

BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

SANDY POINT IMPROVEMENT  
COMPANY,

Respondent.

DOCKET UW-121408

SANDY POINT IMPROVEMENT  
COMPANY'S MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS  
RESPONSIVE TO SANDY POINT'S  
DATA REQUEST NO. 4

1. Respondent Sandy Point Improvement Company ("Sandy Point"), by and through its counsel of record, Joseph Rehberger and Cascadia Law Group PLLC, files this Motion to Compel pursuant to WAC 480-07-375(1)(c), -405(3), and -425.

**RELIEF REQUESTED**

2. Sandy Point moves the Commission for an order compelling production of documents responsive to Sandy Point's Data Request No. 4 to the UTC Staff.

## STATEMENT OF FACTS

3. On November 21, 2012, UTC posted Order 01, Order Initiating Special Proceeding Under RCW 80.04.015; Complaint Against Rates and Charges; and Complaint For Penalties (“Order 01”) to Docket No. UW-121408.

4. On November 21, 2012, UTC also posted its Investigation Report – Sandy Point Improvement Company (UW-121408) dated November 2012 (the “Investigation Report”) to Docket No. UW-121408. The Investigation Report describes its purposes as:

The purpose of this investigation is to determine whether Sandy Point Improvement Company (Sandy Point) is conducting business subject to regulation under Revised Code of Washington (RCW) 80.28 and is performing any act requiring approval of the Washington Utilities and Transportation Commission without securing such approval.

The Investigation Report describes its scope as:

The scope of this investigation includes an analysis of information related to whether Sandy Point is providing water services to the public, and, if so, whether those services are subject to the commission’s jurisdiction.

5. At the end of the Investigation Report, the UTC Staff makes purported conclusions regarding Sandy Point’s jurisdictional status, and also makes the following recommendation:

Staff recommends the commission issue an order initiating a classification proceeding under RCW 80.04.015 to determine whether Sandy Point is conducting business subject to regulation under Title 80 RCW and WAC 480-110 and is performing any act requiring approval of the commission.

Staff further recommends penalties in the amount of \$16,500, calculated at \$100 per customer (119 Class C customers/shareholders and 46 non-shareholder customers) for a one month period, for failure to file a tariff with the commission as

required by RCW 80.28 and WAC 480-110-433(3). Staff may recommend increasing the penalty depending on the date Sandy Point Class C customer/shareholders rose above the threshold of 99 customers and met the jurisdictional criteria under WAC 480-110-255.

6. The Investigation Report cites to and includes nine separate documents as attachments, identified separately as Attachment A through Attachment J, inclusive. Attachments A through Attachment H were included in the copy of the Investigation Report provided to Sandy Point, purportedly in support of the analysis, conclusion, and recommendation included in the Investigation Report. Attachments I and J were excluded from the copy of the Investigation Report provided to Sandy Point.

7. In support of the UTC Staff's analysis, conclusion, and recommendation, the Investigation Report states:

Staff sought legal advice from the Attorney General's Office to determine whether Sandy Point is a water utility subject to commission regulation. On September 6, 2012, Donald T. Trotter, Assistant Attorney General, Utilities and Transportation Division, sent a memorandum to commission regulatory staff. After research and analysis of the issues, Mr. Trotter concluded that Sandy Point is likely subject to commission jurisdiction.

As basis for this statement, UTC Staff refers and cites "Attachment I, September 6, 2012, Memo from Donald Trotter, Assistant Attorney General, Utilities and Transportation Division," referring the reader to "see" such analysis and conclusion.

8. The Investigation Report goes on to state:

Mr. Trotter sent a supplemental memorandum to regulatory staff on September 20, 2012, after being informed that Sandy Point had redeemed 250 Class B shares. Mr. Trotter's supplemental memorandum did not change his opinion that sufficient facts exist to support a recommendation that the commission initiate a classification proceeding for Sandy Point.

As basis for this statement, UTC Staff refers and cites “Attachment J, September 20, 2012, Memo from Donald Trotter, Assistant Attorney General, Utilities and Transportation Division,” again referring the reader to “see” such analysis and recommendation.

9. Both Attachment I and Attachment J were included in the original Investigation Report. However, when the UTC provided a copy of the Investigation Report to Sandy Point the UTC excluded these attachments. The UTC also excluded Attachment I and Attachment J from the copy of the Investigation Report made publicly available through the online docket for UW-121408.

10. On information and belief, the UTC Staff submitted its Investigation Report to the Commission and/or the Commission’s Administrative Law Division and Administrative Law Judge (ALJ) of UTC Staff’s conclusions and recommendations contained within the Investigation Report. The Commission’s Administrative Law Division and ALJ relied on the Investigation Report (including the attached memoranda) in making its probable cause determination as to Order 01. As the UTC Staff explains, “Mr. Greg Kopta reviewed the investigation report and made the decision to initiate the proceeding” against Sandy Point. *See* Declaration of Joseph A. Rehberger (“Rehberger Decl.”) at Exhibit A. The same day UTC Staff posted the Commission’s Order 01, UTC Staff also posted their Investigation Report as support for the Order 01. The copy of the Investigation Report posted now excludes Attachment I and Attachment J.

11. On January 16, 2013, Sandy Point delivered its First Set of Data Requests to WUTC, which included a request for Attachments I and J. That data request was as follows:

## **SANDY POINT DATA REQUEST NO. 4:**

Please produce Attachment I and Attachment J to the Investigation Report, described respectively as a September 6, 2012 Memo from Donald Trotter, Assistant Attorney General, Utilities and Transportation Division and a September 20, 2012 Memo from Donald Trotter, Assistant Attorney General, Utilities and Transportation Division.

Rehberger Decl. at Exhibit B.

12. On January 30, 2013, Sandy Point received an electronic copy of the UTC Staff's response, objecting to Data Request No. 4 and refusing to produce the two documents, asserting protection by the attorney client privilege and deliberative process privilege. *See* Rehberger Decl. at Exhibit C.

### **STATEMENT OF ISSUES**

13. Whether the Commission should compel UTC Staff to produce Attachment I and Attachment J to the Investigation Report?

### **EVIDENCE RELIED UPON**

14. The evidence relied upon for this Motion is included in the accompanying Declaration of Joseph A. Rehberger, together with the pleadings and filings already on file with the Commission in this matter.

### **ARGUMENT AND AUTHORITY**

#### **UTC Waived Any Attorney-Client Privilege**

15. Because the UTC expressly cited to and relied on Attachment I and Attachment J in its Investigation Report, and presented that Investigation Report to the ALJ in support of its probable cause determination, it waived its right to then also assert those communications are privileged

16. The attorney-client privilege is not absolute and can be waived. *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 833, 394 P.2d 681, 684 (1964). Under the common-law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy. *Ideal Elec. Sec. Co., Inc. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997) (“[A party asserting attorney-client privilege] cannot be allowed, after disclosing as much as he pleases, to withhold the remainder”). As other courts have explained, a party places attorney advice at issue when a party specifically pleads reliance on an attorney’s advice as an element of a claim or defense or voluntarily testifies regarding portions of the attorney-client communication. *E.g., Cox v. Burdick*, 907 A.2d 1282, 1286 (Conn. App. 2006) (citing cases). In those instances the party has waived the right to continued confidentiality. *Id.*

17. The UTC waived its right to assert the attorney-client privilege through its affirmative and voluntary act of placing the alleged protected information at issue, thereby making it relevant to the case. *See cf. Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975). Washington courts recognize the principle that the claim of attorney-client privilege is “not consistent with selective disclosure of the privileged documents” when the “claimant decides that the confidential materials can be put to other beneficial purposes.” *Seattle Nw. Sec. Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 739, 812 P.2d 488 (1991) (quoting *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982)).<sup>1</sup> Here the UTC decided that the allegedly confidential

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<sup>1</sup> *See also cf. United States v. Voigt*, 877 F.2d 1465 (10th Cir.1989 (voluntary disclosure of the substance of the attorney-client privilege waives that privilege); *see also United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir.1982) (Selective disclosure of a communication may also waive the privilege as to all related portions of the communication, particularly if the selective disclosure is used to gain a tactical litigation advantage.). Put another way, a party litigant cannot use the attorney-client privilege as both a sword and a shield by selectively using the

materials could be put to beneficial use in this case by supporting the Investigation Report and making a case to the ALJ in support of the UTC's probable cause determination. It further held out the advice of counsel to the public in documents filed in this case and in documents publicly available. It cannot at the same time deny Sandy Point the right to review the documents relied on.

18. The UTC could have made a probable cause determination and decision to initiate these proceedings without submitting an opinion of legal counsel. It did not. The UTC could simply have completed a factual investigation and provided those facts to the ALJ to determine whether probable cause existed. Rather, the UTC submitted two legal memoranda opining and alleging, in known part, that "Sandy Point is likely subject to commission jurisdiction" and that "sufficient facts exist to support a recommendation that the commission initiate a classification proceeding for Sandy Point." It then explains that "Mr. Greg Kopta reviewed the investigation report and made the decision to initiate the proceeding" against Sandy Point. Rehberger Decl. at Exhibit A. By relying on these statements and memoranda to support the probable cause determination, the UTC voluntarily placed these opinions at issue. The UTC cannot then turn around and claim privilege as to those same memoranda. Washington law, as well as basic notions of fairness and equity, compels the disclosure of these memoranda now.

### **Deliberative Process Exemption Does Not Allow Continued Non-Disclosure**

19. Separate from the attorney-client privilege, the UTC claims that the two memoranda are exempt from production based on the so-called deliberative process exemption. The deliberative process exemption is an exemption under Washington's Public Records Act,

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privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.

chapter 42.56 RCW (the “PRA”), exempting certain documents from disclosure under the PRA, whether those documents consist of “preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended . . . , except that a specific record shall not be exempt when public cited by an agency in connection with any agency action.” RCW 42.56.280(1)(i).

20. First, RCW 42.56.280(1)(i) specifically provides that any such record “shall not be exempt when public cited by an agency in connection with any agency action.” Here, the UTC expressly cited the two memoranda in connection with the UTC’s investigation report, probable cause determination, and Order 01. RCW 42.56.280(1)(i) specifically prohibits withholding of documents expressly relied on.

21. Second, even if this exemption applied at one point, it no longer applies. The purpose of the deliberative process exemption is to permit “frank and uninhibited discussion during the decision-making process.” *West v. Port of Olympia*, 146 Wn. App. 108, 116, 192 P.3d 926 (2008) (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978)). Washington courts have recognized that “[t]he purpose of this exemption ‘severely limits its scope.’” *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wash. 2d 243, 256, 884 P.2d 592, 599 (1994). However, once the agency implements the policies or recommendations such records are no longer exempt under the deliberative process exemption. *Port of Olympia*, 146 Wn. App. at 117. Here, the UTC has filed its Investigation Report, incorporating the memoranda, made its probable cause determination, and initiated a Special Proceeding against Sandy Point. Because the UTC has now acted, the memoranda cannot be exempt under the deliberative process exemption.



22. Sandy Point is and remains prejudiced by the UTC's refusal to disclose the two memoranda.

### CONCLUSION

23. Sandy Point respectfully requests the Commission compel production of Attachments I and J to the UTC's Investigation Report in response to Sandy Point's Data Request No. 4 to the UTC Staff.

DATED this 20<sup>th</sup> day of February 2013.

CASCADIA LAW GROUP PLLC



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