[Service Date July 12, 2002]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID and JANIS STEVENS, PAUL CARRICK, ALANand JIM WIEMEYER, CHRIS and CECILY FLAVELL, STAN And KAY MILLER, MICHAEL and COLLEEN STOVER, RICHARD and PAULA RUSSELL, BEN G. MARCIN, RONALD and VICTORIA MONTGOMERY, CHARLES and MICHELLE CLARK, PAUL SCHULTE SUE PERRAULT, and JORG REINHOLT	)	DOCKET NO. UW-011320
Complainants,	)	THIRD SUPPLEMENTAL ORDER RULING ON MOTIONS
v.	)	
ROSARIO UTILITIES, LLC.	)	
Respondent.	)	

1 ***Synopsis:*** *This order grants/denies in part Respondent/Intervenor's Motion to Strike and Second Motion to Strike, grants Respondent/Intervenor's Motion to Dismiss Complainants' affiliated interest claim, denies Complainants' Counter-Motion for Summary Determination, and rules on the issue of standing.*

I. MEMORANDUM

2 **Proceeding.** Docket No. UW-011320 is a complaint brought by twenty-one property owners (Complainants) within the service area of Rosario Utilities, LLC who allege that Rosario Utilities, owned by Oly Rose, LLC, has given preferential rights to available water connections to Rosario Resort, also owned by Oly Rose. The complaint further alleges that Rosario Utilities failed to comply with affiliated interest filing requirements as regards the sale of water connections to Rosario Resort. Respondent filed an Answer that admits and denies certain allegations in the complaint, and alleges that the complaint fails to state a cause of action for which relief may be granted.

3 **Parties.** Michael M. Hanis, Hanis & Olson, attorney, Renton, Washington, represents Complainants. Thomas M. Pors, attorney, Seattle, Washington, represents

Respondent. Richard A. Finnigan, attorney, Olympia, Washington, represents Intervenor Oly Rose, LLC.

4 **Background.** The Commission convened a prehearing conference on January 23, 2002, granted the petition to intervene filed by Oly Rose, LLC, and established a procedural schedule for prefiled testimony and exhibits, evidentiary hearings, and briefs. The Commission's February 2002, Prehearing conference Order formally set forth the procedural schedule.

5 Following the filing of Complainants' direct testimony and amended direct testimony, Rosario Utilities and Oly Rose (Respondent/Intervenor) filed the following pleadings:

- Motion to Strike and Second Motion to Strike portions of Complainants' direct testimony and amended direct testimony.

- Motion to Dismiss Complainants' Affiliated Interest Claim.

6 In addition, Complainants filed a Counter-Motion for Summary Determination in Favor of Complainants on the Affiliated Interest Claim. The Administrative Law Judge (ALJ) requested that the parties file memoranda on the standing of Complainants who own property in the Orcas Highlands Association.

II. DISCUSSION AND DECISION

7 This Order addresses the procedural motions filed by Respondent/Intervenor and Complainants, and the standing issue raised by the ALJ. It does not address the claim of alleged preferential rights given to Rosario Resort with respect to available water connections.

A. MOTIONS TO STRIKE

8 Respondent/Intervenor request that the Commission strike certain portions of the direct testimony and attached exhibits of Gwyneth Burrill, Kay Miller, Paul Schulte, Richard Russell, Stan Miller, Charles Clark, Ronald Montgomery, and Michael Stover. Respondent/Intervenor also request that the Commission strike certain portions of the amended direct testimony of Kay Miller. Complainants oppose the motions to strike. For ease of discussion, we will address Respondent/Intervenor's arguments according to the basis for striking the testimony.

1) Testimony alleged as duplicative

9 **Respondent/Intervenor's position.** Respondent/Intervenor contend that the entire testimony and all accompanying exhibits of Stan Miller, Charles Clark, Ronald Montgomery, and Michael Stover should be stricken as redundant because their

respective testimony duplicates the testimony of their spouses Kay Miller, Michelle Clark, Victoria Montgomery, and Colleen Stover.[1]

10 **Complainants' Response.** Complainants respond that the entire testimony and accompanying exhibits of Mssrs. Miller, Clark, Montgomery, and Stover should be allowed. Complainants acknowledge that the testimony of the above gentlemen are very similar to that of their wives, but argue that the testimony is not repetitious or redundant because it is their own individual testimony offered under oath. Complainants maintain that the similar testimony "adds credibility to the testimony of each individual witness."[2]

11 **Discussion and Decision**. I grant this portion of Respondent/Intervenor's Motion to Strike. The testimony of Mssrs. Miller, Clark, Montgomery, and Stover duplicate the testimony of their respective spouses. The decision to strike this testimony is no reflection on value of the testimony of those individuals. Rather, the testimony is stricken in the interests of efficiency.[3] We do not need duplicates of the same story to reach a decision. Having stricken this testimony in its entirety on the basis of the redundancy of the testimony, I do not address other objections of Respondent/Intervenor to this testimony.

2) Does testimony referencing Orcas Highlands Association lack foundation and relevance?

12 **Respondent/Intervenor's position.** Respondent/Intervenor contend that portions of the testimony and accompanying exhibits of Gwyneth Burrill[4], Kay Miller[5], and Paul Schulte[6] that refer to Orcas Highlands Association should be stricken because the testimony lacks foundation and is irrelevant. Respondent/Intervenor assert that there is no agency relationship between Rosario Utilities and Orcas Highlands Association. Complainants have not demonstrated any legal basis for holding Rosario Utilities responsible for the actions or inactions of Orcas Highlands. Orcas Highlands is not a party in this proceeding and any documents sent by or to it have no bearing on Rosario.

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[1] *RCW 34.05.452(1) (. . . "The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.")*, and *WAC 480-09-750(1) (. . . "Irrelevant, duplicative and inadmissible evidence burdens the commission and all parties. To minimize that burden, the presiding officer shall to the extent possible exclude evidence that is irrelevant, repetitive, or inadmissible, whether or not a party objects to the evidence.")*

[2] *Complaints Response to Motion to Strike* at 9.

[3] *RCW 34.05.452(1) and WAC 480-09-750(1).*

[4] Burrill, Q & A (4) and Ex. GB-1.

[5] Miller, Q & A (9), (12), portions of Answer (14), and Exs. KM-1,KM-3, KM-5 and KM-6.

[6] Schulte, Q & A (6), (7), portions of Answer (9), and Exs. PS-1, PS-2, PS-3, PS-4, PS-5,and PS-7.

13 **Complainants' Response.** Complainants respond that express and inferred facts demonstrate that an agency relationship exists between Orcas Highlands Association and Rosario Utilities. Complainants refer to the following documents to support their assertion:

- A fax from Ms. Vierthaler, manager of Rosario Utilities, to Peggy Rodenberger. (Exhibit PS-6, and attached as Exhibit 1 to Complainants' Response to Motion to Strike)
- A letter from Ms. Vierthaler to all property owners in the Vusario, Orcas Highlands and Rosario Water Systems dated May 23, 2001. (Exs. CS-3, MS-3, CC-6, MC-6, PC-1, RR-1, RM-1, VM-1, JR-2, KM-4, and attached as Exhibit 3 to Complainants' Response to Motion to Strike)
- A letter from Orcas Highlands Association to property owners dated May 28, 2001. (Exs.GB-1, PS-7, KM-5, and attached as Exhibit 4 to Complainants' Response to Motion to Strike)
- The direct testimonies of Sue Perrault, Gwyneth Burrill, Paul Schulte, Kay Miller, and Stan Miller.
- A letter from Ms. Vierthaler sent to all property owners of Orcas Highlands/Otter's Lair dated October 19,1999. (Attached as Exhibit 1 to Complainant's Response to Second Motion to Strike)

14 Complainants maintain that the express statements by Rosario Utilities, through Ms. Vierthaler, the manner in which information was disseminated, and Rosario Utilities' instructions for how to obtain a water certificate clearly demonstrate that an agency relationship exists between Orcas Highlands and Rosario Utilities.

15 **Respondent/Intervenor's Reply**. Respondent/Intervenor argue that consent and control are the essential elements of agency, and Complainants have established neither.[7] Respondent/Intervenor assert that Complainants merely infer the existence of an agency relationship from the letters referenced in their Response to the Motion to Strike. Respondent/Intervenor maintain that there is no evidence that Rosario Utilities consented to Orcas Highlands acting as its agent, or that Orcas Highlands consented to or acted as if it were the agent for Rosario Utilities.

16 Respondent/Intervenor explain that Orcas Highlands is a licensed public water system in its own right, with its own operating certificate, service area, distribution system, and billing arrangements. Orcas Highlands obtains connections from Rosario Utilities

[7] *Nordstrom Credit v. Dept. of Revenue, 120 Wn.2d 935, 941 (1993), Restatement (Second) of Agency, sec. 1, Hewson Constr.,Inc. v. Reintree Corp., 101 Wn. 2d. 819, 823 (1984).*

and pays wholesale rates for water. It then distributes the water to its own customers pursuant to its own bylaws.[8] Respondent/Intervenor note that none of the exhibits cited by Complainants in their Response to the Motion to Strike indicate that Rosario Utilities controlled Orcas Highlands' communications with their customers, or exercised any control over Orcas Highlands' decision how to apply for connections at the June 15th sale. Respondent/Intervenor observe that Orcas Highlands was not acting as Rosario Utilities' agent by having its customers wait in line for connections at the June 15th sale, rather it was using its customers as agents for Orcas Highlands, having them deliver Orcas Highlands' checks and applications to Rosario Utilities so that Orcas Highlands could obtain connections without having to wait in line in its own right.

17 **Discussion and Decision**. Those portions of the testimony and accompanying exhibits of Gwyneth Burrill, Kay Miller, and Paul Schulte referenced above should be stricken because they lack foundation and are irrelevant. Complainants have not demonstrated an agency relationship between Orcas Highlands Association and Rosario Utilities that would hold Rosario Utilities responsible for the actions or inactions of Orcas Highlands.

18 The documents and testimony relied on by Complainants to support their position that an agency relationship exists fail to establish the essential elements of consent and control that would demonstrate an agency relationship. For example, Complainants' reliance on the Respondents May 23, 2001, letter "[t]o all Property Owners in the Vusario, Orcas Highland and Rosario Water Systems" (*May 23 letter*) to infer an agency relationship is misplaced. Contrary to Complainants assertions, the *May 23 letter* does not show an agency relationship between Rosario Utilities and Orcas Highlands Association. Rather, the letter explains the process that *customers* of Highlands and the other associations must follow to obtain water certificates. According to the letter, the associations obtain the water certificates for their customers. Highlands customers are offered the option of standing in line personally with a check issued from the Highlands. Thus, the *May 23 letter* supports Respondent/Intervenor's position that Highlands is a customer of Rosario Utilities, and it is the customer that obtains the water certificate from Rosario Utilities. As Respondent/Intervenor observe, it would appear that Orcas Highlands Association customers acted as the agents of the Association at the June 15, 2001 sale of water certificates.

19 Further, the April 3, 2000, *Water System Coordination (Agreement)*[9] between Rosario Utilities and Orcas Highlands Association clearly defines the Association as a customer of Rosario Utilities, and the process for the Association to obtain additional

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[8] *Reply to Complainants' Response to Respondent's and Intervenor's Motion to Strike*, p. 3.
[9] Attached as Exhibit 1 to *Declaration of Thomas M. Pors In Support Of Respondent's And Intervenor's Brief on Standing And Related Issues*, filed separately on May 31, 2002.

connections for its water system. The *Agreement* demonstrates that there was no agency relationship between Respondent and the Association. Having stricken the testimony based on Complainants failure to demonstrate an agency relationship between Orcas Highlands Association and Rosario Utilities, I do not address other objections of Respondent/Intervenor to this testimony.

3) Other testimony alleged irrelevant

- *Question and Answer 10 of Ms. Burrill's testimony*

20 **Respondent/Intervenor's position.** Respondent/Intervenor contend that Question and Answer 10 of Ms. Burrill's testimony should be stricken as irrelevant because the Commission has no authority to award monetary damages. Specifically, Respondent/Intervenor argue that any reduction in the selling price of property as a result of any action or inaction on the part of Rosario Utilities is irrelevant to the issues in this proceeding. In support of their position, Respondent/Intervenor reference *Hedlund v. White*[10] for the proposition that evidence of damages which cannot be awarded is irrelevant and should be excluded.

21 **Complainants' response.** Complainants assert that the fact that damages cannot be awarded does not make the testimony irrelevant. Rather, it demonstrates the value of a water certificate, and the significance of not having water available on one's property.

22 **Discussion and Decision.** Question and Answer 10 of Ms. Burrill's testimony will not be stricken as irrelevant. Her testimony is relevant to show the value of the water certificates.

- *Question and Answer 10 of Mrs. Miller's testimony and Ex. KM-2*

23 **Respondent/Intervenor's position.** Respondent/Intervenor argue that Question and Answer 10 and Exhibit KM-2, a title insurance policy, should be stricken from Mrs. Miller's testimony as irrelevant because its relevance has been superceded by the regulatory authority of the Commission.[11]

24 **Complainants' response.** Complainants respond that the purpose of Ex. KM-2 is not to establish the existence of a contractual obligation. Rather, the document is relevant to demonstrate the agency relationship between Orcas Highlands and Respondent and the past dealings the two entities have had with each other.

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[10] *67 Wn. App. 409, 413-14 (1992)*

[11] *Raymond Lumber Co. v. Raymond Light & Water Company*, 92 Wash. 330, 335 (1916).

25 **Discussion and Decision.** Question and Answer 10 of Mrs. Miller's testimony and Exhibit KM-2 is stricken as irrelevant. Exhibit KM-2 and the purported relationships described therein have been superceded by the Commission's regulation of Rosario Utilities. Moreover, *The Water System Coordination Agreement* entered into by Orcas Highlands Association and Rosario Utilities on April 3, 2002, conclusively defines the relationship of Orcas Highlands Association as the customer of Rosario Utilities. Thus, this document is not relevant and is stricken.

- *The last sentence of Mrs. Miller's Answer 34 and Ex. KM-10*

26 **Respondent/Intervenor's position.** Respondent/Intervenor argue that Exhibit KM-10 and the last sentence of Mrs. Miller's Answer 34 that makes reference to Exhibit KM-10 should be stricken as irrelevant. Exhibit KM-10 is an announcement of Rosario Utilities annual open house to be held at Rosario Resort. It also announces that Rosario Utilities' office has moved to the 3rd floor of the Mansion. Respondent/Intervenor argue that the announcement was sent and received long after the issues in this case developed and has no real bearing on any of the facts of this matter.

27 **Complainants' response.** Complainants argue that Exhibit KM-10, attached as Exhibit 5 to Complainants' Response to Motion to Strike, is directly relevant to this matter because it demonstrates the relationship of Rosario Utilities and Rosario Resort.

28 **Discussion and Decision.** Exhibit KM-10 and the last sentence of Mrs. Miller's answer 34 is stricken as irrelevant. The announcement of an open house five months after the sale of the water certificates is too removed in time to be relevant to the issues surrounding the sale of water certificates. It does not tend to prove or disprove that Rosario Utilities gave Rosario Resort preferential rights to available water connections on June 15, 2001.

4) Testimony alleged to be hearsay, lacking foundation, and speculative

- *Question and Answer 9 of Ms. Burrill's testimony*

29 **Respondent/Intervenor's position.** Respondent/Intervenor argue that Question and Answer 9 of Ms. Burrill's testimony should be stricken as unreliable because it constitutes triple hearsay. Respondent/Intervenor explain that Ms. Burrill's recitation of the story is the first layer of hearsay. What her anonymous client told her is the second layer of hearsay, and the alleged statements of the Sheriff constitute a third layer of hearsay. Respondent/Intervenor assert that even under the relaxed standards dealing with the admissibility of hearsay in administrative proceedings, this testimony crosses the line and should be stricken as unreliable.

30 **Complainants' response.** Complainants respond that the statement made by Ms. Burrill is reliable since Ms. Burrill is reciting the statements of one of her principals. Complainants assert that if it is determined that Complainants cannot rely on this hearsay evidence, they should be allowed to supplement the record with additional testimony in order to overcome this hearsay objection.

31 **Discussion and Decision.** Question and Answer 9 of Ms. Burrill's testimony is stricken because it is not the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.[12] Ms. Burrill's testimony constitutes triple hearsay. There is no opportunity for cross-examination of the declarants to test the truth of the matter asserted. Moreover, the unreliability of the testimony is enhanced by Complainants' failure to identify the principal who supplied Ms. Burrill with the information. Ms. Burrill represented David and Janis Stevens at the water certificate sale because they live in California. Since the Stevens were in California at the time of the sale, presumably, the principal referenced in Ms. Burrill's answer is another of her real estate clients.

- *Ques. and Ans. 24 of Mrs. Miller's testimony and amended testimony*

32 **Respondent/Intervenor's position.** Respondent/Intervenor contend that Question and Answer 24 of Mrs. Miller's testimony and amended testimony that identifies Sara Geizer as a representative of Rosario Resort should be stricken because it lacks foundation. Respondent/Intervenor argue that Mrs. Miller's answer and amended answer demonstrate a lack of personal knowledge with respect to the subject matter of the question. In support of their argument, Respondent/Intervenor cite *Washington Rule of Evidence 602* that requires that a party have personal knowledge before making statements of fact.[13]

33 **Complainants' response.** Complainants respond that Mrs. Miller does not lack personal knowledge, but rather quite clearly demonstrates her knowledge that Ms. Sara Geizer has in the past been a representative of the Resort. Complainants acknowledge that Mrs. Miller further states that she is not certain if Ms. Geizer was a representative of the Resort for purposes of the sale, thus clarifying the limits of her knowledge. Complaints contend that that this is the "kind of evidence on which reasonable prudent persons are accustomed to rely in the conduct of their affairs." *RCW 34.05.452(1)*.

34 **Discussion and Decision.** Question and Answer 24 of Mrs. Miller's testimony and amended testimony is stricken because it lacks foundation. The testimony in itself

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[12] *RCW 34.04.452(1)*.

[13] *See, e.g. State v. Smith, 87 Wn. App. 345, 351-352 (1997) (holding that testimony of assumptions is generally not admissible because assumptions demonstrate a lack of personal knowledge).*

demonstrates Ms. Miller's lack of personal knowledge. Consequently, the testimony cannot be relied on to prove or disprove any of the matters at issue in this proceeding.

- *Portions of Answer 19 of Mr. Russell's testimony*

35 **Respondent/Intervenor's position.** Respondent/Intervenor contend that portions of Answer 19 of Mr. Russell's testimony should be stricken because it lacks foundation, is speculative in nature, represents unreliable hearsay and is non-responsive to the question. Respondent/Intervenor argue that Mr. Russell's testimony about Rosario's alleged motives is based on nothing more than mere speculation.[14] Respondent/Intervenor argue further that Mr. Russell's testimony about what other water companies do is hearsay that does not provide the Commission with the indications of reliability necessary for it to be admitted into evidence. Lastly, Respondent/Intervenor assert that because the question asks about Mr. Russell's knowledge, and he responds with an answer clearly outside his knowledge, the offending portion of the answer should be stricken as non-responsive.

36 **Complainants' response.** Complainants respond that Mr. Russell's multiple conversations with Respondent prior to and after the sale, and the facts surrounding the sale provide more than sufficient basis upon which Mr. Russell can base his testimony regarding the fairness of the sale. Complainants assert that Mr. Russell is involved with construction and development for a living and is familiar with water systems. According to Complainants, Mr. Russell's testimony about the feasibility of a priority list is relevant to this matter. Complainants maintain that Mr. Russell's testimony regarding the "first-come, first-served" process is not speculative but simply his testimony as to his view of the process utilized by the Utility for the sale of water certificates. Finally, Complainants argue that the question asked elicits knowledge regarding unfair preferences or unreasonable preferences by Rosario Utilities in distributing water certificates. Complainants maintain that Mr. Russell responds directly to that question.

37 **Discussion and Decision.** Respondent/Intervenor's request to strike portions of Answer 19 of Mr. Russell's testimony is denied. Mr. Russell's testimony is responsive to the question. He offers his lay opinion based on his knowledge and his experience in attempting to obtain a water certificate.

B. MOTION TO DISMISS AFFILIATED INTEREST CLAIM AND COUNTER-MOTION FOR SUMMARY DETERMINATION OF AFFILIATED INTEREST CLAIM

[14] *Riccobono v. Pierce County, 92 Wn. App. 254, 264 (1998) (holding that speculation based on assumptions should not be admitted as testimony).*

38 Respondent/Intervenor move to dismiss Complainants' affiliated interest claim under *WAC 480-09-420(8)* and *Civil Rule 41(b)(3). WAC 480-09-420(8)* allows the Commission to be guided by the Superior Court Civil Rules (CR) that govern civil lawsuits. *CR 41(b)(3)* discusses a defendant's (Respondent's) motion for dismissal after the plaintiffs (Complainants) have completed presentation of their evidence. Under *CR 41(b)(3)* a defendant may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

39 Complainants argue that the Commission should deny the Motion to Dismiss. In addition, Complainants file a Counter-Motion for Summary Determination of the Affiliated Interest Claim in favor of Complainants pursuant to *WAC 480-09-426(2)*. *WAC 480-09-426(2)* provides that a party may move for summary determination if the pleadings filed in the proceeding together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor. In considering a motion made under *WAC 480-09-426(2),* the Commission will consider the standards applicable to a motion made under *CR 56.*

40 **Respondent/Intervenor's position.** Respondent/Intervenor contend that nothing in Complainants' written direct testimony or the accompanying exhibits filed on March 11, 2002, makes mention of *RCW 80.16.020* or supports Complainants' allegation at paragraphs 2.6 and 3.14 of the Complaint that Rosario Utilities violated the affiliated interest filing requirement.[15] According to Respondent/Intervenor, because Complainants failed to provide sufficient evidence to support a claim under *RCW 80.16.020*, any claim or allegation concerning affiliated interest filing requirements should be dismissed.

41 **Complainants' response.** Complainants respond that the Commission's records, Respondent/Intervenor's own admissions, the Complaint, Complainants' direct testimony, the statutes, and Commission rules provide sufficient evidence to support Complainants' allegations that Respondent failed to comply with *RCW 80.16.020*. Further, Complainants claim that there is no genuine issue as to any material fact regarding Respondent's non-compliance. Therefore, Complainants are entitled to summary determination in their favor as a matter of law.

42 Complainants argue that Respondent/Intervenor's motion to dismiss under *CR 41* **(***b)(3)* is premature because Complainants have not completed the presentation of their evidence. Complainants assert that they have a right to seek "official notice" of the Commission's records at anytime, including during the hearing.[16] In addition

[15] In its Answer, at paragraphs 9 and 26, Rosario denied Complainants' allegations of wrongdoing with respect to the affiliated interest filing requirements.
[16] *RCW 34.05.452.*

Complainants maintain that they have offered sufficient evidence to establish the affiliated interest claim.

43 Complainants argue that the policy of *RCW 80.16.020* for requiring an affiliated interest filing prior to a transaction, is to overcome the "fear of collusion." [17] Complainants offer four pages of facts alleged to support a finding of a "fear of collusion." Complainants maintain that by offering this evidence, they have shifted the burden to Respondent to show an affiliated interest filing in order to overcome the "fear of collusion." According to Complainants, the only response offered by Respondent is the statement in its Answer that " Rosario Resort was treated the same as any other customer with respect to the sale of water certificates." Complainants assert that that statement is supported only by the testimony of Chris Vierthaler and Joseph March.

44 Complainants argue that they are entitled to summary determination because it is undisputed that Respondent has not made an affiliated interest filing related to the sale of the water certificates. Complainants argue that, based upon undisputed facts, Rosario Utilities, Oly Rose, and Rosario Resort are affiliated interests, and an affiliated transaction occurred at the June 15, 2001, sale of water certificates.

45 In support of their contention that Rosario Utilities, Oly Rose, and Rosario Resort are affiliated interests under *RCW 80.16.010*, Complainants reference Rosario Utilities' Answer at paragraph 25 where Rosario Utilities admits that Rosario Resort is a customer of Rosario Utilities, that Oly Rose is the owner of Rosario Resort, and that Oly Rose is the sole member of Rosario Utilities. Further, Complainants cite the petition to intervene filed by Oly Rose at paragraph 3 that asserts that Oly Rose is the owner of Rosario Utilities, and that Oly Rose operates Rosario Resort which is served by Rosario Utilities.

46 In support of its contention that an affiliated interest transaction occurred at the June 15, 2001, sale of water certificates, Complainants refer to Rosario Utilities Answer in which Rosario Utilities admits that Rosario Resort purchased 16 connections on June 15, 2001, and that an employee of Rosario Resort waited in line on the morning of June 15, 2001, to purchase water certificates.

47 Complainants contend that because Respondent failed to comply with *RCW 80. 16.020,* the transaction should be voided and further briefing conducted to determine how the sixteen certificates should be distributed.

48 **Respondent/Intervenor's Response.** Respondent/Intervenor maintain that their Motion to Dismiss should be granted as a result of Complainants' complete failure to present any evidence in their written direct testimony dealing with their affiliated

[17] *U.S. West Communications, Inc. v. WUTC, 134 Wn. 2d 74, 94 (1997).*

interest claim. Respondent/Intervenor represent that they file this Response in the event the Commission decides to look past the lack of evidence and address the substantive issues regarding the affiliated interest claim.

49 Respondent/Intervenor argue that none of Complainants' arguments or analysis deals with the issues that must be addressed regarding Complainants' claim of Respondent's failure to comply with *RCW. 80.16.020*. Therefore, they contend, Complainants' Counter-Motion should be denied.

50 According to Respondent/Intervenor, the issues to be decided are as follows. First, was there an affiliated interest transaction? Second, do Complainants have standing to complain of a violation of the affiliated interest statute? Third, if there was a violation of the affiliated interest statute, what is the appropriate remedy?

51 Respondent/Intervenor contend that there is no affiliated interest transaction because there is no *contract or arrangement* as required by *RCW 80.16.020* and as defined by the Court in *Waste Management of Seattle, Inc., v. WUTC.*[18] In that case, the Court explained that just because money is transferred from an affiliated interest to a regulated company, or vise versa, an affiliated interest transaction is not automatic. There must also be an actual *contract or arrangement* within the context of the statutes. Respondent/Intervenor assert that Complainants have assumed that there was an affiliated interest transaction in this matter. Respondent/Intervenor acknowledge that Rosario Utilities and Rosario Resort are affiliated with one another. Respondent/Intervenor also acknowledge that a water sale occurred on June 15, 2001, where Rosario Resort purchased water certificates from Rosario Utilities. However, there was no *contract or arrangement* for the purchase of water certificates as defined by *Waste Management of Seattle, Inc*. There was only a distribution of water certificates in accordance with the requirements imposed on Rosario Utilities by the Department of Health and the Commission.

52 Respondent/Intervenor argue that even if the Commission determines that there was an applicable affiliated interest transaction under *RCW 80.16.020*, Complainants lack standing to complain about the transaction. In support of their position, Respondent/Intervenor cite *United & Informed Citizen Advocates Network v. Pacific Northwest Bell Telephone Co. d/b/a U S West Communications, Inc., Third Supplemental Order, Commission Decision and Order Granting Interlocutory Review of Order; Affirming Second Order, Docket No. UT-960659, at pp. 6-7 (Feb. 1998) (holding that a party without a direct customer relationship lacks standing to complain).* Respondent/Intervenor also cite *U S West Communications, Inc. v. WUTC* for the proposition that ratepayers are the intended beneficiaries of the affiliated interest statute. *See U S West, 134 Wn.2d 74 at 94 ("the effect [of violating RCW*

[18] *123 Wn. 2d 621, 634 (1994).*

80.16.020] is to give something of value at the expense of the ratepayers of the utility").

53 Finally, Respondent/Intervenor contend that Complainants make the false assumption that the appropriate remedy for a violation of *RCW 80.16.020* is to undo the transaction. However, *RCW 80.16.020* does not state that the Commission can reverse a transaction once it has taken place. Instead, the statute provides that any inappropriately conducted affiliated interest transactions can be *disallowed*. According to Respondent/Intervenor, this means that the Commission can refuse to allow the utility to calculate the revenue or expenses associated with that transaction for ratemaking purposes.[19] In the event there is a violation of *RCW 80.16.020, RCW 80.16.030* further clarifies the remedy. It provides, in part:

> In any proceeding, whether upon the commission's own motion or upon complaint, involving the rates or practices of any public service company, the commission may exclude from the accounts of the public service company any payment or compensation to an affiliated interest for any services rendered or property or service furnished, as described in this section, under existing contracts or arrangements with the affiliated interest unless the public service company establishes the reasonableness of the payment or compensation.

54 Respondent/Intervenor explain that if there has been a violation of the affiliated interest statute in this case, the Commission could instruct Rosario to file affiliated interest filings in the future; it could impute revenue or disallow expenses related to the transaction for rate-making purposes; and it could even require an audit of Rosario Utilities. According to Respondent/Intervenor undoing the sale is not an option available under the statute.

55 **Complainants' Reply.** In reply to Respondent/Intervenor's response in opposition to Complainants' counter-motion for summary determination of the affiliated interest claim, Complainants maintain that there was an affiliated interest transaction between Rosario Utilities and Rosario Resort. Complainants' contend that the "contract or arrangement" provided for the sale and service of water from Respondent to Rosario Resort, not a "flow of payments." They argue that since it is undisputed that this transaction occurred, the statute requires that Respondent make an affiliated interest filing. Further, Complainants maintain that they have standing to assert a claim for violation of the affiliated interest statute as a "person" under *RCW 80.04.110*, and as an "applicant" for service under *RCW 80.28.110* and *WAC 480-110-325(2)*. Finally, Complainants maintain that undoing the sale is an available remedy. Complainants cite *RCW 80.16.020* and argue that the statute clearly provides that the Commission

[19] See, *Waste Management of Seattle, Inc., 123 Wn.2d at 635-35*.

can "disapprove" the contract between Respondent and Rosario Resort for the service of water for failing to comply with the affiliated interest statute.

56 **Discussion and decision.** Respondent/Intervenor's motion to dismiss Complainants' affiliated interest claim under *CR 41(b)(3)* is granted. Complainants have failed to present evidence to support their claim that Respondent violated *RCW 80.16.020*. Under *RCW 80.16.020*, every public service company must file a copy or summary, if unwritten, of a *contract or arrangement* providing for the purchase, sale, lease, or exchange of any property, right, or thing. Complainants have failed to provide evidence that a *contract or arrangement* existed for which Respondent must make an affiliated interest filing under *RCW 80.16.020*.

57 Complainants' testimony, alleged to support a finding of a "fear of collusion," does not establish the occurrence of an affiliated interest transaction. Likewise, the sale of 16 water certificates to Rosario Resort during the June 15, 2001, sale of water certificates in and of itself does not establish the occurrence of an affiliated interest transaction. Complainants acknowledge that Rosario Resort waited in line along with other property owners on the morning of June 15, 2001, to purchase water certificates.[20] Complainants also acknowledge Rosario Resort paid the proper amount for the water certificates.[21] Rosario Utilities filed tariff sheet No. 33 for Schedule No. 13[22] establishes the connection charge for each Equivalent Residential Unit (ERU) at $3100, which is consistent with Complainants' testimony. Thus, Complainants' evidence fails to establish that Respondent's sale of water certificates to Rosario Resort was a contract or arrangement, rather than a sale of an ERU pursuant to its tariff. Under the facts and law presented, Complainants have shown no right to relief. Accordingly, the affiliated interest claim is dismissed. Consistent with this ruling, Complainants' Counter-Motion for Summary Determination is denied. Having granted the Motion to Dismiss, the parties' other arguments on affiliated interest filings will not be addressed.

C. STANDING OF COMPLAINANTS

58 On May 1, 2002, during the course of a scheduling conference, the ALJ requested that the parties prepare memoranda on the issue of whether or not property owners within the Orcas Highlands Association (Association Complainants)[23] have standing to be Complainants in this matter. Complainants and Respondent/Intervenor timely filed memoranda and responses addressing the issue of standing.

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[20] *Complainants' Response to Motion to Dismiss, p. 5.*
[21] *Complainants' Reply to Respondent's and Intervenor's Response to Motion to Dismiss, p.12.*
[22] The Commission takes administrative notice of Rosario Utilities' tariff sheet No. 33 for Schedule No. 13, filed with the Commission on December 7, 1999.
[23] The following Complainants are members of the Orcas Highlands Association: Sue Perrault, Stan and Kay Miller, and Paul Schulte.

59 **Complainants' position.** Complainants argue that the under *RCW 80.04.110* and *WAC 480-09-400*, "any person," including the Association Complainants, has standing to bring a complaint before the Commission. Complainants' assert that they, along with the property owners within the Association, brought this complaint alleging Respondent violated *RCW 80.16.020*, by failing to make an affiliated interest filing, *RCW 80.28.090*, by granting undue or unreasonable preference or advantage to Rosario Resort in the sale of water certificates, and *chapter 80.28 RCW* by failing to furnish water in a fair just, reasonable, and sufficient process.

60 **C**omplainants argue further that they and Association Complainants have standing as "applicants" under *RCW 80.28.110*, which provides that "Every. . . water company, engaged in the sale and distribution of . . . water, shall upon reasonable notice, furnish to all persons and corporations who may apply therefore and be reasonably entitled thereto . . .furnish all available . . . water as demanded".

61 Complainants cite *WAC 480-110-325* in further support of their position that Complainants have standing as "applicants." Subsection 2 provides:

> After completing the application, the water company must: . . .
> (c) Inform the applicant within ten days of the company's intention to provide service or deny service. If service is denied, the company must tell the applicant the reason service is being denied and advise the applicant of the commission's toll-free number (1-800-562-6150) for appealing the decision.

62 Complainants argue that this rule would be superfluous if an "applicant" does not have standing to complain to the Commission.

63 Complainants assert that the Association Complainants each testified in their prefiled direct testimony that they applied for and attended, or had an agent attend on their behalf, the June 15, 2001, sale in order to purchase water certificates for their individual use.
Complainants' argue that their position that they were acting as "applicants" for their own water certificates is supported by letters from the Respondent dated May 23, 2001, and October 19, 1999, and the prefiled rebuttal testimony of Tom Corrigan, President of the Association. Association Complainants were the applicants at the sale. Accordingly, they have standing to bring this Complaint.

64 In the alternative, Complainants argue that the Association Complainants have standing as agents for Orcas Highlands Association, because the Association is a customer and "applicant" for water from Respondent. Association Complainants contend that they have the permission of the Association to act as its agent, citing the testimony of Tom Corrigan.

65 **Respondent/Intervenor's position.** Respondent/Intervenor contend that the issue of the standing of the Association Complainants is not limited to the Orcas Highlands Complainants but applies to all Complainants.[24] According to Respondent/Intervenor, unless Complainants are customers of Rosario Utilities they do not have standing to bring this Complaint.

66 Respondent/Intervenor relies on *SAVE v. City of Bothell* [25] as the basis for its standing analysis. Respondent/Intervenor argue that in *SAVE*, the Washington Supreme Court established a two-part test for determining if persons in Complainants' position have standing to sue a regulated utility like Rosario Utilities. The first requirement under *SAVE* is that there be "injury in fact." The second requirement is that the Complainants be within the "zone of interest."[26]

67 Respondent/Intervenor argue that most of the Complainants have failed to provide evidence of an existing injury. For those that actually allege an injury, it is a future or potential injury, not an actual or existing injury. Accordingly, Complainants have failed to satisfy the "injury in fact" prong of the *SAVE* test and thus have failed to demonstrate that they have standing in this matter. Furthermore, Respondent/Intervenor argue that even if an injury in fact can be demonstrated by some of the Complainants, they cannot overcome the second prong of the *SAVE* test that requires that the Complainants be in the "zone of interest" contemplated by the statutes allegedly violated. According to Respondent/Intervenor, all of the statutes referenced in the Complaint require that the Complainants be customers of Rosario Utilities in order to maintain a complaint against it. They argue that because none of the Complainants are customers of Rosario Utilities, they are not within the "zone of interest" to be protected by any of the statutes in this matter.

68 In support of their argument, Respondent/Intervenor cite *United & Informed Citizen Advocates Network (U & I CAN) v. Pacific Northwest Bell Telephone Company d/b/a U S West Communications.*[27] There, the Commission agreed with Staff that *U & I CAN* did not have standing to complain because it was not the subscriber to the lines that were disabled. Respondent/Intervenor notes that the Commission reaffirmed this holding in *In the Matter of Determining the Proper Classification of U & I CAN*[28] stating that "[i]n Docket No. UT-960659 the Commission found that U & I Can did not have standing to bring claims against U S West because it did not have a direct customer relationship which would impose duties upon U S West."

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[24] Respondent/Intervenor's Memorandum points out other procedural failings associated with Complainants' claims that are outside the scope of the issue to be briefed. Those issues will not be addressed here.
[25] 89 Wn.2d 862, 866 (1978).
[26] Id.
[27] Docket No. UT-960659, *Third Supplemental Order Granting Interlocutory Review of Order* (Feb. 1998).
[28] Docket No. UT-971515 (Feb. 9, 1999).

69 Respondent/Intervenor argue that the Washington Courts, when dealing with issues of standing before the Commission, have applied the same "zone of interest" standard as it relates to a "direct customer relationship" applied by the Commission. *Cole v. WUTC*[29], *WUTC v. Federal Communications Commission*.[30] They argue that even if some of the Complainants can demonstrate that they would have become customers of Rosario Utilities if they were able to purchase water service connections on June 15, 2001, they would still fail to demonstrate that they are within the "zone of interest" necessary to demonstrate standing. *Arco Products Co. v. WUTC*.[31]

70 Lastly, Respondent/Intervenor argue that the Association Complainants have no ability to become customers of Rosario Utilities, regardless of whether they were able to purchase water service connections at the June 15, 2001 sale. Consequently, Association Complainants fall outside the "zone of interest" necessary to acquire standing. In support of their argument, Respondent/Intervenor reference the April 3, 2000, *Water System Coordination Agreement (Agreement)* between Rosario Utilities and Orcas Highlands Association. According to Respondent/Intervenor, the *Agreement* clearly states that those within Orcas Highlands' boundaries are Orcas Highlands' customers.[32]

71 As a result of all the problems delineated in their Memorandum, including but not limited to all of the Complainants' lack of standing, Repondent/Intervenor urge that the Complaint be dismissed**.**

72 **Complainants' Response.** Complainants point out that every single case cited by Respondent/Intervenor in support of their position that Complainants do not have standing applies to rate-making or similar issues. Complainants agree that a non-customer cannot bring a complaint for rates it is not paying. However, an applicant for the purchase of a water certificate clearly has standing to challenge how water is distributed in light of the specific statutes that address the issue.

73 Complainants argue that the two prong analysis in *SAVE v. City of Bothell* does not apply here because Complainants are challenging the actions of a water company regulated by the Commission, not government action. Complainants have standing in this matter because the statute expressly gives them standing. According to Complainants, even if the two part test of *SAVE* applies, Complainants have satisfied

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[29] 79 Wn. 2d 3012 (1972) (a rate complainant entitled to be heard had to be a gas consumer, therefore Oil Heat Institute had no standing to intervene).

[30] 513 F. 2d 1142, 1147 (9th cir. 1975) ("The interest of the public to be protected under the statute is that of the customers of the regulated utility.")

[31] 125 Wn.2d 805 (1995) (in order to have standing a person or entity must be a current customer, not a former customer).

[32] *See Rosario/Orcas Contract, p. 1. ("Rosario Utilities shall issue a water availability certificate to Highlands for the benefit of the requesting Highlands customer.")*

the "injury in fact" requirement and are arguably within the "zone of interest" to be protected by the statute in question.

74 They argue that every single one of the Complainants has shown an existing injury. Complainants are injured because they do not have water as a result of Respondent's unjust, unreasonable, unjustly discriminatory, unduly preferential process for obtaining water certificates. *RCW 80.28.020*. Likewise, Complainants are within the "zone of interest" because they are owed a duty by Respondent as applicants. Respondent has a duty to provide water to applicants under *RCW 80.28.100*. Respondent must provide water to applicants without giving an "undue or unreasonable preference." *RCW 80.28.090*. Respondent must provide water using rules and regulations which affect or pertain to the sale of distribution of water, in a just and reasonable manner. *RCW 80.28.010(3)*. Finally, Complainants argue that the *Water System Coordination Agreement* clearly establishes the role Association Property owners play in obtaining permission to obtain water on their own behalf from the Utility.

75 **Respondent/Intervenor's response.** In response, Respondent/Intervenor assert that Complainants fail to distinguish properly between issues relating to general jurisdictional authority and issues related to the specific standing of a party to bring a *claim*. According to Respondent/Intervenor, both *RCW 80.04.110* and *WAC* 480-09-400 involve the general jurisdictional authority of the Commission to entertain claims. Neither is designed to confer standing on Complainants or anyone else.

76 Respondent/Intervenor also assert that Association Complainants' "standing as applicants" argument is faulty because Complainants did not plead any cause of action under *RCW 80.28.110*. Complainants briefly mention *RCW 80.28.110* in their Complaint as one of the statutes that "may be brought into issue" in the case.[33]

77 Finally, Respondent/Intervenor argue that Association Complainants are not agents of Orcas Highlands Association and should not be entitled to substitute Orcas Highlands as a Complainant at this time. Respondent/Intervenor point out that despite the allegations in Tom Corrigan's rebuttal testimony, there is no actual evidence that Orcas Highlands has consented to have the Association Complainants act in its behalf. Moreover, it would be inappropriate to permit the substitution Complainants seek because of the additional time and expense it wouldll add to these proceedings.

78 **Discussion and decision.** I disagree with Respondent/Intervenor's conclusion that Complainants must be customers of Respondent in order to have standing to bring this Complaint. Repondent/Intervenor's analysis would apply if this complaint challenged rates or a statute that did not establish a duty owed to the complainant by the utility. However, that is not the case here.

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[33] *See, Complaint, p. 3.*

79 In order to determine whether Complainants have standing to bring this Complaint, we must look at the nature of the Complaint. Complainants and Rosario Resort are applicants for water service. *WAC 480-110-245* defines "Applicant" as any person, partnership, firm, corporation, municipality, cooperative, organization, governmental agency, etc., that has completed a water company's application for water service. As applicants for water service, Complainants allege that Respondent's process for selling water certificates gave preferential rights to available water connections to Rosario Resort.

80 Applying the two part test of *SAVE* advocated by Respondent/Intervenor to the circumstances of this Complaint, Complainants have demonstrated standing. Complainants have satisfied the "injury in fact" requirement. Each Complainant applied for and was denied a water certificate, allegedly as a result of Respondent's unjust, unreasonable, unjustly discriminatory, and unduly preferential process for obtaining water certificates. *RCW 80.28.020*. Likewise, Complainants satisfy the "zone of interest" requirement because they are owed a duty by Respondent as applicants. Respondent has a duty to provide water to applicants under *RCW 80.28.110*. Moreover, under *RCW 80.28.010, Duties as to rates, services, and facilities*, all rules and regulations issued by any water company, affecting or pertaining to the sale or distribution of its product shall be just and reasonable. Accordingly, Complainants have standing to bring this Complaint.

81 As to those Complainants who are members of the Orcas Highlands Association (Association), it would appear from the *Water System Coordination Agreement* (*Agreement*) and from Respondent's May 23, 2001, letter to all "Property Owners in the Vusario, Orcas Highlands and Rosario Water Systems" (*May 23 letter*) that for purposes of obtaining water certificates on June 15, 2001, Association Complainants acted as agents of the Association.

82 The *Agreement* establishes that Orcas Highlands Association will apply to Rosario Utilities for each new service connection and will pay any facility charge as provided in tariffs. Rosario Utilities would then issue a water availability certificate to the Association for the benefit of the requesting Association customer. The *May 23 letter* notifies the members of the Highlands and Vusario associations that they should apply to the association board (water system) for a water certificate and pay the required fees. After the association board forwards payment and receives a signed certificate from Rosario Utilities, the association board will then issue the applicant a water certificate. The notice provides further that "Highlands customers may elect to come to the Rosario Utilities office personally, and the Highlands Association will issue you a check for this purpose.

83 Accordingly, I conclude that for purposes of obtaining water certificates on June 15, 2001, Association Complainants acted as agents of the Association and therefore have standing to bring this Complaint.

Dated at Olympia, Washington, and effective this_____th day of July, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

KAREN M. CAILLÉ
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-09-760*.