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September 23, 2013

Comments of the Washington Rural Electric Cooperative Association

RE: Docket UW-131386, Rulemaking Inquiry to Consider the Need to Evaluate and Clarify Jurisdiction of Water Companies, WAC 480-110-255, Jurisdiction, and related rules

The Washington Rural Electric Cooperative Association ("WRECA") is the trade association representing the interests of the electric mutual companies and electric cooperatives that provide service to their members in the state of Washington. WRECA respectfully files these comments because 1) three of the mutual electric companies represented by WRECA also provide water service and 2) the proposed WAC revisions do not correctly apply controlling law which applies to the mutual companies and cooperatives represented by WRECA.

WRECA's primary concern with the proposed WAC revisions is the proposed repeal of WAC 480-110-255(2)(e) and (f) which provide categorical exemptions from commission regulation for certain providers of water service including homeowner associations, cooperatives and mutual corporations. WRECA acknowledges the proposed WAC revisions apply to the regulation of water companies. However, as noted above, the proposed revisions misconstrue well settled law which applies to electric mutual companies and electric cooperatives.

Therefore, WRECA opposes the proposed WAC revisions, specifically the proposed repeal of WAC 480-110-255(2)(e) and (f).

Review of established case law establishing that mutual companies and cooperatives are not subject to regulation by the UTC

The first case we reference is Inland Empire Rural Electrification, Inc., v. Department of Public Service of Washington.[1] Affirming the lower court in a declaratory judgment action, the Washington Supreme Court held that Inland Empire "[was] not a public service corporation and is, therefore, not subject to regulation by the [UTC]."[2]

The Washington Supreme Court applied Inland Empire in West Valley Land Co., Inc. v. Nob Hill Water Association.[3] In its December 4, 1986 ruling, the Supreme Court relied significantly on its previous Inland Empire ruling when it affirmed a lower court's ruling that Nob Hill "[was]

[1] Inland Empire Rural Electrification, Inc. v. Dept. of Pub. Serv. of Wash., 92 P.2d 258 (Wash. 1939)
[2] Id. at 263
[3] West Valley Land Co., Inc. v. Nob Hill Water Ass'n, 729 P.2d 42 (Wash. 1986)

not a public service corporation but rather a nonprofit cooperative . . . [and] not within the ambit of regulation of the UTC as a public service corporation."[4]

In both cases, the Supreme Court focused on the relationship between the corporations and the members receiving the corporations' services. In Inland Empire, the Supreme Court said:

> A corporation becomes a public service corporation, subject to regulation by the [UTC], only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility, or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.[5]

The Supreme Court then observed that Inland Empire:

> . . . 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 themselves own. . . 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.[6]

In Nob Hill, the Supreme Court applied the Inland Empire test to determine whether Nob Hill, a water company organized as a nonprofit cooperative, was subject to UTC regulation. The Supreme Court noted:

> Nob Hill does not conduct its operations for gain to itself or for the profit of investing stockholders, but functions entirely on a cooperative basis . . . The members of Nob Hill do not stand in the same position as members of the general public needing the protection of the UTC in the matter of rates and service supplied by an independent corporation.[7]

The Supreme Court reasoned: "In a cooperative, the consumers have a 'voice' in the management of its affairs. . . Equality of representation is not required by Inland Empire; all that is requisite is a voice in the cooperative. Since all members are directly or derivatively represented, the requirement is met."[8]

The Supreme Court concluded: "Nob Hill is a nonprofit cooperative. It is not within the ambit of regulation of the UTC as a public service corporation."[9]

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[4] Id. at 48
[5] Inland Empire, 92 P.2d at 262-63
[6] Id. at 263-64
[7] Nob Hill, 729 P.2d at 47
[8] Id. at 47-48
[9] Id. at 48

The Supreme Court excluded nonprofit cooperatives from regulation by the UTC.
The Supreme Court's rulings in Inland Empire and Nob Hill unequivocally determined that electric companies and water companies that are nonprofit mutual companies or cooperatives are not subject to regulation by the UTC, basing its reasoning upon an examination of the purpose for UTC regulation of electric and water companies.

Consumers of utility services and products are usually "captive" to a single service provider and don't have competitive options that the open market generally provides consumers. This monopoly arrangement is largely due to the complexity and costs required to provide the services offered by electric companies and water companies. However, such a "monopoly market" creates a conflict of interest and puts the purchasing public in a precarious position when the utility is in business to make a profit for its owners (shareholders), most of whom will not be customers of the utility. Without an independent entity to balance the interests of the consuming public against the interests of the owners of the monopoly who seek to profit from the business, the customers are severely disadvantaged. The legislature accordingly established the UTC to act as a "referee", providing a balance between the interests of the consumer and the owner, and thereby resolving the conflict of interest.

In the case of electric or water companies that are mutual companies or cooperatives, the owners of the company and the consumers of the product or service *are the same individuals*. Any purported protection for consumers provided by UTC regulation would be duplicative and thus unnecessary, because the consumers themselves are also the owners. As such, the interest of the consumer and the owner are aligned. Therefore, since there is no conflict of interest, regulation by the UTC is not necessary and is inappropriate. That is the heart of the Supreme Court's rationale in both Inland Empire and Nob Hill when it excluded mutual companies and cooperatives from UTC regulation.

We note that the Supreme Court pointed out several important characteristics of mutual companies and cooperatives which describe the relationship between the consumer/owners of the utilities and the utilities as entities.[10] However, at no time did the Supreme Court require that any or all of the noted characteristics be used as a legal test to be met in order for the mutual company or cooperative to retain status as a private corporation; they were not outcome determinative. It simply ruled that such corporations are not public service corporations subject to regulation by the UTC, and listed those characteristics as salient factors it considered in reaching its conclusion.

The WAC provisions proposed to be repealed should be retained.
WAC 480-110-255(2)(e) provides a categorical exemption from commission regulation for homeowner associations, cooperatives and mutual corporations that provide water service to their members, and properly applies the law from Inland Empire and Nob Hill. This provision should not be repealed.

[10] Inland Empire, 92 P.2d at 263-64; Nob Hill, 729 P.2d at 47-48

WAC 480-110-255(2)(f) provides a categorical exemption from commission regulation for homeowner associations, cooperatives and mutual corporations that provide water service to non-members under specific conditions, and marries the Supreme Court's rulings from Inland Empire and Nob Hill with a provision in statute that exempts small water companies from UTC regulation.[11] This provision should not be repealed.

According to the CR-101 for Docket 131386, the UTC is concerned that there may be entities seeking to avoid regulation by the UTC by virtue of WAC 480-110-255(2)(e) and/or (f). If so, there are remedies for determining whether such entities are in fact exempt from UTC regulation available to the UTC that do not conflict with Washington law. The existence of the WAC provisions proposed to be repealed is not the problem. The provisions should be retained because they accurately reflect the law. Any question concerning an entity's exemption from UTC regulation arising from the provisions should be addressed on a case by case basis.

Conclusion

WRECA opposes the proposed repeal of WAC 480-110-255(2)(e) and (f).

We appreciate your consideration of our comments.

Respectfully submitted,

Kent Lopez, General Manager
Washington Rural Electric Cooperative Association

[11] RCW 80.04.010(30)(b)