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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Preproposal Statement of Inquiry Petition, Docket No. 131386, to Consider the Need to Evaluate and Clarify Jurisdiction of Water Companies, WAC 480-110-255, related rules.	Docket No.: 131386___________ COMMENTS OF PENINSULA LIGHT COMPANY, PARKLAND LIGHT AND WATER COMPANY, MODERN ELECTRIC AND FRUITLAND MUTUAL WATER COMPANY ON WUTC PREPROPOSAL STATEMENT OF INQUIRY

INTRODUCTION

The following comments respond to the Washington Utilities and Transportation Commission's (also referred to herein as the "WUTC" and "the Commission") August 22, 2013 "Notice of Opportunity to File Written comments on the Preproposal Statement of Inquiry Petition, Docket No. 131386."

Peninsula Light Company ("Peninsula"), Parkland Light and Water Company ("Parkland") and Modern Electric ("Modern") are electric and water utilities incorporated under either RCW 24.06 or RCW 23.86. Fruitland Mutual Water Company ("Fruitland") is a water utility incorporated under RCW 24.06. Peninsula, Parkland, Modern and Fruitland are sometimes hereafter referred to as the "Joint Parties." Peninsula provides water distribution service to more than 1,200 water members and more than 30,000 electric members in West Pierce County. Parkland provides water distribution service to more than 7,500 water members

and 4,500 electric members in Pierce County. Modern provides water distribution service to approximately 5,300 water members and over 9,800 electric members in Spokane County. Finally, Fruitland provides water distribution service to more than 3,700 water members.

The Joint Parties are each recognized as tax exempt mutual/cooperative organizations under section 501(c)(12) of the federal Internal Revenue Code. As consumer owned, locally regulated utilities, each of the Joint Parties are presently categorically exempt from regulation by the WUTC under WAC 480-110-255 and have operated free from regulation by the WUTC for decades.

Accordingly, the Joint Parties all have an interest in this proceeding because they would be adversely impacted by the change of law that is proposed by the amendments to WAC 480-110-255.

The Joint Parties have joined together to file these comments because each believes: (1) that the WUTC is without legislative authority to propose this amendment, (2) the proposed amendment is unnecessary, (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, and, (5) it is otherwise unwise and contrary to law.

The Joint Parties urge the Commission to withdraw the proposed amendment in its entirety.

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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* is of critical importance and 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, in relevant part, 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. However, on August 21, 2013, the WUTC issued a "Preproposal Statement of Inquiry" initiating a "rulemaking inquiry to consider the need 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." The proposed rule would 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, the Joint Parties strenuously object to the proposed rulemaking.[1]

COMMENTS

A. THE WUTC LACKS AUTHORITY TO ELIMINATE THE EXISTING CATEGORICAL EXEMPTION FROM REGULATION FOR COOPERATIVE AND MUTUAL CORPORATIONS.

The proposed amendments to WAC 480-110-255 are 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. For the following reasons, the WUTC lacks that authority.

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[1] Please also be aware that on September 10, 2013, representatives from Fruitland and Parkland (along with representatives of other non-profit mutual and cooperative water companies within Washington) attended a meeting at the WUTC office with various WUTC employees to discuss their objections to the proposed rulemaking. The members of the agency represented at this meeting that the pending inquiry process was a *fait accompli*. One of the WUTC representatives went so far as to state "it is nice to meet future customers", meaning that the WUTC had already decided to proceed with the revisions to WACs at issue. This conduct on behalf of the agency was inappropriate for at least two reasons. First, it shows that the agency is not participating in the pending rulemaking inquiry process in good faith because the WUTC has already made up its mind. This action on the agency's behalf violates both the letter and the intent of RCW 34.05.310. Second, the agency's representations at the September 10, 2013 meeting shows an intent on the WUTC's behalf to violate the existing law in the State of Washington (as clearly stated by the Washington Supreme Court in the Inland Empire and Nob Hill cases) which grant non-profit mutual and cooperative companies a categorical exemption from the jurisdiction of the WUTC.

In its background paper entitled, "UTC Water Rulemaking – HOA, etc. (UW-131386) Background Information," the WUTC states:

> In its current form, WAC 480-110-255(2)(e) and (f) could be [and have been] interpreted to create a blanket exemption for any homeowner association, cooperative or mutual corporation, no matter how it is operated. [emphasis added]

That the regulations "could be" and "have been" been interpreted to provide a "blanket exemption" for cooperative and mutual utilities from WUTC regulation, should not be a surprise to the WUTC. These subsections of the WAC 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, of course, appropriate, given the Washington Supreme Court's clear mandate in *Inland*.

The foregoing proposition was then confirmed once again in *Nob Hill,* wherein the Washington Supreme Court noted that the WUTC has,

> …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.

The WUTC staff background paper correctly notes that,

> In *Inland Empire Rural Electrification, Inc. v. Department of Public Service,* 199 Wash. 527, 92 P.2d 258 (1939) (*Inland Empire*), the court ruled that while a mutual corporation providing electric service met the literal definition of "electrical company" in RCW 80.04.010 (199 Wash. at 534-35), the company nonetheless was exempt from Commission regulation.

As previously noted above, the *Nob Hill* court stated that the WUTC itself, has "historically" not asserted jurisdiction over cooperative and mutual utilities and has consistently interpreted Washington law to provide a categorical exemption from regulation for cooperative

and mutual utilities. Thus, WAC 480-110-255, which was apparently first adopted in 1999, merely codified that long standing agency interpretation of *Inland*[2].

The WUTC staff background paper referenced above acknowledges that,

> In *West Valley Land Co., Inc. v. Nob Hill Water Association,* 107 Wn.2d 359, 729 P.2d 42 (1986) (*Nob Hill),* the court applied its analysis in *Inland Empire* to a cooperative providing water service. Similar to what it did for the mutual corporation in *Inland Empire,* the court indicated that the cooperative, the Nob Hill Water Association (Water Association), also met the literal definition of "water company" in RCW 80.04.010. However, the court held the Water Association exempt from Commission regulation.

Nob Hill is instructive because that case was brought in superior court by a member of the association who disputed the amount of fees charged for water hook-ups. The WUTC was not a party to the case. The court affirmed that a water cooperative is not a "public service company" and is not subject to WUTC regulation. Neither the Court, nor any party, suggested that the case should be remanded to the WUTC to determine whether Nob Hill was, in fact, operating as an exempt cooperative or mutual corporation. The trial court made the determination that the association was a cooperative and the Supreme Court affirmed that decision without the necessity of the WUTC inserting itself into the case.

Subsequent to the *Nob Hill* decision, the WUTC continued to follow its long standing interpretation of *Inland,* that cooperative and mutual corporations are categorically exempt from WUTC regulation by adopting WAC 480-110-255. WAC 480-110-255 has been amended and

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[2] This WAC categorically states:

> (2) The commission does not regulate the following providers of water service:
>
> > (e) Homeowner associations, cooperatives and mutual corporations, or similar entities that provide service only to their owners or members. [emphasis added]

re-adopted by the WUTC several times since it was initially adopted and the WUTC has never attempted, until now, to eliminate the categorical exemption.

The Legislature has long been aware of the *Inland* and *Nob Hill* cases and of the Commission's historic position that it does not regulate consumer owned cooperative and mutual utilities. In fact, the Legislature has explicitly and affirmatively acquiesced and ratified this interpretation of Title 80 RCW and has affirmatively stated on numerous occasions that "consumer owned" utilities incorporated under RCW 23.86 and RCW 24.06 are exempt from WUTC regulation. Some of the acts passed by the Legislature acquiescing, adopting and ratifying the exemption of cooperative and mutual utilities from WUTC regulation include the following:

1. **RCW 23.86.400 and RCW 24.06. 600**. The Legislature adopted RCW 23.86.400 and RCW 24.06.600 in 1996. These provisions specifically define utilities created under those chapters as "locally regulated" utilities. They authorize the governing bodies of electric utilities organized under those chapters to adopt "pole attachment" rates and charges applicable to investor owned telecommunications providers without oversight by the WUTC. Both statutes say,

> Nothing in this section shall be construed or is intended to confer upon the utilities and transportation commission any authority to exercise jurisdiction over locally regulated utilities.

2. **RCW 54.48.040**. Similarly, in 1969 the Legislature adopted RCW 54.48 authorizing what would otherwise be (i.e., absent state approval) illegal monopoly "service territory" agreements between and among cooperatives and mutuals, PUDs, municipals and

Investor Owned Utilities ("IOU"). In adopting this statute, the Legislature made it clear that cooperative and mutual utilities are intended to be exempt from any WUTC jurisdiction, although it required IOUs that enter into such an agreement with a cooperative/mutual electric utility, to apply to the WUTC for approval for its own participation in the agreement. In enacting RCW 54.48, the Legislature adopted, followed and expanded upon both the *Inland* and *Nob Hill* cases and affirmed the WUTC's then interpretation of both cases, i.e. cooperative and mutual utilities are categorically exempt from WUTC regulation. RCW 54.48.040 states:

> **54.48.040 Cooperatives not to be classified as public utilities or under authority of utilities and transportation commission**.
>
> Nothing herein shall be construed to classify a cooperative having authority to engage in the electric business as a public utility or to include cooperatives under the authority of the Washington utilities and transportation commission.

3. **RCW 19.29A**. In 1998 the Legislature adopted RCW 19.29A, which specifically recognizes the existing exemption from regulation that applies to consumer owned utilities, including cooperatives and mutuals. That statute provides,

> **19.29A.010 Definitions.**
>
> 6) "Consumer-owned utility" means a municipal electric utility formed under Title 35 RCW, a public utility district formed under Title 54 RCW, an irrigation district formed under chapter 87.03 RCW, a cooperative formed under chapter 23.86 RCW, or a mutual corporation or association formed under chapter 24.06 RCW, that is engaged in the business of distributing electricity to more than one retail electric customer in the state.
>
> **19.29A.900 Construction — 1998 c 300.**
>
> Nothing in chapter 300, Laws of 1998 shall be construed as conferring on any state agency jurisdiction, supervision, or control over any consumer-owned utility.

4. **RCW 19.280**. In 2006 the Legislature enacted RCW 19.280 regarding Resource Planning. That statute explicitly provides that "consumer owned" utilities, including cooperatives and mutuals formed under RCW 23.86 and RCW 24.06, are required to adopt Resource Plans, but unlike the IOUs, the consumer owned utilities report their Resource Plans and information to the Department of Commerce, not the WUTC. This recognized the long established understanding of the WUTC and the Legislature that the WUTC has no jurisdiction over consumer owned utilities and should not be given any jurisdiction over consumer owned utilities.

5. **RCW 19.285.** In RCW 19.285.060 (6) and (7), the Energy Independence Act (I-937), it is explicitly stated that, "(6) the commission (WUTC) may adopt rules to ensure the proper implementation and enforcement of this chapter as it applies to investor-owned utilities," [but] "(7) For qualifying utilities that are not investor-owned utilities, [i.e. consumer owned utilities including cooperatives and mutuals] the auditor is responsible for auditing compliance with this chapter and rules adopted under this chapter that apply to those utilities and the Attorney General is responsible for enforcing that compliance." In other words, in adopting I-937, the voters of the state of Washington adopted and ratified the categorical exemption from WUTC regulation of cooperative and mutual utilities.

There are other examples and instances of the Legislature recognizing and ratifying the long standing and settled principle of Washington law represented by the *Inland* and *Nob Hill* cases, i.e. that cooperative and mutual utilities are categorically exempt from regulation by the WUTC.

THE WUTC LACKS LEGISLATIVE AUTHORITY TO ADOPT THE PROPOSED RULE DUE TO LEGISLATIVE ACQUIESENCE AND RATIFICATION

It is also 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

See also State v. Coe, 109 Wash.2d 832, 750 P.2d 208 (1988), stating:

> The Legislature is deemed to acquiesce in the interpretation of the court if no change is made for a substantial time after the decision. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 789, 719 P.2d 531 (1986); *Nyland v. Department of Labor & Indus.,* 41 Wash.2d 511, 513, 250 P.2d 551 (1952). We therefore can conclude the legislative silence after *Ingham* was an indication of legislative approval of the *Ingham* interpretation of the statute.

Many cases from other jurisdictions also adopt the doctrine of "legislative acquiescence." *See, e.g. DuPont Photomasks, Inc. v. Strayhorn, 219 S.W.3d 414* (Tex.App.Austin, 2006)(When a statute has been given a longstanding construction by an administrative officer and the statute is re-enacted without substantial change, the Legislature is presumed to have been familiar with that interpretation and to have adopted it); *Cazarez-Gutierrez v. Ashcroft*, 356 F.3d 1015 (9th Cir., 2004) (Congress is presumed to be aware of

administrative interpretation of statute and to adopt that interpretation when it reenacts statute without changing that interpretation.); *Ball Corp. v. Fisher*, 51 P.3d 1053 (Colo.App., 2001) (When a legislature reenacts or amends a statute without repealing a long-standing agency interpretation, it is persuasive evidence that the legislature intended the agency interpretation to remain in effect.); *Yamaha Corp. of America v. State Bd. of Equalization*, 86 Cal.Rptr.2d 362, Cal.App.2.Dist. (1999)(Courts should apply a presumption that the Legislature is aware of a consistent and very longstanding administrative interpretation, and thus, the reenactment of the statute being interpreted with no modification designed to make it clear that the agency's interpretation is wrong is a strong indication that the administrative practice was, and is, consistent with underlying legislative intent.)

The Legislature has amended and reenacted the WUTC's jurisdictional statutes RCW 80.04 and RCW 80.28 numerous times since *Inland* and *Nob Hill* were decided[3]. 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

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[3] E.g., The notes to RCW 80.04.010 indicate that the statute was amended or reenacted by the Legislature as follows: " [2011 c 214 § 2; 2011 c 28 § 1; 1995 c 243 § 2; 1991 c 100 § 1; 1989 c 101 § 2; 1987 c 229 § 1. Prior: 1985 c 450 § 2; 1985 c 167 § 1; 1985 c 161 § 1; 1979 ex.s. c 191 § 10; 1977 ex.s. c 47 § 1; 1963 c 59 § 1; 1961 c 14 § 80.04.010; prior: 1955 c 316 § 2; prior: 1929 c 223 § 1, part; 1923 c 116 § 1, part; 1911 c 117 § 8, part; RRS § 10344, part.]"

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 form WUTC regulation.

To the extent that some state reporting or oversight is required, the Legislature has always placed that responsibility with agencies other than the WUTC, e.g. the Attorney General or the Department of Commerce. 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. *Leonard v. Baker,* supra, and *State v. Coe*, supra.

B. THE RATIONALE OF THE PROPOSED RULE CANNOT BE LIMITED TO WATER UTILITIES.

Although the proposed WUTC amendment to the WACs would only, by its terms, apply to cooperative and mutual water utilities, no rationale is offered in the WUTC background paper to support this limitation. In fact, the staff paper's rationale for eliminating the categorical exemption is a slippery slope. If the WUTC were correct that cooperative and mutual water utilities incorporated under RCW 23.86 and RCW 24.06 might operate within those statutes but outside the guidelines offered in *Inland* and *Nob Hill* so as to be a "public service company,"

then the same could be said of any cooperative and/or mutual corporation providing any other utility service, including electric service, telecommunications services, sewer services and any other utility service that might be regulated by the WUTC.

C. EVEN IF THE WUTC HAD AUTHORITY FROM THE LEGISLATURE TO AMEND WAC 480-110-255, IT IS UNNECESSARY.

The WUTC staff paper offers no concrete examples of any problem that their proposed amendment would solve. The amendment appears to be nothing more than an effort to extend the WUTC's authority and jurisdiction where it is not wanted or needed. Put another way, 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.

Setting aside the WUTC's lack of authority discussed above, the proposed rulemaking is overbroad and would impose unnecessary administrative burdens and financial costs upon Washington's non-profit mutual and cooperative utilities - which are doing an admirable job of providing a valuable and needed utility service to their members at cost. More specifically, the WUTC's proposed rulemaking is unnecessary for the following reasons:

First, the WUTC's September 5, 2013 position paper (referenced above) implies that the basis for its proposed rulemaking is a concern that there may be a theoretical mutual company, a cooperative company, or a home owners' association operating under an exemption from the

WUTC to which it is not entitled because the entity is not operating with the parameters established by *Inland* and *Nob Hill*.

Even taking the WUTC's purported concern at face value, it is overkill and economically inefficient for the WUTC to attempt to address this concern by painting every non-profit water company with the same brush. There is simply no evidence whatsoever that there is an epidemic, or even any instance of abuse by cooperative and mutual utilities in which the WUTC's presence is needed to resolve any dispute or protect the public interest. Whatever grievance any member of a cooperative or mutual utility might have can be redressed through the democratically elected boards that govern consumer owned utilities or, if necessary, the Courts.

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.

D. THE PROPOSED NEW DEFINITION OF "TO THE PUBLIC" WOULD IMPROPERLY EXPAND THE STATUTORY DEFINITION OF A "PUBLIC SERVICE CORPORATION" BY MISCONSTRUING AND NARROWING THE DEFINITION OF AN EXEMPT COOPERATIVE OR MUTUAL WATER COMPANY SET FORTH IN *INLAND* AND *NOB HILL*.

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 misleading and 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 definition 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." This proposed new definition suggests that <u>only</u> 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

misleading because it improperly narrows the scope of the test applied by the Court in *Inland* and *Nob Hill.* In fact, it 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 is 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[4]" 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 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**

[4] 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.

> **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. Unlike an investor owned utility in which the fundamental interest of the owners (shareholders) is to maximize profits,

there is a fundamental identity of interest between the member/owners/consumers in a cooperative or mutual utility because they are the same persons.

There is no explicit definition under Washington law of what it means to operate under the "cooperative plan." Federal tax law provides the most useful definition of operating under the cooperative plan. The U.S. Tax Court defined "cooperative" as follows:

> A cooperative is an organization established by individuals to provide themselves with goods and services or to produce and dispose of the products of their labor. The means of production and distribution are those owned in common and the earnings revert to the members, not on the basis of their investment in the enterprise, but in proportion to their patronage or personal participation in it.

Puget Sound Plywood, Inc. v. Commissioner, 44 T.C. 305 (1966), *acq*. 1966-2 C.B. 6.

Following *Puget Sound Plywood,* the IRS generally defines the essential elements of a cooperative as: (1) democratic control; (2) operation at cost; and (3) subordination of capital (i.e. the pecuniary benefit of the corporation flows to members not to equity investors). Among other things, the IRS' regulations constrain how non-profit cooperative and mutual utilities may earn revenue and require the annual filing of a Form 990 non-profit tax return form. If these non-profit companies depart from their mission and purpose and conduct themselves like a for-profit corporation, then they face the proposition of answering to the IRS and, ultimately, the loss of their federal tax exemption. This layer of regulation is more than sufficient. More regulation and burden by the WUTC is unwarranted.

Cooperative and Mutual utilities incorporated in Washington under RCW 23.86 and RCW 24.06 meet all of these criteria and this is what makes them exempt from being

a "public service corporation," not the fact that they have the power to deny service to particular applicants by denying membership in the cooperative/mutual corporation.

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.

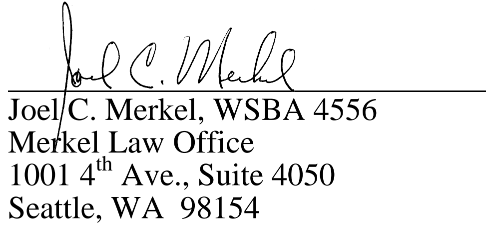
The bottom line is that the WUTC's proposed amendments to WAC 480-11-245 and WAC 480-110-255 would be counterproductive and impose additional and unnecessary costs upon the non-profit mutual and cooperative utilities. Such costs are ultimately borne, of course, by these non-profit companies' members. The Joint Parties and their members do not need, or want, to bear the costs that would result from an unwarranted additional layer of regulation by the WUTC.

E. HOMEOWNERS ASSOCIATIONS.

Peninsula, Parkland, Fruitland and Modern are not "homeowner's associations" and not knowledgeable about the statutes under which they are formed and governed or their operations. However, Peninsula, Parkland, Fruitland and Modern generally understand that such associations are non-profit membership entities. Peninsula, Parkland, Fruitland and Modern assert that, as a matter of law, whether or not such associations have the attributes that caused the court in *Inland* and *Nob Hill* to determine that cooperatives and mutual corporations are not "public service

companies," the doctrine of "legislative acquiescence" applies equally to homeowner's associations and the WUTC lacks authority to change a long standing interpretation of law without obtaining specific authority to do so from the Legislature.

Dated this 23rd day of September, 2013.



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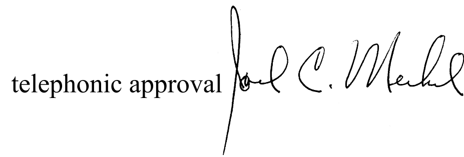
_/s/ Dave Luxenberg__________ telephonic approval 

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