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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Penalty Assessment  
against,  
  
WASHINGTON WATER SUPPLY, INC.

NO.: UW-140598

WASHINGTON WATER SUPPLY,  
INC.'S REPLY IN SUPPORT OF ITS  
MOTION FOR SUMMARY  
JUDGMENT

**I. INTRODUCTION**

The opposition papers filed by the Washington Utilities and Transportation Commission (“WUTC”) in response to Washington Water Supply, Inc.’s (“WWS”) motion for summary judgment rely on a definition of “acquisition” that is inconsistent with the statutory and regulatory framework in which the term is used. When the term is examined in that context, it is evident that WWS did not “acquire” the Silent Sky or Bainbridge 1 water systems and had no legal duty to add those systems to its tariff. The WUTC’s assertion that “acquisition” includes the informal operation of a water system is a new position and cannot be found in the agency’s notice of violation. Rather this new argument should be seen for what it is: backfilling and last-minute modification intended to shore up a claim that is wholly lacking in support under Washington law.

1 WUTC’S attempt in its opposition papers to assert a violation based on WWS’  
2 involvement in the Whidbey West Water System is a violation of due process and basic  
3 fairness. No mention of the Whidbey West Water System is found in the Notice of Penalties  
4 Incurred and Due for Violations of Laws and Rules (“Notice of Penalties”), dated April 15,  
5 2014. This proceeding is based solely on the alleged violations contained in that Notice and  
6 can involve no other matters. Likewise, the details and subjects in the Notice of Brief  
7 Adjudicative Proceeding make absolutely no mention of the Whidbey West Water System,  
8 and the WUTC is barred from pursuing any claims pertaining to that system.

## 9 II. ARGUMENT AND AUTHORITIES

### 10 A. Acquisition is Legally Different Than Management or Operation.

11 That the WUTC itself recognized the distinction between owning and operating a  
12 water system can be plainly seen in the language used by it in the Notice of Penalties:

13 As part of an investigation into the nature of Washington Water Supply’s  
14 business activities, Commission staff found that the Company acquired **and** has  
15 been operating two water systems, Silent Sky and Bainbridge 1, that were not  
16 listed in the Company’s tariff. [Emphasis added.]

17 WUTC carefully chose the wording of its Notice of Penalties, a legal document of a serious  
18 nature imposing a severe financial penalty, and intentionally described the common sense  
19 distinction between ownership of a system and operation of that system. Now, having been  
20 confronted in WWS’s motion for summary judgment with the absence of any law or rule  
21 preventing a public water company from managing or operating a system that it does not own  
22 without adding it to its tariff, WUTC has adopted a new definition of “acquisition” to mean  
23 “possession, control, or power of disposal.” Answer to Motion for Summary Judgment, p. 5.  
24 That definition, which WUTC could have adopted and enshrined in its rules, cannot be found  
25 therein. Recognizing that the facts do not support any finding of ownership, WUTC attempts

1 to shift focus to “operations” rather than “ownership.” What is apparent is that the WUTC  
2 has come up with a new definition that did not exist at the time of the conduct under  
3 examination. This is an example of an ex post facto application of a new definition to past  
4 behavior, where the respondent had no warning that the agency would take such a position.  
5 This enforcement activity creates an ad hoc system of justice where the result depends on the  
6 whim of the regulator. Any finding of a violation must be based on the requirements of  
7 fairness, i.e., notice to any potential rule breaker that its conduct would run afoul of the rule.  
8 There was no such notice in this case. And any punishment based on a violation of a known  
9 law or rule must be based on the requirements of basic fairness. That basic fairness is  
10 completely lacking here where there was no clear notice of improper conduct to WWS or  
11 warning of a penalty for violation.

12 **B. The Plain Wording of the Rule Does Not Support WUTC’s Position.**

13 The rule now relied upon by WUTC to support its claim of violation is WAC 480-  
14 110-431: “A water company must file revisions to its filed tariff within thirty days of its  
15 acquisition of new service area, whether by acquisition of another regulated water company or  
16 by acquiring one or more previously unregulated water systems.” This provision makes it  
17 clear from its own language that it applies to acquisition in the formal legal sense -- obtaining  
18 ownership of either a regulated water system or ownership of an unregulated water system.  
19 Nothing here connotes, suggests, or touches upon informal operation.

20 **C. WUTC is Well Aware of the Distinction Between Ownership and  
21 Operation.**

22 WUTC knows well how to define and distinguish the operation and control of a water  
23 system. In the definitions provided at WAC 480-110-456, which govern Part IV of the Water  
24 Company Rules, “Control” is defined as “the possession, direct or indirect, of the power to  
25 direct or cause the direction of the management and policies of a company, whether through  
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1 the ownership of voting shares, by contract, or otherwise.” Control and management are  
2 clearly a different thing than acquisition and ownership. WUTC knows the difference, despite  
3 its new position and argument presented in its Answer.

4 **D. The Governing Statute, RCW 80.12, Focuses Solely on Ownership – Not**  
5 **Operation.**

6 Further support to the conclusion that WUTC is well aware of the difference between  
7 ownership or acquisition and management or control is provided by RCW 80.12.040, found  
8 in the title and chapter governing the transfer of property by regulated utility companies such  
9 as WWS. Just as RCW 80.12.020 provides that no public service company “shall sell, lease,  
10 assign or otherwise dispose of the whole or any part of its franchises, properties or facilities  
11 whatsoever ... without having secured from the commission an order authorizing it to do  
12 so...”, and any such sale is void under .030, RCW 80.12.040 likewise provides that no such  
13 company “shall, directly or indirectly, purchase, acquire, or become the owner of any of the  
14 franchises, properties, facilities, capital stocks or bonds of any other public service company  
15 unless authorized to do so by the commission.” Any such transaction without prior approval  
16 of the Commission is void under .040. Thus, WUTC closely regulates the acquisition and  
17 sale of water systems by regulated water companies such as WWS, and conversely has no  
18 statutory authority to require the addition to a regulated company’s tariff of non-owned  
19 systems that are managed by that company under contract. WUTC has significantly failed to  
20 identify any statutory provision or rule that expressly requires such an addition to a tariff or  
21 that prevents a regulated water company from managing non-owned systems whether under  
22 contract or not.

23 If there were any doubt about whether a public utility company such as WWS is  
24 required to obtain Commission approval prior to acquiring a water system property, that doubt  
25 is dispelled in WAC 480-143-130, which again requires prior Commission approval of the

1 acquisition of any “franchise, property, facility, capital stock, or bonds of another public  
2 service company....” Here, WUTC knew very well that WWS had not applied for or received  
3 approval to acquire the Silent Sky and Bainbridge 1 water systems. Although WUTC knew  
4 that WWS was operating the systems, it never once alerted WWS to the need to apply for  
5 formal approval to acquire the systems. WUTC’s past conduct and regulatory position is  
6 inconsistent with its new contention that WWS was required to add these systems to its tariff  
7 when WUTC did not even recognize that WWS had lawfully acquired the systems. WUTC  
8 cannot have it both ways: it does not recognize ownership that it did not approve, but now  
9 contends that it can require the utility to add an unlawfully obtained system to its tariff. This  
10 absurd result is clearly not countenanced by either statute or rule.

11 “Acquisition” as used in WAC 480-110-431 must be interpreted in the legal rather  
12 than the loose colloquial sense urged by the Commission, given that the rule is a legal rule  
13 promulgated in compliance with statutory authority and interpreted in relation to the  
14 authorizing statute. As discussed above, and which is unchallenged by WUTC, WWS did not  
15 acquire the two systems. Indeed, it could not acquire them because the owner could not  
16 document its ownership sufficiently to be able to convey title to WWS. Without such  
17 ownership, WWS could do nothing other than informally operate the systems. It could not  
18 transfer any assets, change existing rates, or assert any other control. The Commission’s  
19 report attached to the declaration of Darren Tinnerstadt makes no contrary assertion.

20 The loose colloquial definition WUTC now urges is picked from one of many  
21 dictionary definitions that suit its new need. One can easily find other dictionary definitions  
22 that do not support this interpretation. A quick internet search of the definition of  
23 “acquisition” reveals results such as:

1 ACQUISITION, property, contracts, descent. The act by which the person  
procures the property of a thing.

2 2. An acquisition may be temporary or perpetual, and be procured either for a  
3 valuable consideration, for example, by buying the same; or without  
consideration, as by gift or descent.

4 TheFreeDictionary.com.

5 **E. Other WAC Sections Support the Legal Meaning of Acquisition.**

6 That a tariff need not include water systems that are not owned by the regulated  
7 company is also supported by the definitions in WAC 480-110-245, which define “Initial  
8 Tariff” as not including “a tariff filed to add a newly acquired system or company to the tariff  
9 of a currently jurisdictional company.” There is nothing in that definition suggesting anything  
10 other than that ownership is required for a necessary addition to a tariff. It is therefore evident  
11 that nothing in the statutory or regulatory scheme governing water companies prevents a  
12 company from managing a water system that is not part of its tariff. As previously noted, a  
13 sound public policy reason supports this conclusion: allowing a regulated company an  
14 opportunity to evaluate a system before a decision to acquire the system serves the public  
15 good by promoting the competent management of privately owned systems suffering from  
16 operation by unregulated operators. The same is true for a regulated company managing an  
17 unregulated water system by contract with the owner. The owner and its customers benefit  
18 from management by a regulated operator. WUTC’s new interpretation of its rules would,  
19 without advance notice, substantially interfere with contract management and this public  
policy interest.

20 **F. The Whidbey West Water System is Not a Matter Properly Made Part of**  
21 **This Proceeding.**

22 As noted above, nothing in the Notice of Penalties or the Notice of Brief Adjudicative  
23 Proceeding addressed or even mentioned the Whidbey West Water System. That a staff  
24 report mentioned it does not put that issue before the Commission in this proceeding. WUTC

1 has offered no explanation for that omission or its attempt to belatedly expand the scope of  
2 the proceeding.

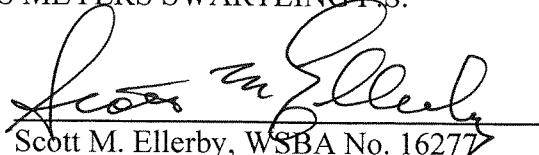
3 **III. CONCLUSION**

4 For the reasons articulated above, WWS respectfully requests that the complaint and  
5 penalty imposed by WUTC against WWS be dismissed with prejudice.

6 Dated 14<sup>th</sup> day of August 2014.

7 MILLS MEYERS SWARTLING P.S.

8  
9 By:



10 Scott M. Ellerby, WSBA No. 16277  
11 Counsel for Washington Water Supply, Inc.  
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**DECLARATION OF SERVICE**

I, Anna Armitage, declare that I am an employee of Mills Meyers Swartling, am over the age of eighteen and am competent to testify to the matters stated herein.

On this date I caused to be served a true and correct copy of the within and foregoing Motion for Summary Judgment on the following, in the manner indicated:

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

DATED this 14<sup>th</sup> day of August 2014.

  
\_\_\_\_\_  
Anna Armitage