UW-250159

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June 23, 2025

<u>SENT VIA WUTC WEB PORTAL</u>
Jeff Killip
Executive Director and Secretary
Washington Utilities and Transportation Commission
621 Woodland Square Loop SE
Lacey, WA 98503

Re: ***In the Matter of Suncadia Water Tariff Revision*** **(General Rate Increase), Docket UW-250159**

Dear Director Killip:

The Public Counsel Unit of the Washington State Attorney General's Office (Public Counsel) respectfully submits these comments in advance of the June 26, 2025, Open Meeting of the Washington Utilities and Transportation Commission (UTC or Commission). These comments address Suncadia Water (Suncadia Water or Company) proposed general rate increase, effective July 1, 2024. Public Counsel participated in discussions with UTC Staff (Staff) and Company representatives regarding this case. We appreciated the Company's responses to informal data requests and willingness to discuss the issues in the case.

On March 7, 2025, the Company requested an overall increase in revenues of $690,623, an incremental increase of 32.6 percent. In discussions with Staff and Public Counsel, the Company has agreed to reduce its request to a revenue increase of $396,319 by incorporating Staff's proposed adjustments and agreeing to a non-precedential cost of capital.

Public Counsel's Recommendation

Public Counsel recommends that the Commission set this general rate increase for adjudication of whether Suncadia Water collected rates that were unlawful under Tariff WN U-1. Public Counsel does not oppose the remainder of the revenue requirement increase as compromised between Suncadia Water and Staff. Public Counsel would support a tariff increase that incorporated the uncontested portions of the proposed tariff and tracked the portion that would be affected by the Commission's adjudication of the Tariff WN U-1 issue in a deferral.

Public Counsel participated in these settlement conversations, and with one exception, does not oppose the requested revenue increase. Specifically, Public Counsel believes that the Commission should order all distribution mains placed into the ground prior to May 1, 2022, removed from rates and any monies collected for those distribution mains refunded to customers. Public Counsel recommends that the Commission set the matter of the impact of Tariff WN U-1 for adjudication. The Commission could permit Suncadia Water to place the portion of the rate increase unaffected by the tariff into rates. Alternatively, the Commission could set over the entire matter for adjudication.

Cost of Capital

Suncadia Water is a well-capitalized water utility owned by Northwest Natural Water. Noting that the Commission's historical policy permits a 12 percent return on equity (ROE), the Company initially proposed a 10.9 percent ROE, a cost of debt at 5.22 percent and a 66/34 equity/debt ratio, resulting in its $690,623 filed request.

The proposed $396,319 revenue requirement is based some Staff proposed adjustments and a cost of capital that is a substantial compromise between the Company's original filing and Public Counsel's position in the active adjudication involving a different wholly owned subsidiary of Northwest Natural Water, Cascadia Water, LLC. Although Cascadia Water, LLC and Suncadia Water are separate companies, the Commission's resolution of what is fair, reasonable, and sufficient for one wholly owned subsidiary of Northwest Natural is highly relevant. Although Public Counsel believes that its litigated position in Cascadia Water is a more accurate reflection of a fair, reasonable, and sufficient return for a subsidiary of Northwest Natural, the current proposed settlement is a reasonable compromise solution between Public Counsel's view and that of Suncadia Water.

Public Counsel believes that the cost of capital for this proposed rate should not be precedential for future Cascadia Water rate cases for three reasons. First, Public Counsel reiterates its position that the Commission's Open Policy Docket UW-240733 is reexamining the Commission's policy on water case cost of capital. Any future water rate filing should apply the Commission's policy statement after that Docket is completed. Second, as noted above, Suncadia Water's sister company is undergoing a full adjudication of the cost of capital. The Commission's resolution in that matter will be a more accurate assessment of the fair, reasonable, and sufficient rates for wholly owned subsidiaries of Northwest Natural Water. A full adjudication in this case would be duplicative and expensive. But delaying this decision based on that adjudication would also add both administrative and time costs. The proposed revenue requirement here represents a reasonable compromise. Third, based on conversations with Staff and the Company, Public Counsel believes all three parties agree that the cost of capital underlying the current proposal should not have precedential value because of both the ongoing litigation and the Open Policy Docket.

Tariff WN-U-1

The proposed rates do not include a necessary adjustment for the impact of Suncadia Water's WN U-1 Tariff that was in effect until May 1, 2022. The other adjustments Staff and Suncadia Water agreed to are wholly independent of this Tariff issue. For the following reasons, Public Counsel recommends that the Commission set the issue of whether such an adjustment is necessary for adjudication.

In 2019 Northwest Natural Water created Suncadia Water and acquired the water system from Suncadia Resort (the Resort), the developer. At the time of acquisition and until May 1, 2022, the Tariff contained the following language in "Rule 7":

> The Water Company or its owner will construct and pay for the distribution mains serving Suncadia's planned lots unless a homebuilder agrees to construct and pay for the distribution mains serving those lots that the builder is purchasing for resale. *For the retail purchaser of individual lots*, *the cost of the distribution mains will be included in the price of the lot*.[1]

Both by the plain language of this Tariff, and in actual practice while Suncadia Resort operated the water system, this meant that the water system was not entitled to recover for distribution mains in rates. The customers paid for the water mains in a lump sum upon purchase of the lot. Based on Public Counsel's review of historical practice, the Resort would offset the entirety of the distribution mains for prior subdivisions with a contribution in aid of construction (CIAC) entry when the mains were placed into service. The sale of the water assets to Suncadia Water does not change the result. At most, Suncadia Resort is now the "builder" constructing and paying for the mains, and the retail purchasers maintain the same status. The cost was properly allocated to the builder who recouped expenses through a sale price rather than rates.

This practice changed when Suncadia Water took over operation, but Suncadia Water did not change the tariff language until May 1, 2022, in Docket UW-220052. In that Docket, Suncadia placed distribution mains into rates for one subdivision, Paintbrush Lakes/Tumble Creek. Suncadia now seeks to place two other subdivisions, Nelson Creek and Nelson Ridge, into rates, even though the actual infrastructure for all three subdivisions appears to have already been placed in the ground by Suncadia Resort prior to May 1, 2022. Based on the research of Doug Beck, a resident, and partially confirmed by Public Counsel, Paintbrush Lakes/Tumble Creek has

[1] Initial Filing of Suncadia Tariff Pages, *In re Suncadia Water Co. LLC, Tariff Revision*, Docket UW-101323 (July 19, 2010) (emphasis added). Rule 7 appeared in the water systems original tariff sheet. There was a general rate case in UW-160379 that modified unrelated tariff sheets, and in Docket UW-190953, Suncadia Water adopted the entire set of tariffs without modification. Those tariffs remained in effect until altered by Docket UW-220052 on May 1, 2022.

100 lots, and 77 were sold before May 1, 2022. Nelson Creek had 34 of 36 lots and Nelson Ridge had 30 of 42 lots sold by that date.

Based on the language of the Tariff operative at the time of these purchases, these 141 retail purchasers paid in full for the distribution mains through the purchase price of their lots. A corresponding CIAC should have been entered and offset the corresponding increase in rate base. In essence, these homeowners were (and are) being retroactively charged for a utility asset for which they have already paid.

Under Commission precedent, the rates based on these distribution assets have been wrongfully collected and must be removed from the rate base via a CIAC. The Commission follows the filed rate doctrine, which prohibits a public utility from charging rates for its services differently than the rates properly filed with the Commission.[2] Retroactively changing those rates is generally "improper because it makes adjustments to rates that have already been charged to customers."[3] It is axiomatic that the current collection of past obligations constitutes retroactive ratemaking.[4] Here, under the existing filed rate, retail homeowners who purchased their lots prior to May 1, 2022, paid for the cost of distribution infrastructure at the date of sale. Suncadia Water is not entitled to later change the Tariff and in order to place those assets into rates.

In the 2022 rate case, however, the Commission permitted such retroactive rates to go into effect by operation of law at an open public meeting. On May 1, 2022, distribution mains for the Paintbrush Lakes/Tumble Creek subdivision were placed in rates. Based on conversations with Staff, Public Counsel believes this to be the result of a mistake by Staff, Public Counsel, and the Commission about the nature of Rule 7. Shortly before the April 2022 open meeting, Suncadia Resort filed a letter about a water capital recovery fee.[5] This letter explained that the Resort included a charge in the sale of the property for water treatment infrastructure owned and operated by the City of Cle Elum. Staff evidently believed that the distribution mains referenced in Rule 7 which the homeowners paid for in the purchase price was this water treatment capital fee.

This was an error for several reasons. First, the letter explicitly says that this "reimbursement is only on assets that are owned by the City of Cle Elum and none of this reimbursement is on any of the water assets owned and operated by Suncadia Water Company." Rule 7, by contrast, expressly applies to distribution mains "serving planned lots" and not the City of Cle Elum's water plant or distribution lines to the City reservoir. Moreover, Rule 7 references a builder

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[2] *Wash Utils. & Transp. Comm'n v. PacifiCorp*, Docket UE-100749, Order 10, ¶ 20 n.16 (Aug. 23, 2012).
[3] *Id.* ¶ 20 n.17
[4] *Wash. Utils. & Transp. Comm'n v. Avista Corp*, Dockets UE-080146 & UG-080417 (consol.), Order 08, ¶ 112 (Dec. 29, 2008).
[5] Comments by Suncadia, *Wash. Utils. & Transp. Comm'n v. Suncadia Water Co.,* Docket UW-220052 (filed Apr. 27, 2022).

being able to agree to build and pay for distribution mains, which is completely inconsistent with the capital charge referenced in the letter. Second, as indicated above, the Resort's practice was to offset prior subdivision distribution mains with a CIAC covering the full charge, a practice that strongly supports Public Counsel's interpretation. Third, as the letter indicates, Suncadia did not own the water treatment plant and it makes no sense to have a tariff for an asset not owned by the utility. The surcharge appeared, instead, in the property disclosures to the sellers, a document to which Suncadia Water was not a party. It would be improper to forgive a charge in a third-party contract through a tariff.

Both Staff and Suncadia water assert that even if the 2022 rates were based in error, it is too late to address the error because fixing the error would constitute retroactive ratemaking. Initially, this is a perverse application of the filed rate doctrine, using the doctrine to defend what was clearly retroactive ratemaking in the first place. But it is also not consistent with Commission precedent. As the Commission explained, "Although these are well-established principles [against retroactive ratemaking], they are not so rigid as sometimes viewed."[6] In 1990, the Commission ordered a property sales adjustment and rejected the argument that it constituted retroactive ratemaking, and adopted the principles from *Democratic Central Committee v. Wash. Metro. Area Transit Comm'n*.[7] That D.C. Circuit case dealt with allocation of property capital gains after utility property was sold, and in addressing the question of whether later distribution of profits constituted retroactive ratemaking because there had been subsequent fare orders, the DC Circuit explained, "rectification of the illegal consequences of an unlawful rate order must then consist in something other than retroactive ratemaking….the remedy is restitution" in which the utility "must be compelled to make appropriate restitution for the increased fares it collected under those orders."[8]

Here, by the clear application of its filed tariff, Suncadia Water was never entitled to recover distribution mains from retail purchasers in rates for lots sold before May 1, 2022. This is not a utility error in underestimating costs or over estimating revenue. This was an asset for which the customers had already paid. Any subsequent rate collected on those assets constitute double recovery and retroactive ratemaking. The collection of additional rates in a latter proceeding, particularly when based on an error, was unlawful. The remedy in rectifying an unlawful rate order is not retroactive ratemaking.

This result is not inequitable for Suncadia Water. Per Suncadia Water's responses to informal discovery, Suncadia Water pays Suncadia Resort when the Resort finishes building water infrastructure and enough lots are sold. The price is calculated based on an algorithm predicting future revenue streams. Under Tariff WN U-1, this meant that Suncadia Resort was the entity

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[6] *In re PacifiCorp Accounting Order*, Docket UE-020417, Third Supp. Order, ¶ 24 (Sept. 27, 2002).
[7] *Democratic Central Comm. v. Wash Metro. Area Transit Comm'n*, 485 F.2d 786 (D.C. Circuit 1973); *Wash Util. & Transp. Comm'n v. Puget Sound Power & Light Co.* Docket U-89-2955-T Fifth Suppl. Order (Mar. 30, 1990).
[8] *Democratic Central Committee*, 485 F.2d at 824.

receiving double payment. The retail purchasers paid the Resort through its purchase price and then Suncadia Water paid the Resort for the same infrastructure. Suncadia Water has a claim for unjust enrichment against the Resort to recoup the price it paid the Resort for an asset that was already fully offset through a CIAC. The Commission can reasonably order Suncadia Water to pursue legal remedies against the Resort to make the Company whole.

During informal discovery, Suncadia Water informed Public Counsel that it had negotiated an indemnity provision between the Resort and the water company related to the tariff result during the original 2019 purchase agreement. So far, the Company has refused to provide a copy of that indemnity agreement even though it has been incorporated into current agreements between the water company and the Resort. The Commission can order the Company to pursue legal remedies against the Resort to recoup lost revenue from the Resort's failure to disclose the impact of the tariff operative until May 1, 2022.

Impact of WN U-1 Tariff Issue

In order to correct the unlawful collection of rates in this case, there are two distinct remedies. First, the Commission should order the Company to refund the portion of rates attributable to Paintbrush Lakes/Tumble Creek distribution mains and collected since the conclusion of Docket UW-220052. Second, the Commission should order a CIAC be entered into Suncadia Water's books to fully offset the distribution mains for Paintbrush Lakes/Tumble Creek and for all Nelson Creek and Nelson Ridge lots covered by Tarriff WN U-1.

Public Counsel will need to conduct additional discovery to accurately calculate these remedies. As an upper bound, our current estimates suggest that including the Paintbrush Lakes/Tumble Creek distribution mains in the rate base in Docket UW-220052 inflated Suncadia's annual revenue requirement by up to $100,000 (or about five percent of its current operating revenue). This is a rough estimate, and the actual number may be much lower. Additionally, removing the distribution mains for Paintbrush Lakes/Tumble Creek, Nelson Creek, and Nelson Ridge from this rate case will result in CIACs of up to $1.35 million (or about 14 percent of the rate base calculated in Staff and Suncadia's settlement). Again, the actual number may be lower.

Public Counsel is cognizant that a delay to adjudicate this matter will impact Suncadia Water's recovery. To mitigate this harm, Public Counsel recommends the portion of the rate increase unaffected by this Tariff WN U-1 issue be approved while the meaning and impact of Tariff WN U-1 is adjudicated.

Public Counsel appreciates the opportunity to submit these comments. If you have any questions about this filing, please contact Tad Robinson O'Neill via email at Tad.ONeill@ATG.WA.GOV or Stefan de Villiers via email at Stefan.deVilliers@ATG.WA.GOV.

Sincerely,

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