Hand was mistaken about
this sample or whether she produced less than complete testing documentation. Either circumstance is
problematic.

1 testimony offered to the Commission shows that the sampling was biased, unreliable, and
2 intended to achieve a predetermined result. Nonetheless, the Order asks the Commission to find
3 this testing reliable.

4 10. Despite biased sampling methods, two of the three samples were below the 0.05
5 mg/L SMCL for manganese (non-detect and 0.03 mg/L). SH-29. The third was 0.08 mg/L. *Id.*
6 Because dissolved inorganics are not distributed uniformly through moving water, the DOH wisely
7 requires water purveyors to average their samples, with the understanding that if any single test
8 skews the average above the SMCL, that exceedance will be enforced. WAC 246-290-310(3)(b).
9 However, if the average is below the SMCL, the standard is not exceeded. *Id.* Without explanation,
10 the Order declines to follow the DOH's methodology, and instead imposes liability because one
11 of the three samples exceeds the SMCL. The average of the three samples is 0.037 mg/L – safely
12 below the SMCL.

13 11. This Order ignores the biased sampling methodology. This Order ignores the fact
14 that the other two samples (taken using the same biased methodology) satisfied the SMCL. This
15 Order creates the dangerous precedent that if a customer has ONE sample that exceeds the
16 SMCL, regardless of the sampling methodology and regardless of the other samples of the same
17 water, that water is deemed impure as a matter of law. This borders dangerously close to strict
18 liability and represents a substantial shift in policy that should concern purveyors statewide.

19 12. The Order also states that Rainier View acknowledges that, prior to treatment; the
20 level of manganese was higher than the legal limit in one of the wells feeding the Southwood
21 Sound water system. While technically accurate, context is critical, here. The Fir Meadows well
22 site that provides water to Ms. Hand's home contains three wells blended together as the water
23 enters the distribution system. Tr. at 148:3–149:2. While technically accurate that one of those
24 three wells contained a manganese exceedance, the DOH treats Fir Meadows as one sampling
25 location, permitting Rainier View to use a blended sample for a more accurate representation of

1 the water entering the system. *Id.* The Commission should view Fir Meadows as the DOH does.

2 The water entering the distribution system from the blended Fir Meadows well site is not impure.

3 13. The law holds Rainier View to the technical standard imposed by the DOH. That
4 standard is tested using methods prescribed and enforced by the DOH. The Commission
5 generally contends that it defers to, and relies upon, the DOH as to technical matters. Here,
6 however, this Order disregards the DOH's technical standards and technical methods to impose
7 liability based on a more stringent standard and alternative sampling methods. As a matter of
8 policy, Rainier View and other water utility providers should be regulated according to a consistent
9 set of standards and methods, rather than one that changes if a customer complains to the
10 Commission. It would be unjust to impose liability or administrative punishment where Rainier
11 View complied with the laws governing its operations.

12 **B. Remedies, Paragraph 29: Rainier View must ensure that the water it supplies to**
13 **Ms. Hand's home consistently meets or exceeds DOH drinking water quality standards**
within 60 days from the effective date of the Order.

14 14. First and foremost, the Order relies on the assumption that any manganese that
15 flowed through Rainier View's distribution system did so by virtue of some violation of DOH
16 drinking water standards. Obviously, any manganese that entered the Hand home came from a
17 Rainier View well, at some point. The house is about 20 years old and has presumably been
18 connected to the same water distribution system the entire time. Tr. 178:13–20. For those 20
19 years, Rainier View has consistently provided water that meets the DOH drinking water standards.
20 However, that is not to be confused with "pure" water. Any water³, especially groundwater,
21 inherently contains dissolved minerals. That is normal and expected.

22 15. The SMCL for manganese allows for 50 micrograms per liter of water. WAC 246-
23 290-310. Millions of liters have flowed through those pipes over the last 20 years – nearly all of
24 which contained manganese levels below the SMCL, but still contained some manganese. Even

25 ³ Except distilled water, which customers would not want.

1 at acceptable, non-exceedance levels, manganese still enters the distribution network and will
2 settle into the water lines, only to be pushed downstream during pressure events.

3 16. This Order demands that Rainier View remove all manganese from the distribution
4 system. That manganese is primarily the result of decades of lawful, compliant, non-exceedance
5 levels of manganese. Further, even if Rainier View were to dig up and replace its entire distribution
6 network, manganese would immediately re-enter the system once it is back online. The water
7 leaving the filtration system at Fir Meadows is between non-detectable levels and 20 micrograms
8 per liter. BRR-2. This is entirely compliant -- but it is not zero, and thus, manganese will continue
9 to settle and accumulate. This Order calls for zero manganese. Zero is impossible.

10 17. These unavoidable and fully compliant levels of manganese⁴ are one reason
11 homeowners are recommended to do routine preventative maintenance. Some homeowners opt
12 to buy home filtrations systems (a whole-house system runs between \$500 and \$2500 at the local
13 hardware store). Others occasionally flush their home plumbing systems. Ms. Hand did nothing.
14 She did not even alert Rainier View that a problem existed at her home so her water company
15 could do something. As a result, the first notice Rainier View had of Ms. Hand's problem came
16 when she demanded that Rainier View replace a \$600 pressure relief valve, or face legal action.
17 BB-1T, at 11:5–12.

18 18. The Order reaches the erroneous conclusion that "the record evidence
19 demonstrates that the water Rainier View supplies Ms. Hand is not fit for human consumption or
20 normal household use as a result of manganese contamination." Order, ¶ 26. As explained
21 above, the evidence does not support such a conclusion. And as explained above, this conclusion
22 imposes liability and regulatory punishment where the law does not.

23 19. The Order reaches the above conclusion despite Rainier View's compliance with
24 DOH's regulations. As a matter of policy, a water utility provider that has satisfied its obligations

25 ⁴ The same could be said for other minerals, not at issue here, because Rainier View does not provide, and its customers would not want, distilled water – pure H₂O.

1 under the law should not be subject to liability. Investor-owned utility companies cannot adjust
2 their prices without Commission approval, and the companies and the Commission are able to
3 negotiate and set such rates because the company's liability is predictable. This Order imposes
4 standards beyond those contained in the law and removes the bargained-for protections of the
5 tariff. This would be an inappropriate precedent for the Commission to set.

6 **C. Remedies, Paragraph 30: Rainier View must inspect Ms. Hand's pipes and**
7 **remove any manganese once the results of the tests of water coming into her home show**
8 **that Rainier View is in compliance with the Order.**

9 20. The mandate that Rainier View must remove any and all manganese from Ms.
10 Hand's plumbing violates Rainier View's tariff and ignores Ms. Hand's various failures to mitigate
11 her damages.

12 21. First, Rainier View's tariff contains the following limitation of liability:

13 "The company's liability, if any, for its gross negligence, willful misconduct or
14 violation of Chapter 19.122 RCW is not limited by this tariff. With respect to any
15 other claim or suit, by a customer or by any others, for damages associated with
16 the installation, provision, termination, maintenance, repair, or restoration of
17 service, the company's liability, if any, shall not exceed an amount equal to the
18 proportionate part of the monthly recurring charge for the service for the period
19 during which the service was affected. ... THERE SHALL BE NO LIABILITY FOR
20 CONSEQUENTIAL OR INCIDENTAL DAMAGES."

21 BB-5, Tariff, Rule 20 (emphasis original). This limitation of liability was previously
22 approved by the Commission. The rates charged for services under Rainier View's tariff are
23 expressly based on this limitation of damages. *Id.*

24 22. This Order defies Rule 20 in three ways. First, there is no finding of gross
25 negligence, willful misconduct, or violation of Chapter 19.122 RCW (the UUDPA). The facts do
not support such a finding. That finding, the tariff's limitations should apply. Second, the damages
claimed by Ms. Hand and remedied by the Order are purely consequential and/or incidental
damages, which is fully disclaimed in Rule 20. However, third, to the extent the Commission finds
Rainier View liable for non-consequential or non-incidental damages, such damages should be

1 limited to an amount equal to the proportionate charge for non-compliant water. The Commission
2 should abide by the tariff in determining what, if any, remedy is appropriate.

3 23. Rainier View's tariff expressly states that "All pipe and fixtures on the customer's
4 side of the Point of Delivery (water meter) shall be provided by the customer and maintained and
5 operated at the customer's expense." *Id.*, Tariff, Rule 9. The Order violates the tariff's
6 apportionment of responsibility without any explanation of its authority to do so or any showing of
7 good cause.

8 24. Rule 9 of Rainier View's tariff is consistent with the customer's duty to mitigate its
9 damages, and the Company's inability to control preventative maintenance within customers'
10 homes. Repairs like the one prompting this complaint are inherent to home ownership and largely
11 unavoidable – the pressure-reducing valve giving rise to this complaint was presumed to be about
12 20 years old. Repairs can often be avoided with proper maintenance, but Ms. Hand did no
13 preventative maintenance and there is no evidence the previous owner did, either. There is no
14 question that preventative maintenance should have been performed on the plumbing system at
15 some point, and such preventative maintenance likely would have reduced or eliminated the build-
16 up in Ms. Hand's plumbing. Liability should not default to the Company where the customer or her
17 predecessors-in-interest choose to defer maintenance.

18 25. The Order unjustly waives the protections bargained for in Rainier View's tariff and
19 exonerates Ms. Hand from any obligation to mitigate her damages. The Order cites no authority
20 to waive tariff provisions, and such waiver directly conflicts with the purpose and policy of imposing
21 rate restrictions in exchange for predictable liability. The Commission should uphold the tariff and
22 bargained-for limitations of liability contained therein.

23 **D. Remedies, Paragraph 34: The Commission waives WAC 480-110-395 and orders**
24 **Rainier View to suspend charges to Ms. Hand until Rainier View has fully complied with**
25 **the Order.**

1 26. The Commission should not waive WAC 480-110-395 on a prospective basis
2 because Ms. Hand fails to provide reliable evidence supporting her claim that the water provided
3 by Rainier View presently fails to meet DOH standards. Ms. Hand's test results show an average
4 water quality that meets the SMCL for manganese. SH-29. That test was taken over a year ago,
5 and before the filtration system went online, improving the quality of the water. *Id.* Ms. Hand even
6 testified that the quality of her water has improved since those tests were taken. SH-32X, at 97:9-
7 17.

8 27. Further, the Commission should not compel Rainier View to provide free utility
9 service to a customer that complains when the DOH has already approved of the water Rainier
10 View is providing. WACs 246-290-300, -310, and -320 impose remedial measures based on
11 DOH's understanding of consumer acceptance and willingness to pay for the remedial measures.
12 Here, to the extent a manganese exceedance exists, the DOH has deemed it acceptable and did
13 not order Rainier View to take any corrective measures. *See e.g.* BB-1T, at 5:9-16. Individual
14 customers who disagree with the DOH determination should not be entitled to receive free utility
15 service.

16 28. Finally, the Order acknowledges that due process prevents the Commission from
17 retroactively waiving the rule imposing certain requirements before a water quality refund be
18 issued. That rule, WAC 480-110-395, requires a formal proceeding to find that the water provided
19 exceeded some MCL, and that the company failed to take follow up steps outlined in WAC 246-
20 290-320. Here, Rainier View complied with WAC 246-290-320. DOH did not issue an order that
21 action be taken. Evidentiary deficiencies aside, this prospective Order, again, imposes a stricter
22 and more stringent requirement than does the law. Without notice or opportunity to act, due
23 process prevents that, too. *See e.g. Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d
24 1220 (2010).

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1 29. To the extent Ms. Hand's test results are found persuasive to show that her water
2 was insufficient, that evidence does not show that her water presently fails to meet DOH
3 standards. Since her tests were taken, Rainier View's filtration system went online and Rainier
4 View has demonstrated 12 months of consistent near-zero test results. -2. Ms. Hand agreed that
5 her water has improved since these tests were taken. A finding of good cause to prospectively
6 waive a rule to impose punishment on a company requires evidentiary support. That support is
7 absent here. To the contrary, the evidence shows that a prospective waiver of WAC 480-110-395
8 is inappropriate and unnecessary. The Commission should decline such a waiver.

9 **E. Findings and Conclusions 7, Paragraph 47: The water Ms. Hand has received**
10 **from Rainier View since she moved into her home in 2015 is brown, has an unpleasant**
11 **odor, should not be consumed, and is only marginally useful for bathing and washing.**

12 30. As described in greater detail above, this finding of fact defies the evidence. It is
13 possible that Ms. Hand experienced the occasional spurts of manganese-rich water that her
14 neighbors experienced. However, as thoroughly explained above, her testimony that she
15 consistently received extremely brown water is based upon incredible testimony and biased
16 testing. That biased testing refutes Ms. Hand's own testimony and shows that the water is, in fact,
17 not brown. As written, this finding of fact describes a continuous flow of brown, odorous water
18 from Ms. Hand's faucet – the evidence proves that is not the case.

19 31. The following evidence supports Rainier View's proposed finding of fact: BB-1T,
20 BB-2T, BRR-2, SH-29.

21 32. Rainier View proposes the following finding of fact: "Since Ms. Hand moved into
22 her home in 2015, Ms. Hand has occasionally received water containing manganese in excess of
23 the SMCL."

24 **F. Findings and Conclusions 8, Paragraph 48: Ms. Hand arranged for the water in**
25 **her home to be tested in 2017. The testing was sufficiently reliable for the Commission to**
base a finding on its results.

1 33. The water testing commissioned by Ms. Hand is not sufficiently reliable to base a
2 finding upon. Rainier View had no opportunity to depose or cross-examine Ms. Hand's consultant,
3 and no explanation as to her methods was provided. Rather, Ms. Hand attempted to offer
4 testimony of her consultant's sampling methods, but she failed to provide even basic explanations
5 or details. Mr. Blackman testified that, as far as the parties could deduce from the notes on the
6 testing forms, this sampling was taken in such a way as to produce a biased outcome, specifically
7 seeking artificially high manganese levels. Ms. Hand presents no evidence to the contrary. All of
8 the testimony before the Commission shows that this sampling methodology is biased. On this
9 basis alone, the testing is not sufficiently reliable for the Commission to base its findings.

10 34. Further, without explanation, the Order declines to average the three test results.
11 As a legal and technical matter, averaging the test results in this circumstance is appropriate
12 because it mirror's the DOH's testing methodology. See *e.g.* WAC 246-290-310(3)(b). As a
13 practical matter, all three tests came from the same place, the hot water heater. Therefore, an
14 average is appropriate.

15 35. As a policy matter, this finding of fact sets the precedent that so long as ONE
16 sample exceeds the SMCL, that water is impure as a matter of law, regardless of how many other
17 samples meet the SMCL (even where the sampling methodology is biased to achieve a
18 predetermined result). This is an unsound policy and inappropriate precedent to set, particularly
19 as it directly conflicts with the law governing how water purveyors test their water.

20 36. The following evidence supports Rainier View's proposed finding of fact: BB-2T,
21 SH-26T, at 2:24--3:17, SH-29, Tr. 193:23--197:11.

22 37. Rainier View proposes the following finding of fact: "Ms. Hand arranged for the
23 water in her home to be tested in 2017. The testing was not sufficiently reliable for the Commission
24 to base a finding on its results."

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1 **G. Findings and Conclusions 9, Paragraph 49: The results of the testing**
2 **demonstrate that the water Ms. Hand receives from Rainier View contains manganese in**
3 **excess of the amounts permitted under state drinking water standards.**

4 38. As described above, the results of Ms. Hand's biased water testing do not
5 demonstrate that Ms. Hand receives water containing manganese in excess of the state drinking
6 water standards. This biased testing showed an average manganese level below the SMCL. At
7 most, Ms. Hand's tests show that she has, on occasion in the past, received water with a
8 manganese level arguably above the SMCL. And explained in greater detail above, this testing is
9 not representative of the water she currently receives. Her tests were taken before Rainier View's
10 filtration went online. Since that time, Rainier View's tests show water entering the system far
11 below the SMCL. To that end, Ms. Hand agrees that her water has improved. All the evidence
12 demonstrates that the water Ms. Hand received had, at most, only occasional levels of
13 manganese above the SMCL in the past, and has consistently improved in the past year.

14 39. The following evidence supports Rainier View's proposed finding of fact: BB-2T,
15 SH-26T at 2:24–3:17, SH-29, SH-32X at 97:9–17, Tr. 193:23–197:11.

16 40. Rainier View proposes the following finding of fact: "Ms. Hand's testimony
17 demonstrates that she occasionally received water containing manganese exceedances in the
18 past."

19 **H. Findings and Conclusions 9, Paragraph 50: The water Ms. Hand receives from**
20 **Rainier View is impure as that term is used in RCW 80.28.030(1) and has been impure since**
21 **she moved into her home in 2015.**

22 41. This finding is unsupported by the facts. As explained above, at most, Ms. Hand
23 occasionally received water containing manganese exceedances. As also explained above, the
24 evidence does not support a finding that she still receives water containing manganese
25 exceedances – rather, the evidence supports a finding that the water provided Ms. Hand is not
currently impure.

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1 42. The following evidence supports Rainier View's proposed finding of fact BB-2T,
2 SH-26T at 2:24-3:17, SH-29, SH-32X at 97:9-17, Tr. 193:23-197:11.

3 43. Rainier View proposes the following finding of fact: "The evidence is insufficient to
4 find that water Ms. Hand presently receives is impure."

5 **I. Findings and Conclusions 10, Paragraph 51 and Order 1, Paragraph 63: Rainier**
6 **View should take all reasonable steps necessary to ensure the water it supplies to Ms.**
7 **Hand consistently meets or exceeds DOH drinking water quality standards within 60 days**
8 **from the effective date of the Order.**

9 44. This conclusion and order assumes that the water provided by Rainier View is
10 currently impure. That assumption defies the evidence. As explained above, there is no evidence
11 that the water presently provided to Ms. Hand exceeds the SMCL for manganese. Her test
12 samples drawn more than a year ago showed an average below the SMCL, and since that time,
13 Rainier View has tested the water leaving Fir Meadows twice a month every month and every test
14 has shown levels far below the SMCL – non-detectable in most cases, but in no event higher than
15 0.02 mg/L against a SMCL of 0.05 mg/L. Ms. Hand even testified that her water has improved
16 since her consultant tested the water at her home.

17 45. This conclusion and order is also vague and ambiguous in terms of what Rainier
18 View must do to comply. The Order states that continuing to flush the pipes, without more, is
19 insufficient. However, Rainier View believes that other alternatives are unreasonable. Pigging the
20 lines leading through Ms. Hand's neighborhood toward her home will render the entire
21 neighborhood without water for a day or more, and then on a boil advisory for several more days.
22 Digging up and replacing the pipes throughout the distribution network is obviously unreasonable.

23 46. Rainier View has been implementing what it believes is the most effective,
24 reasonable remedy for potential manganese buildup in the distribution system. This Order
25 declares, without explanation, that that remedy is insufficient. As every other option known to
Rainier View appears unreasonable based on the undeniable disruption to a substantial number

1 of Rainier View's customers, the Commission should allow Rainier View to increase the flushing
2 currently being done to expedite any improvement.

3 47. The following evidence supports Rainier View's proposed conclusion of law: Tr.
4 141:18–143:8, 157:7–159:8.

5 48. Rainier View proposes the following conclusion and order: "Rainier View should
6 test the water at the point of delivery to Ms. Hand and, if that water contains manganese
7 exceeding the SMCL, Rainier View should increase its flushing regimen until the water passing
8 the point of delivery to Ms. Hand satisfies the SMCL for manganese."

9 **J. Findings and Conclusions 12, Paragraph 53 and Order 3, Paragraph 65: Rainier**
10 **View is responsible for any manganese sediment in the pipes in Ms. Hand's home and**
should inspect those pipes and remove the manganese.

11 49. As explained more thoroughly above, this conclusion and order defies the law and
12 defies Rainier View's tariff. First, this conclusion and related order impose liability for manganese
13 that presumably flowed into Ms. Hand's house without any SMCL exceedance. This water
14 undisputedly came from Rainier View, but at least in large part, without any evidence of
15 manganese levels exceeding the SMCL. Manganese can, and did, flow through the distribution
16 network into the house without exceeding the SMCL. Rainier View should not be liable for
17 maintenance to Ms. Hand's house where the buildup was not caused by any SMCL exceedance.

18 50. Further, Rainier View's tariff expressly states that "all pipe and fixtures on the
19 customer's side of the Point of Delivery shall be provided by the customer and maintained and
20 operated at the customer's expense." BB-5, at Rule 9. This conclusion and order directly conflicts
21 with Rainier View's tariff.

22 51. Rainier View's tariff also expressly states that "THERE SHALL BE NO LIABILITY
23 FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES." *Id.* at Rule 20(a) (emphasis original).
24 The liability imposed here is for consequential and/or incidental damages, and thus, violates the
25 tariff. To the extent the liability imposed herein is not for consequential or incidental damages,

1 liability should be limited to the proportion of the customer's monthly bill that was affected or
2 contained the substandard water, in compliance with the tariff. *Id.*

3 52. Finally, this conclusion and order ignores Ms. Hand's duty to mitigate her
4 damages. See e.g. *WPI 33.01; Sutton v. Shufelberger*, 31 Wn. App. 579, 582, 643 P.2d 920
5 (1982). Ms. Hand testified that she did no preventative maintenance to her plumbing. She
6 presented no evidence that anyone had done any preventative maintenance to her home during
7 the almost 20 years since it was built. This Order inappropriately tasks Rainier View with Ms.
8 Hand's deferred maintenance.

9 53. Rainier View proposes deleting paragraphs 53 and 65 from the Order.

10 **K. Findings and Conclusions 16, Paragraph 57 and Order 6, Paragraph 68: The**
11 **Commission should waive WAC 480-110-395 on a prospective basis and prohibit Rainier**
View from charging Ms. Hand until it fully complies with the Order.

12 54. Due process requires the Commission delete paragraphs 57 and 68 from the
13 Order. The Order acknowledges that it cannot retroactively waive a rule to impose a punishment
14 on Rainier View. However, the same due process consideration precludes the Commission from
15 prospectively waiving a rule to impose punishment on Rainier View where Rainier View has relied
16 on that rule and the underlying law to get to this point. Here, the law states that before a refund
17 may be ordered, a formal hearing must find that water provided fails to meet DOH standards and
18 that the water company failed to take follow up actions as prescribed in WAC 246-290-320.
19 Rainier View has relied on that law and the underlying policy of being free from liability or
20 administrative punishment where the DOH accepts the quality of the water provided and deems
21 that no remedial action is necessary. Here, the DOH has always known the quality of the water
22 provided and has not ordered Rainier View to take any action. Waiving this rule prospectively,
23 violates due process by changing the laws to impose a punishment without affording Rainier View
24 any opportunity to align its actions with the new (or, in this case, waived) law. See *Lummi Indian*
25 *Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010).

1 55. Prospectively waiving this rule is unjust and dangerous public policy because it
2 creates an inconsistent remedy in the midst of a regulatory system designed to allow certainty of
3 liability for purposes of negotiating fixed rate schedules. Water purveyors rely upon the law to
4 identify their risks. In this case, the law states that liability arises if, and only if, the water purveyor
5 fails to comply with DOH remedial orders. The DOH issued no remedial order, here. Thus, under
6 the law, Rainier View should be free from liability or administrative punishment. In addition, the
7 DOH is tasked with considering public willingness to fund system improvements. This Order
8 creates a sort of defacto dissenter's rights where none exists in the law. If the DOH deems the
9 level of service appropriate or determines that the costs of any potential remedy exceed the
10 potential benefit, this Order allows individuals to receive free utility service, despite a DOH
11 determination that no remedial measures are appropriate. This order, thus, conflicts with the law.

12 56. Rainier View proposes deleting paragraphs 57 and 68 of the Order.

13 DATED this 22 day of October, 2018.

14 PREG O'DONNELL & GILLETT PLLC

15
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