

Docket No. UW-170924 - Vol. I

Hand v. Rainier View Water Company, Inc.

December 18, 2017



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BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

Sarah Hand,) DOCKET NO. UW-170924
))
Complainant,))
))
vs.))
))
Rainier View Water Company,))
Inc.,))
))
Respondent.))

PREHEARING CONFERENCE, VOLUME I

Pages 1-23

ADMINISTRATIVE LAW JUDGE GREGORY J. KOPTA

December 18, 2017

1:30 p.m.

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34 * * * * *

35

1 OLYMPIA, WASHINGTON; DECEMBER 18, 2017

2 1:30 P.M.

3 --oOo--

4 P R O C E E D I N G S

5

6 JUDGE KOPTA: All right. Then let's be on
7 the record in Docket UW-170924, captioned Sarah Hand v.
8 Rainier View Water Company, Inc. I am Gregory J. Kopta,
9 the administrative law judge who will be presiding over
10 this matter, and we are here today on Monday, December
11 18th, 2017, for a prehearing conference.

12 Let's begin by taking appearances, and we'll
13 start with those who are in the room. Because I have
14 filings from all of you, I just need your name and law
15 firm, if applicable, and who you represent.

16 Mr. Finnigan.

17 MR. FINNIGAN: Richard Finnigan representing
18 Rainier View Water Company.

19 JUDGE KOPTA: And on the phone for Staff?

20 MR. ROBERSON: Assistant attorney general
21 Jeff Roberson, on behalf of Staff.

22 JUDGE KOPTA: And for Ms. Hand?

23 MR. MALDEN: Nigel Malden, and I'm here with
24 my paralegal, Anna Lee.

25 JUDGE KOPTA: All right. Thank you.

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1 Mr. Malden, if you would make sure you are close to the
2 phone when you're talking, you're a little bit faint.

3 MR. MALDEN: Okay. I've actually got you on
4 speakerphone. I'll take you off speakerphone.

5 JUDGE KOPTA: That's probably going to be
6 helpful.

7 MS. HAND: Gretchen Hand is also on the
8 phone.

9 JUDGE KOPTA: All right. Thank you,
10 Ms. Hand.

11 MS. HAND: Sarah Hand is also on the phone.

12 JUDGE KOPTA: All right. Then we have you
13 as well. And you're -- you will be represented by
14 counsel; is that correct, Ms. Hand?

15 MS. HAND: Yes.

16 JUDGE KOPTA: All right. Thank you.

17 First thing is usually interventions. I
18 haven't received any petitions to intervene nor have I
19 heard from anybody on the phone who wishes to intervene,
20 so I'm assuming that there are none. And hearing
21 nothing, there are no interventions, so the parties
22 stand as they are currently represented.

23 The next issue is discovery. Do the parties
24 believe that they need to have the Commission's
25 discovery rules available?

1 MR. FINNIGAN: Yes, Your Honor. This is
2 Richard Finnigan. I would so ask.

3 JUDGE KOPTA: All right. Then we will make
4 them available. And since we are having discovery, is
5 there a need for a protective order?

6 MR. MALDEN: This is Nigel speaking for
7 Ms. Hand. I'd have to see discovery to know whether
8 there's a need for a protective order.

9 JUDGE KOPTA: Well, usually a protective
10 order would be issued if there is a need for
11 confidential information as defined under RCW 80.04.095.
12 So I don't know. That would probably be the Company
13 that would have those kinds of concerns. But we don't
14 need to decide that today. It may be that as discovery
15 progresses, if there is a need, then I can receive a
16 request and we can enter an order at that time.

17 Is that acceptable, Mr. Finnigan?

18 MR. FINNIGAN: Yes, it is.

19 JUDGE KOPTA: All right. Then that's what
20 we'll do.

21 The next and last issue that I have on my
22 list is the schedule in this case. As the parties are
23 aware, I had requested briefing on the Commission's
24 jurisdiction and ability to provide remedies to
25 Ms. Hand, and I received responses from all three

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1 parties. It seems as if there is consensus that the
2 Commission has jurisdiction, but there is not consensus,
3 or at least I would like to have a better sense, of what
4 the issues are that we will be litigating going forward.
5 I know the Company had recommended that we dismiss this
6 case and initiate a new one with the issues raised that
7 have been raised by Ms. Hand in superior court that have
8 been deferred back to the Commission essentially by the
9 superior court.

10 I don't know that we need to do that, but my
11 inclination would be to have Ms. Hand or her counsel
12 file a revised complaint so that we cover the issues
13 that are properly before the Commission in light of
14 superior court's decision.

15 Mr. Finnigan, does that accord with your
16 understandings?

17 MR. FINNIGAN: I would have no objection to
18 that procedure.

19 JUDGE KOPTA: All right.

20 MR. FINNIGAN: My concern is I want to be
21 sure I have a clear understanding of what issues are
22 involved in this matter, so that would be my primary
23 concern.

24 JUDGE KOPTA: And I share your concern.

25 Mr. Malden, is that acceptable to you?

1 MR. MALDEN: It is, but I remain really
2 confused since it was not me that initiated the
3 complaint. It was the WUTC that on its own motion
4 initiated the complaint asserting it had jurisdiction.
5 And I'm really unclear on how it is -- how I'm supposed
6 to go about that, determining what the scope of that
7 jurisdiction is, and I just don't really quite
8 understand it. I didn't file the complaint, first
9 complaint. I was told the WUTC had no jurisdiction. If
10 the WUTC wishes to assert jurisdiction, should it not be
11 the one to determine and say what it is deciding? What
12 it is asserting jurisdiction over?

13 JUDGE KOPTA: Well, Mr. Malden, and just for
14 when you next speak, if you would get closer to the
15 phone because we are having a hard time hearing you. We
16 initiated this proceeding in response to a complaint
17 that we received from Ms. Hand. And in response to that
18 complaint, the Commission initiated this adjudication.
19 I recognize that there is a history, that this did come
20 before the Commission in an open meeting. Subsequently,
21 Ms. Hand filed a complaint in superior court. And
22 during the course of the proceedings before the Court,
23 the Court dismissed this -- the case there because
24 the -- believed that the Commission has primary
25 jurisdiction over at least some of the issues that

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1 Ms. Hand raised in her complaint. In response to that
2 action, the Commission initiated this particular
3 adjudication.

4 So from my perspective, I am not fully aware
5 of the Court's decision or all of the issues that were
6 presented to the Court in terms of which ones the
7 Commission has primary jurisdiction over, and I'm
8 relying on you and the other parties to make sure that
9 whatever issues the Commission has primary jurisdiction
10 over are presented for adjudication.

11 So as Mr. Finnigan indicated earlier, my
12 interest is to make sure that we are covering those
13 issues. And I believe as the party who is -- initiated
14 this proceeding way back when, that it would be
15 incumbent on you to inform the Commission what issues
16 you wish for us to adjudicate.

17 MR. MALDEN: Well, okay. Like I say, it's
18 odd to me, because I think the WUTC has stated in
19 writing it doesn't have jurisdiction to decide the issue
20 that needs to be decided. But if the parties wish for
21 me to write up another complaint and address it, then so
22 be it. I'm just reluctant to get into a long process
23 which is going to end in the WUTC once again saying oh,
24 we don't have jurisdiction.

25 JUDGE KOPTA: Well, that's not a

1 determination that I am prepared to make at this point,
2 Mr. Malden. That's why I asked for the briefing, to at
3 least from an initial point of view, determine what the
4 parties' views are on what the Commission's jurisdiction
5 is. And as I read the response that you provided as
6 well as the response that the Company and Commission
7 Staff provided, there is agreement that there are at
8 least some issues that are within the Commission's
9 jurisdiction.

10 So I don't think that the issue that we have
11 before us is whether or not the Commission has
12 jurisdiction. It is instead, what is the extent of the
13 Commission's jurisdiction and what remedies can we
14 provide if it is demonstrated that the Company is
15 somehow operating in violation of Commission statutes,
16 rules, or orders.

17 So what I would like from you is to present
18 in a complaint the issues that you believe the
19 Commission has jurisdiction over and the issues that you
20 would like the Commission to render a determination on.

21 MR. MALDEN: Okay.

22 JUDGE KOPTA: All right. Then we will need
23 a time frame for that. When do you expect that you
24 would be able to submit that for filing?

25 MR. MALDEN: How about ten days?

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1 JUDGE KOPTA: All right. So that would be
2 January 7th? Which is on the weekend, so it would be
3 January 8th, I think. Monday, January 8th. Am I -- I
4 don't have a calendar.

5 MR. FINNIGAN: That is correct.

6 JUDGE KOPTA: All right.

7 MR. MALDEN: That would be fine.

8 JUDGE KOPTA: All right. Then we will
9 anticipate -- or let's put it this way, we will adopt
10 that date as the date by which you will file a revised
11 complaint.

12 Mr. Finnigan, how much time would you like
13 to respond? Or would you like an opportunity to
14 respond?

15 MR. FINNIGAN: Well, yeah. Yes, I would.
16 I'm trying to remember what the rule is on that. Isn't
17 it 20 days?

18 JUDGE KOPTA: 20 days is the default, yes.

19 MR. FINNIGAN: Is the default. I -- I -- I
20 would like to stay with the default, please, under the
21 Commission's rules.

22 JUDGE KOPTA: All right. Then that would be
23 the 28th, although, again, not having a calendar, I
24 don't know what day of the week that falls on. That
25 would probably be the 29th, I'm thinking.

1 MR. ROBERSON: The 29th is a Monday.

2 JUDGE KOPTA: So let's make it the 29th. I
3 would hope that we would be able to establish other
4 procedural schedule guidelines at this point.

5 Am I being overly optimistic, Mr. Finnigan?

6 MR. FINNIGAN: I don't think so. I mean,
7 the question I had in my mind driving over here this
8 afternoon was whether we're going to have prefiled
9 testimony. And if that's the case, it's obvious we can
10 set up the schedule for that and -- and proceed. I
11 think that would be the preferred way to do it. I think
12 that helps discovery -- makes discovery shorter and
13 keeps everybody focused on the issues.

14 JUDGE KOPTA: I would agree that that is my
15 preferred outcome.

16 Mr. Malden, I recognize that you don't
17 regularly practice before the Commission, so I'm not
18 sure how familiar you are with our procedures. But
19 often in -- or generally in cases such as this, we will
20 have testimony that is prefiled on behalf of each of the
21 parties. Usually the complainant would file their
22 testimony first and then after a period of time,
23 responsive testimony would also be filed, and then we
24 schedule a hearing for cross-examination on that
25 prefiled testimony. Are you familiar at all with that

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1 type of process?

2 MR. MALDEN: You say "prefiled testimony,"
3 do you mean a declaration or affidavit?

4 JUDGE KOPTA: Well, it's something like
5 that. It's actually testimony in Q and A format that is
6 essentially what your witness would say if you asked the
7 questions live. So it's just simply written down
8 instead.

9 MR. MALDEN: The problems that I have with
10 this that I can see right now is I have to rely on the
11 testimony of State employees who, number one, aren't
12 willing to cooperate with me and number two, even if
13 they were willing, they wouldn't without a lawyer. And
14 I'm referring to specifically, for example, the DOH
15 employees. And their testimony is critical because
16 they're going to tell you, the DOH is going to tell you,
17 that we're not aware of a single complaint forwarded by
18 the WUTC or by Rainier View groundwater.

19 And we know from that, as I put in my brief,
20 that there is a very, very serious problem when the DOH
21 has no idea of what's going on, and I couldn't possibly
22 bring that information to you other than through live
23 testimony where I have the ability to subpoena
24 government employees to compel their testimony. They
25 are not going to voluntarily cooperate with me.

1 And so I don't know that I'm comfortable
2 with -- I mean, what I would ask is whether we can have
3 a hearing where we subpoena witnesses and they testify
4 live and they're subject to both direct and cross.

5 JUDGE KOPTA: Well, we have engaged in that
6 process in the past. It is somewhat difficult, but it
7 is possible. There's also through the discovery
8 process, you are entitled to seek to depose any
9 witnesses, even third parties, although that is
10 generally not allowed, to obtain the information that
11 you need to support your case.

12 MR. MALDEN: Well, the problem with that is
13 the idea of shifting to the consumer the cost of
14 depositions of government officials makes no sense to
15 me, especially when the WUTC is telling us up front that
16 the most they can do is maybe order a partial refund of
17 the water bill. It's not reasonable for me to incur
18 thousands of dollars going around taking depositions of
19 State employees. I shouldn't have to do that.

20 You know, if I could call up the DOH and
21 they would talk to me on the phone and they answer
22 questions and commit to doing the declaration, I would
23 be very happy to do it that way, but I know they won't.
24 They're not going to talk to any member of the public in
25 a case like this unless they have an AG present. And

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1 it's absurd with this entire system designed to protect
2 the consumer that these are the roadblocks that are put
3 up. And I don't want to agree to spend all that money
4 to secure deposition testimony. I think that I would
5 like, if I can, to have [inaudible] served subpoenas and
6 compel the testimony of government employees who
7 otherwise will not cooperate.

8 JUDGE KOPTA: Well, at this point,
9 Mr. Malden, I have no knowledge about what the
10 Department of Health would do in these circumstances.
11 So I'm -- I recognize that you have much more
12 familiarity with these issues than I do, having ventured
13 to superior court, but that is one of the aspects of
14 adjudication or litigation that is rather inescapable.
15 You have the burden to prove that the Company is not
16 acting lawfully, and if you need the testimony of
17 employees of another government agency to make -- to
18 carry that burden, then it is up to you to -- to be able
19 to do that. And I recognize that it is an expense and
20 it's unfortunate, but I don't really see a way around it
21 because if you don't do it, then I don't know who else
22 would.

23 So at this point, I leave it up to you. If
24 you want the Commission to resolve the case and you
25 believe that there is information that you need from the

1 Department of Health, then I think it's incumbent upon
2 you to obtain that information. We can discuss whether
3 that would be in the form of prefiled testimony or live
4 testimony. We certainly do not want to encourage or
5 incur -- have you incur expenses that are unnecessary,
6 and it may be that, rather than prefiled testimony, that
7 we would have live testimony. I have not made a
8 decision on that, but ultimately, you will need to
9 provide the witnesses and the information that the
10 Commission needs to make a determination.

11 MR. MALDEN: Yes, I definitely understand
12 that obligation. I'm just saying if I have the option,
13 if I have the ability to compel testimony by subpoena to
14 the hearing, then that's how I want to do it. Because
15 if I have to submit written summaries of what people
16 might say, I mean, that is not consistent with due
17 processes rights of citizens in this country.

18 I cannot -- I cannot get Department of
19 Health or other State government employees to cooperate
20 voluntarily in something like this. They're all going
21 to require a subpoena to testify, whether it be at a
22 deposition or at a hearing. And what I'm suggesting is
23 I'd rather not have the consumer, citizen, incur the
24 cost of the deposition, thousands of dollars gone. I
25 think it would be much fairer and much more appropriate

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1 to have power of subpoena tell an individual to attend a
2 hearing in Olympia and testify live, and I'd be very
3 happy to make sure that I'm efficient, I'm quick with my
4 questions, I'm totally prepared and so we're not wasting
5 time.

6 But I'm trying to avoid the situation where
7 we have to personally spend thousands of dollars trying
8 to compel testimony in a deposition format to present,
9 because I think that live testimony's better and is far
10 more economical for a consumer face-to-face for a
11 situation like this.

12 JUDGE KOPTA: Well, again, I don't know what
13 the Department of Health's response will be. So I'm not
14 willing at this juncture to assume that they would not
15 cooperate.

16 But, Mr. Finnigan, you have been listening
17 to this exchange, do you have anything to contribute in
18 terms of what the Company's preference would be in terms
19 of how we proceed?

20 MR. FINNIGAN: My preference remains the
21 prefilled testimony route. If we go another route for
22 live testimony, we'd have to have dates for witness
23 lists, we'd have to have time to take discovery of
24 whoever's on the witness list and proceed that way. So
25 it's not going to be, I don't think, any appreciably

1 quicker route, and I couldn't say whether or not it
2 would be more or less expensive for the complainants,
3 but the complainants are the ones that brought the
4 complaint, and they -- it's -- it's going to be their
5 obligation to put on a case.

6 And it's my company -- my client's right to
7 be able to be prepared for whatever case they put on.
8 So if we don't go the prefiled testimony route, we'll
9 need to come up with an alternative schedule that's got
10 firm dates for witness lists, firm dates for reply
11 witness lists, and time to take discovery in the interim
12 so that everybody's equally prepared for a live hearing
13 if that's the route we go.

14 So I don't see it -- the reason you didn't
15 hear from me earlier was I was trying to figure out how
16 in the world this -- the route of live testimony would
17 be any cheaper than prefiled testimony, and I wasn't
18 coming up with any strong answers so...

19 JUDGE KOPTA: Well, I am not either, because
20 I certainly can anticipate if there are third-party
21 witnesses such as employees of the Department of Health,
22 that there would -- would necessarily involve some
23 discovery, and it may be that the Company would initiate
24 the deposition. But whether the Company initiated the
25 deposition or the complainants did, there would still be

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1 a deposition. I was a litigator myself, and I would be
2 very loathe to walk into a hearing room with a witness
3 who I had no idea what he or she was going to say.

4 So I don't know that there are going to be
5 any cost savings, as Mr. Finnigan points out, with going
6 a live route as opposed to the prefiled testimony route.
7 But my belief at this point is that we're not going to
8 resolve that today. So what I'm going to have the
9 parties do is to confer outside of this hearing room and
10 see if they can agree on a format and schedule for this
11 case. I would ask that they provide anything that they
12 can agree on to me by the time that the revised
13 complaint is filed on January 8th.

14 If you cannot agree, then I would ask for
15 proposals from each party as to how they would prefer to
16 proceed and what deadlines should be established,
17 including a proposed evidentiary hearing date. So both
18 of those, whatever you are able to agree with, and if
19 necessary your individual proposals, I would ask that
20 you would file those by Monday, January 8th.

21 Mr. Finnigan?

22 MR. FINNIGAN: Your Honor, do you have any
23 dates where you know the hearing room and your schedule
24 would not allow you to appear? I would hate to pick a
25 hearing date and then have to start over again.

1 JUDGE KOPTA: You are welcome to contact me
2 or my legal assistant to check on dates if -- if you
3 need to do that, and certainly -- we would rather you do
4 that so that we don't go back and forth saying well, you
5 know, pick another date because that one doesn't work.
6 So yes, if you get to that point, if you can agree on a
7 hearing date. But if not, if you have individual
8 proposals, then please contact us to make sure that the
9 hearing room and I am available on whatever date it is
10 that you propose.

11 MR. FINNIGAN: Okay.

12 JUDGE KOPTA: Haven't heard anything from
13 Mr. Roberson. Are you -- have anything to contribute,
14 Mr. Roberson?

15 MR. ROBERSON: I do not. I don't think
16 Staff has any particular format preference, so I'll talk
17 to Staff and then I'll speak to the other parties.

18 JUDGE KOPTA: All right. Then that's how we
19 will proceed.

20 Mr. Malden, does that make sense to you?

21 MR. MALDEN: The only thing I wasn't sure on
22 is when you asked for an additional document to be filed
23 on January 8th. Do you mean that's confirmation of
24 whether or not Mr. Finnigan and I have agreed on a plan,
25 and if we haven't, then we submit our own by January

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1 8th?

2 JUDGE KOPTA: Yes, on January 8th I would
3 like either an agreed schedule from the parties or
4 individual schedules from each party as to what you are
5 proposing that the Commission adopt and then I will
6 decide.

7 MR. MALDEN: Okay. And the agreed schedule,
8 that would end with the last item, the date of the
9 hearing, right?

10 JUDGE KOPTA: It can, yes. I mean, often we
11 will have post-hearing briefing, but that can await
12 another date. At this point, I would just like to know
13 the hearing date and any prefiled testimony filing
14 dates. Or if we're going to have the live testimony or
15 you're proposing live testimony, that there be times
16 when witness lists are submitted and other prehearing
17 deadlines are established; is that clear?

18 MR. MALDEN: If I may ask one form of
19 question on that. In general, are you thinking -- how
20 far down the road are we thinking this hearing would be
21 set?

22 JUDGE KOPTA: That is entirely up to the
23 parties. I do not have any preconceived notion of when
24 the hearing will be. I don't know how long you will
25 need to prepare, I don't know how long discovery will

1 take. That's really something I look to the parties to
2 provide me. I mean, I can certainly have my own ideas
3 about how long it might be, but you are much better
4 informed than I am at this stage.

5 MR. MALDEN: Okay.

6 JUDGE KOPTA: All right, then. Is there
7 anything further that we need to address today?

8 MR. FINNIGAN: No, Your Honor.

9 MR. MALDEN: Actually, I guess one question
10 that I have about the testimony. We actually do have
11 deposition transcripts taken to DOH employees. In those
12 depositions, Rainier View did have an attorney present
13 at the time of those depositions, but it wasn't in the
14 context of this administrative hearing. I guess one
15 question I might have is whether those depositions can
16 be used in lieu of submitted statements that you
17 described earlier.

18 JUDGE KOPTA: As far as I'm concerned, it's
19 a possibility to have depositions be a substitute for
20 prefiled testimony as long as the witness is then
21 available during the evidentiary hearings for
22 cross-examination on that testimony.

23 MR. MALDEN: Okay. All right. Well, that
24 actually might be a solution for me to discuss with
25 Mr. Finnigan, then. Okay. I appreciate it.

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1 JUDGE KOPTA: All right. I will leave that
2 to your discussion, and hearing nothing further, we are
3 adjourned. Thank you.

4 (Adjourned at 1:59 p.m.)

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C E R T I F I C A T E

STATE OF WASHINGTON

COUNTY OF THURSTON

I, Tayler Garlinghouse, a Certified Shorthand Reporter, in and for the State of Washington, do hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill and ability.



Tayler Garlinghouse

Tayler Garlinghouse, CCR 3358

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