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August 19, 2004

Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

Re: *WUTC v. Cougar Ridge Water System*
Docket No. UW-040367

Dear Ms. Washburn:

Enclosed for filing are the original and 8 copies of Commission Staff's Response To Cougar Ridge's Petition For Administrative Review, and Certificate of Service.

Very truly yours,

JONATHAN C. THOMPSON
Assistant Attorney General

JCT:kl
Enclosures
cc: Parties

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BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

COUGAR RIDGE WATER SYSTEM,

Respondent.

DOCKET NO. UW-040367

COMMISSION STAFF'S
RESPONSE TO COUGAR
RIDGE'S PETITION FOR
ADMINISTRATIVE REVIEW

1 In accordance with the Commission's August 9, 2004, Notice, Commission Staff submits the following response to Cougar Ridge's August 5, 2004, Petition for Review of Interlocutory Order and Petition for Administrative Review.

1. The Respondent should be granted review of the ALJ's July 30, 2004, Interlocutory Order.

2 In this docket, the Commission combined an RCW 80.04.015 classification proceeding with an RCW 80.04.110 complaint against the Respondent's rates and charges. It is of course possible, and probably more common, for a classification proceeding to stand alone. The two types of cases really cannot proceed at the

same time because a finding of jurisdiction in the classification proceeding is a prerequisite to a case against the company's rates. Complaints under RCW 80.04.110 can only be made against public service companies.

3 The reason for consolidating the rate complaint with the classification proceeding in this case was procedural efficiency – if the classification proceeding were to result in a finding of jurisdiction, Staff could proceed with its case concerning the appropriate level of rates and charges without the need to issue a second notice of prehearing conference.

4 The ALJ's July 30, 2004, interlocutory order is, therefore, much like an initial order in a stand-alone classification proceeding. For that reason, interlocutory review is appropriate under the "some other factor" language of WAC 480-07-810(2)(c).

2. **There have been no *ex parte* contacts between Staff and the Commission and the Respondent's unsupported assertion notwithstanding, there have been no "misunderstandings" on the part of Staff, Staff counsel, the Commissioners, or the ALJ about what contacts are proper during a contested case.**

5 Without any citation to the record, the Respondent states "The record is clear that staff employees discussed this case with the Commissioners prior to and during the proceedings." Cougar Ridge's assertion seems to be based on its

counsel's misinterpretation of when the *ex parte* contact prohibition arises (or, in a manner of speaking, "when the *ex parte* wall goes up").¹

6 While the Commission's investigative staff and counsel did meet with each of the commissioners to obtain their decision about whether there was cause to initiate this proceeding, it is absolutely false that there have been any *ex parte* contacts between advocacy staff and the Commissioners in this case.

7 When Judge Mace asked counsel for Cougar Ridge if he had "anything that would indicate that this meeting you're referring to in request number 10 is other than the meeting related to determining probable cause" counsel quoted from the transcript of Mr. Eckhardt's deposition testimony. Tr. at 58:15 to 61:13. But the quoted section of Mr. Eckhardt's testimony clearly indicates that the meetings were prior to initiation of a proceeding and were for the purpose of determining whether there was cause to initiate a proceeding. Eckhardt Dep. at 60:10-20. *See also* Second Decl. of Jonathan Thompson in Opposition to Cougar Ridge Water System's Motion to Compel at ¶ 6.

8 The Administrative Procedure Act's (APA's) prohibition against *ex parte* contacts arises after a proceeding has been initiated. RCW 34.05.455(1)(A

¹ Counsel for Cougar Ridge appears to be operating under the theory that the "ex parte wall" goes up under an anticipation of litigation standard. At Tr. 58, lines 18-23, Mr. Brown argued, in reference to the probable cause meeting between Staff and Commissioners, "I don't understand what he's talking about in [regard to Cougar Ridge's data request] number 10, because even under his argument, the *ex parte* wall would have gone up before they walked in the room on that one, because that was going to be – clearly going to be a contested matter."

presiding officer may not communicate, directly or indirectly, regarding any issue *in the proceeding* other than communications necessary to procedural aspects of maintaining an orderly process, with any person employed by the agency without notice and an opportunity for all parties to participate, except as provided . . .); *Medical Disciplinary Bd. v. Johnston*, 99 Wash.2d 466, 481 (1983)(“We must construe [the predecessor statute to 34.05.455²] to prohibit *ex parte* consultations during the pendency of the proceedings—not prior to such hearings—or else the board would be without power to carry out its investigatory functions.”) Consistent with this, the Commission’s procedural rules prohibit *ex parte* communications “[a]fter an adjudicative proceeding begins and before a final determination.” WAC 480-07-310.

9 An adjudicative proceeding begins when the agency or the presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted. RCW 34.05.413(5); WAC 480-07-305(1). Thus, this proceeding commenced on March 1, 2004, when the Commission issued its Order Initiating Classification Proceedings Under RCW

² The prior *ex parte* provision of the APA read, in relevant part “Except upon notice and an opportunity for all parties to be present or to the extent required for the disposition of *ex parte* matters as authorized by law, no hearing examiner or agency or member of an agency presiding in a contested case or preparing a decision, or proposal for decision shall consult with any person or party on any issue of fact or law in the proceeding, . . .” Former RCW 34.04.115, derived from Laws of 1967, ch. 237, § 11, repealed by Laws of 1989, ch. 175, § 185. The current RCW 34.05.455 was adopted at Laws of 1988, ch. 288, § 416.

80.04.015 and Complaint Against Rates and Charges; and Notice of Prehearing Conference.

10 Closely related to the APA's *ex parte* contacts prohibition is the Act's separation of functions provision. While the APA at RCW 34.05.458 establishes safeguards for the separation of the adjudicative and prosecutorial functions within agencies like the WUTC, it expressly allows those in a judicial role to confer with those in an investigative and prosecutorial role for a "probable cause" or similar preliminary determination.³

11 The meeting between the Commission's investigative/prosecutorial staff and the Commissioners to obtain the Commission's approval to initiate this proceeding did not violate either *ex parte* prohibitions or separation of functions provisions of the APA.

3. Respondent has failed to provide a valid argument for allowing Cougar Ridge discovery of Staff's attorney-client privileged communications and attorney work product.

12 Cougar Ridge argues that Staff waived its attorney-client privilege when Mr. Ward told a customer of Cougar Ridge that he had been advised by the Attorney General's Office that the Commission did not have jurisdiction over

³ Subsection (2) of that section states that "A person, including an agency head, who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same proceeding unless a party demonstrates grounds for disqualification in accordance with RCW 34.05.425."

Cougar Ridge. Again, Cougar Ridge cites no legal authority for its argument. Staff briefed this issue in response to Cougar Ridge's motion to compel and stands by the reasonable and well-supported rule that merely disclosing an attorney's legal conclusion (albeit a misinterpretation of a legal conclusion in this instance) does not constitute waiver of the attorney-client privilege. *Seattle Northwest Securities v. SDG Holding Company, Inc.*, 61 Wash. App. 725, 739-40 (1991).

13 One of the more curious statements in Cougar Ridge's petition is that "the Attorney General's Office is participating in the formation of staff policy, and then hiding its participation behind a claim of privilege." It is true that the Attorney General's Office participates, as legal counsel, in the formation of Staff's litigation and legal strategy in contested matters before the Commission. That is part of its statutory role. RCW 80.01.100.⁴ It is preposterous, however, that the Attorney General's office is "hiding" its participation. Rather, the office is

⁴"It shall be the duty of the attorney general to represent and appear for the people of the state of Washington and the commission in all actions and proceedings involving any question under this title or Title 81 RCW, or under or in reference to any act or order of the commission; and it shall be the duty of the attorney general generally to see that all laws affecting any of the persons or corporations herein enumerated are complied with, and that all laws, the enforcement of which devolves upon the commission, are enforced, and to that end he is authorized to institute, prosecute and defend all necessary actions and proceedings." *See also* Wash. Const. Art. III, Sec. 21 ("The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.")

seeking to protect its work product from being appropriated by an adverse party and to protect its client's ability to seek legal guidance without having its requests for advice used against it.

4. The Commission should disclose those portions of the "probable cause" memo that do not constitute general legal advice about enforcement but that simply state facts and related legal assertions for potential adjudication before the Commission.

14 The memorandum at issue contains a recital of facts and related legal assertions about Cougar Ridge and another water system (Marbello Water System). It also contains general legal advice for the Commission about enforcement.

15 Staff suggested in a July 21, 2004, letter to the administrative law judge (with a copy to counsel for the Respondent) that it may be appropriate to disclose certain case-specific portions of the memorandum while redacting general legal advice to the Commission concerning enforcement.

16 The company-specific facts and related legal assertions that are set out in the memo are substantially the same as what appears in the order initiating this proceeding (and, for that matter, in Staff's motion for summary determination). Because the memo contains attorney-client privileged communications (running to the Commission and not to Staff), Staff withheld the memo from discovery, but disclosed its existence and provided an explanation of its contents. See Staff's

May 13, 2004, response to Cougar Ridge Data Request No. 2, attached to Second Declaration of Jonathan Thompson in Opposition to Motion to Compel.

17

The attorney-client privilege applies to legal advice provided to agency decision makers concerning litigated matters before the agency. In *Amoss v. University of Washington*, 40 Wash. App. 666, 687-8 (1985), the Court of Appeals upheld a trial court's finding that the attorney-client privilege protected from disclosure two memoranda prepared by an Assistant Attorney General concerning an administrative proceeding before the University of Washington Board of Regents. One of the memoranda was prepared for the president of the University at the administrative appeal stage of the proceeding and was "an extensive memorandum digesting the evidence and outlining options available to the president." There was a caveat, however, in the court's reasoning:

The trial judge in this case determined that the memoranda reflected legal advice confidentially conveyed by Mr. Wilson to President Gerberding and the Board. *Mr. Wilson's [the AAG's] memoranda were based solely on facts which were in the record, the briefs, and the exhibits, and were available to Dr. Amoss during the proceedings.* Presumably weighing the need to preserve attorney-client confidentiality against Dr. Amoss' need for disclosure under the discovery rules, the judge decided that the memoranda should not be produced. In these circumstances, we cannot find that the judge erred. Moreover, *the nondisclosure did not prejudice Dr. Amoss since she had access to all the facts in Mr. Wilson's memoranda, and the reviewing courts could base their decisions on the full administrative record.* [Emphasis added.]

Although the facts discussed in the memorandum at issue in the instant case are substantially the same as those that were eventually set forth in the order initiating this proceeding, the memorandum was not, strictly speaking, based on facts that were in the record. The record had not yet been assembled.⁵ To ensure that there is no appearance of prejudice, the Commission should disclose a redacted copy of the memorandum and to allow the company an opportunity to respond, if necessary.

5. The Respondent raises no persuasive arguments about the proper measurement of "annual revenue," nor the consideration to be given to its \$3000 connection charge.

18 Staff has briefed the "substantive" issues in Cougar Ridge's petition in its Motion for Summary determination and will not repeat them here. It should be clarified, however, that Staff did not select a "random" twelve month period to show that Cougar Ridge had exceeded the jurisdictional revenue threshold for

⁵ One of the issues in *Amoss* was whether there was an impropriety under the appearance of fairness doctrine as a result of assistant attorneys general from the same office serving as both legal advisor to the decision maker and representative to one of the parties in the proceeding. The court concluded there was no impropriety after noting that different attorneys were assigned to the respective roles and that those individuals kept separate files and did not confer with one another. *Id.* at 686. There is no impropriety in the present case because, unlike under the facts in *Amoss*, the advisory and prosecutorial functions of the AAG in this case were separated in time. As discussed above, the APA expressly allows pre-adjudicatory contacts to occur between investigative/prosecutorial staff and judges for the purpose of a preliminary determination of whether there is cause to initiate a proceeding. See also *Medical Disciplinary Bd. v. Johnston*, 99 Wash.2d 466, 480-81 (1983) (finding that no actual prejudice was demonstrated in a case in which a single assistant attorney general was assigned to serve as the board's legal adviser and prosecutor). Additionally, the advice provided in the memorandum (i.e., that portion of the memo that can, without question, be withheld as privileged) is of a general nature, concerning enforcement, and was not specific to the issues adjudicated in this case concerning Cougar Ridge.

Commission regulation. Rather, Staff looked at Cougar Ridge's ongoing revenues over a period a many months and found that the company's revenues had exceeded the threshold for regulation from February through September of 2003 based on a proper application of WAC 480-110-255. Staff Motion for Summary Determination at 11. Yet the company had not filed a tariff in compliance with the law.

19 Cougar Ridge provides no evidentiary support for its contention that the calculation of annual per customer revenue is so complicated that Staff misapplied it. Neither is it even relevant. Cougar Ridge admits that Staff has properly calculated annual per customer revenue under the WAC 480-110-255. Tr. at 31:2-11.

20 For the foregoing reasons, the Commission should affirm the Interlocutory Order.

DATED this 19th day of August, 2004.

CHRISTINE O. GREGOIRE
Attorney General

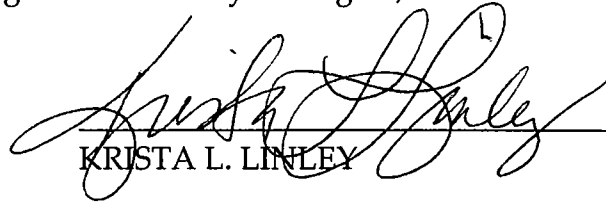


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Docket No. UW-040367
CERTIFICATE OF SERVICE

I hereby certify that I have this day served Commission Staff's Response To Cougar Ridge's Petition For Administrative Review, upon the persons and entities listed on the Service List below by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED at Olympia, Washington this 19th day of August, 2004.



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