September 23, 2013

Via electronic filing

Steven V. King
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
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Cascadia Law Group
ENVIRONMENTAL ATTORNEYS

RE: Docket UW-131386
Comments Submitted on Behalf of Sandy Point Improvement Co.

Dear Mr. King:

This firm represents Sandy Point Improvement Co. ("Sandy Point"), a homeowners association located in Ferndale, Washington. We write to provide comments on behalf of Sandy Point for the Washington Utilities and Transportation Commission ("UTC" or "Commission") Staff's rulemaking inquiry under Docket UW-131386 (the "Rulemaking Inquiry"). Sandy Point has operated an independent and self-governed water system serving water to its own shareholder members for over 45 years.

The proposed rulemaking, in which the UTC Staff asks the Commission to consider repealing WAC 480-110-255(2)(e) and (f), is inappropriate and should not be completed because (1) it appears to inappropriately target Sandy Point, and in doing so goes far beyond what is needed for clarity of rules, (2) is contrary to public policy, and (3) as a practical matter, makes the regulations more, not less, vague, and would add to the public's confusion regarding this important issue.

1. The Rulemaking Inquiry Is Improperly Targeted at Sandy Point

WAC 480-110-255(2) currently reads, in part:

> 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.

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> (f) Homeowner associations, cooperatives and mutual corporations, or similar entities that provide service to nonmembers unless they serve one hundred or more nonmembers, or charge nonmembers more than five hundred fifty-seven dollars average annual revenue per nonmember.

The Commission Staff now seeks to strike exemptions (e) and (f) from UTC jurisdiction. The Commission should not proceed with the rulemaking requested by the UTC Staff because it improperly targets Sandy Point. The proposal on its face states that it stems from a "recent classification proceeding" in which the staff "became aware that part of the Commission's rule on jurisdiction over water companies, WAC 480-110-255(2)(e) and (f), may be read to exempt from Commission regulation certain entities that are not exempt." *See* Preproposal Statement of Inquiry (August 21, 2013).

In January 2012, UTC Staff initiated an investigation regarding Sandy Point's jurisdictional status. Sandy Point had never been subject to UTC jurisdiction in its 45-year history, and a prior UTC investigation, completed in 2006, concluded that Sandy Point was not subject to jurisdiction because the "staff determined Sandy Point was operating as a homeowners association and did not fall under commission jurisdiction."[1] Nonetheless, on November 21, 2012, UTC Staff initiated a classification proceeding against Sandy Point.[2]

Sandy Point argued, as supported by the regulations, that it was not subject to UTC jurisdiction.[3] The Commission Staff ultimately agreed to move the Commission to voluntarily dismiss the proceeding, but then commenced this rulemaking in order to delete the regulatory exemption on which Sandy Point had relied. As part of the proceeding, the Staff expressly acknowledged "water companies are also exempt from the Commission's jurisdiction if they are 'homeowner associations, cooperatives and mutual corporations, or similar entities.'"[4] The Staff now seeks to revoke that exemption, altering decades of policy, practice, and jurisprudence, as well as removing a basis for not just Sandy Point's exemption, but that of over 300 water companies and associations that are currently exempt but may not be eligible for remaining

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[1] Investigation Report – Sandy Point Improvement Company (Docket UW-121408) dated November 2012 (filed Nov. 21, 2012).
[2] *See id.*; *see also* Order 01, Order Initiating Special Proceeding Under RCW 80.04.015; Complaint against Rates and Charges; and Complaint for Penalties ("Order 01") to Docket UW-121408.
[3] *See* Sandy Point Motion for Summary Determination (Docket UW-121408) dated May 6, 2013.
[4] *See* Order 01 at ¶ 9.

exemptions. The Staff provides no substantive basis for this arbitrary proposal. Simply stated, the CR-101 Notice requests comments regarding whether there exists a need to evaluate and clarify jurisdiction of water companies; no such need is evident. Whatever deficiencies the current regulations may have, targeting individual water companies through rule-making is not a proper basis for rulemaking, particularly without consideration of the wide-reaching impact such changes would have. Should the Commission proceed to adopt such a rule, a court would undoubtedly find such an action arbitrary and capricious.

For the reasons explained further below, the proposed rulemaking is improper not only in that it is issued in response to and to directly target Sandy Point, but also because it is contrary to public policy and would have wide-reaching ramifications.

2. The Rulemaking Inquiry is Contrary to Public Policy

The intent of WAC 480-110-255(2) is to protect the interests of the public in obtaining water services and to permit small-scale water providers and certain private organizations to provide water services without over-burdensome regulation that would interfere with fulfilling those responsibilities. The Staff's proposed rulemaking would gut this protection from the law, entirely deleting the exception for private homeowner associations, cooperatives, mutual corporations, and similar entities. Dozens or possibly hundreds of community water associations would also likely lose exemptions under this proposal.[5] The only exemptions from UTC jurisdiction for entities that exceed the monetary or customer threshold that would remain are for municipal corporations, and limited other entities such as mobile home parks.[6]

The UTC Staff proposes its inquiry under the guise of its statement that the Staff "recent[ly]" "became aware that part of the Commission's rule on jurisdiction over water companies, WAC 480-110-255(2)(e) and (f), may be

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[5] The State of Washington Department of Health records indicate that of all water companies operating in the state with more than 100 connections, there are approximately 126 classified as "investor," 124 classified as "private," and 125 classified as "associations." All of these could potentially be affected by the proposed rulemaking. According to the UTC website, it currently regulates only 71 private water companies, meaning that at least roughly 300 companies could be affected by this proposed rule revision.

[6] Staff's proposal raises the question of what public policy is being served in removing the long-standing exemption for self-governed organizations such as homeowners associations, cooperatives, and mutual corporations, or similar entities, *see* CR 101 Notice, while retaining the exemption for mobile home parks and manufactured home rental communities. *See* WAC 480-110-255(g)(ii) and (iii).

read to exempt from Commission regulation certain entities that are not exempt." *See* Preproposal Statement of Inquiry (August 21, 2013).

These provisions, which exempt homeowners associations, mutual corporations, cooperatives, and similar entities from jurisdiction, are not a recent or inadvertent addition to the regulations, nor are they new to Staff inquiry. They are, in fact, a critical aspect of the regulatory framework that has always limited the Commission's jurisdiction, for the important policies of protecting private interests and small entities from overlyburdensome and unnecessary regulation and ensuring the efficient use of government resources. Indeed, the boards of these associations, mutual corporations, cooperatives, and similar entities provide direct and local oversight for the utility services provided, within the regulations of the State of Washington Department of Health.[7] These entities are distinct from the investor-owned utilities (IOU), not responsive to or governed by their customers, which are the subject of UTC regulation. The public policy behind close regulation of IOUs is simply not present in the case of independent and self-governed homeowners associations, mutual corporations, cooperatives, and similar entities.

Moreover, the UTC Staff's statement that "certain entities . . . are not exempt" is also inaccurate and, in the context of the current regulatory framework, makes no sense. The Staff has, in fact, repeatedly acknowledged that "water companies <u>are</u> . . . exempt from the Commission's jurisdiction if they are 'homeowner associations, mutual corporations, or similar entities.'" *See*, *e.g.*, Order 01 at ¶ 9 (emphasis added); *see also* Investigation Report at 2 (2006 determination that Sandy Point not subject to UTC jurisdiction because it was a homeowners association).[8]

The UTC's proposed amendments are also contrary to longstanding judicial interpretations of the intent of the statute. For example, in *West Valley Land*

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[7] Notably, each of these exempt entities is well-defined in the law and all share in common the fact that the members in the entity have a voice in the operation of its affairs, and the safeguards established by law with respect to their operations and responsibilities to their members.

[8] WAC 480-110-255(1) currently memorializes one of the underlying principals of UTC jurisdiction, providing that "the commission only regulates investor-owned water companies" that meet certain thresholds." While not discussed in the filed CR-101 Notice, the Commission Staff now propose to delete any reference to "investor-owned water companies" in WAC 480-110-255(1) section, and bring all "water companies" under UTC jurisdiction. This proposal is contrary to the long-standing and established role of the UTC in regulating investor-owned water companies, and deleting this explanatory and threshold criteria is contrary to the law and public policy. UTC staff provide no rationale or basis supporting this far-reaching broadening of its jurisdiction.

Co. Inc. v. Nob Hill Water Association, 107 Wn.2d 359 (1986), the Court affirmed that companies functioning as a cooperative – where "consumers have a 'voice' in the management of its affairs" – are not properly subject to UTC regulation. As our state supreme court has cautioned, "[w]ere the law construed to apply to private corporations not serving the public, a serious question would arise as to its constitutionality" under the United States Constitution and the constitution of the state of Washington. *Inland Empire Rural Electrification v. Dep't of Pub. Serv.*, 199 Wash. 527 (1939). The proposed rule amendment risks running afoul of this cautionary statement from our courts. To now change the regulations such that the exemption for homeowners associations, mutual corporations, and cooperatives is deleted in its entirety is plainly inconsistent with the intent of the law and would have broad-reaching ramifications on numerous small businesses and non-profit associations throughout the state. It would further have the effect of greatly expanding the breadth of the UTC jurisdiction, extending it for the first time over independent self-governed entities serving their own members and constituents, entities that have always been exempt from regulation. Should the UTC choose to proceed with this rulemaking, it must thoroughly investigate and prepare a Small Business Economic Impact Statement and a Cost Benefit Analysis to evaluate the scope of effects such an action could have. An Environmental Impact Statement may also be necessary to evaluate the effects such a regulation would have if, for example, certain small water providers decide to cease operations rather than shoulder the burden of UTC jurisdiction.

3. The Rulemaking Inquiry is Vague and Confusing

In addition to the disruptive effects the Staff's proposal would have on currently exempt homeowners associations, cooperatives, and mutual corporations, its proposed revisions to the rule are unconstitutionally vague and confusing. While the Staff has attempted to clarify the rule by adding definitions of "for hire" and "to the public," the proposal only serves to confuse the issue further.

For example, the proposed definition of "to the public" is "the water company holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or that portion of it that can be served by the company; or whether, on the contrary, it merely offers to serve only particular customers of its own selection." This definition is unclear and circular and does nothing to clarify the regulations. It is, in fact, language quoted almost verbatim from one of the leading cases regarding the appropriate scope of utility regulation, *see Inland Empire Rural Electrification,* 199 Wash. 527,

without fully incorporating the court's rationale for the rule statement. In that case, the supreme court concluded that an entity operating electrical facilities to provide electricity to its members was an "electrical company," but not a "public service corporation" subject to state regulation. The language now proposed does not at all serve to clarify this jurisdictional threshold as adopted by our courts 70 years ago or, accordingly, what entities may actually be subject to regulation. In fact, it makes the definition even less clear. For example, what does it mean to hold oneself out "impliedly"? How does the "public as a class" differ from "to the public"? How is a company serving the public different from a company that "merely offers to serve only particular customers of its own selection"? A water company always has a choice in which customers to serve--for example, companies may terminate service for customers who do not pay their bills--and a water company can, by its nature, only serve the "portion" of the public that its infrastructure can reach rather than the public "as a class." There is thus no practical difference in the two scenarios presented by this definition and no clarity regarding what types of water providers might still be considered exempt from jurisdiction under the new rule.

Additionally, while proposing to completely delete the longstanding jurisdictional exemption, at the same time, the Staff "proposes the Commission consider addressing the jurisdictional status of such entities, preferably in a policy statement, or in the rule. CR-101 Notice at 1. This proposal is contrary to Washington's Administrative Procedure Act (APA), which encourages agencies, as a means to "better inform and involve the public," to convert "longstanding interpretive and policy statements into rules." RCW 34.05.230(1). Here the Staff proposes converting how the Commission addresses this fundamental jurisdictional status issue from its current rule status, into an unknown and, to date, unformulated policy statement.[9] This proposal is directly contrary to the intent and public policies underlying the APA's rulemaking provisions.

Finally, there is no way to comprehend from the Staff's proposal how currently-exempt entities will be evaluated under the new rule or how jurisdiction would

[9] Specifically, the CR-101 Notice provides that "[s]taff proposes the Commission consider addressing the jurisdictional status of such entities, preferably in a policy statement . . ." The CR-101 Notice provides no notice of the staff's proposal of how that jurisdictional status would be addressed, when it may be "considered," or which entities would or would not be covered by any such future policy. The clear and unambiguous rule language now would be deleted, and there is no clear indiciation of what regulatory framework or policy would take its place. The public would no longer have the benefit of being able to look to the Commission's regulations for guidance as to classification status.

be enforced against entities who have, for decades, not been subject to Commission jurisdiction. Considering the costs of implementation and confusion stemming from such a far-reaching new rule, if the Commission decides to move forward with the proposed rulemaking, it should give strong consideration to including a grandfathering provision that would exempt currently-exempt entities from future regulation.

Thank you for your and the Staff's consideration of these comments. Please include my office on the distribution and mailing list for this Docket UW-131386.

Sincerely,

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cc: Donald D. Trotter, Senior Assistant Attorney General
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