[Service Date November 22, 2004]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UW-040367
	)	ORDER NO. 03
Complainant,	)	
	)	ORDER GRANTING PETITION
v.	)	FOR INTERLOCUTORY
	)	REVIEW; AFFIRMING IN PART,
COUGAR RIDGE WATER SYSTEM,	)	AND REVERSING IN PART,
	)	INTERLOCUTORY ORDER;
Respondent	)	ESTABLISHING FILING
	)	SCHEDULE
	)	
	)	NOTICE OF PREHEARING
	)	CONFERENCE
	)	**(Set for Thursday, February 3,**
. . . . .	)	**2005, 9:30 a.m.)**

1 ***Synopsis:*** *The Commission grants Cougar Ridge's petition for review of a July 30, 2004, interlocutory order in this case. The Commission affirms that portion of the interlocutory order concluding Cougar Ridge is subject to Commission regulation, and reverses, in part, that portion of the interlocutory order denying Cougar Ridge's discovery request for a memorandum.*

2 **NATURE OF PROCEEDING.** Docket No. UW-040367 is a special proceeding initiated by the Commission pursuant to: 1) RCW 80.04.015,[1] to determine whether Cougar Ridge Water System (Cougar Ridge or the Company) is subject to regulation under Chapter 80. 28 RCW; and 2) RCW 80.04.110, to determine whether, if Cougar Ridge is a regulated company, its rates and charges are fair, just, reasonable and sufficient.

[1] All statutes and regulations cited in this order are set out in Appendix A, attached to this order.

3 **BACKGROUND.** On June 11, 2004, Commission Staff filed a motion for summary determination on the matter of the Commission's jurisdiction over Cougar Ridge. In its motion, Staff requested the Commission to enter an order that, as a matter of law, Cougar Ridge is a water company, as defined in RCW 80.04.010, and is subject to Commission regulation.

4 On June 24, 2004, Cougar Ridge filed a response opposing Staff's motion. Cougar Ridge also filed its own motion to compel discovery.

5 On July 30, 2004, Administrative Law Judge ("ALJ") Theodora Mace entered an interlocutory order ("July 30th Order) granting Staff's motion and granting, in part, Cougar Ridge's motion to compel discovery.

6 On August 5, 2004, Cougar Ridge filed its petition for Commission review of the July 30th Order, pursuant to WAC 480-07-810(3) and WAC 480-07-825.

7 Staff filed its response to the petition on August 19, 2004.

8 **APPEARANCES.** Thomas A. Brown, Attorney, Aberdeen, Washington, represents Cougar Ridge. Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff ("Staff").

9 **PETITION FOR REVIEW.** Cougar Ridge asserts the following points in its petition for review:

- The interlocutory order improperly interpreted the language of RCW 80.04.010—the statute that governs when a water company becomes subject to Commission regulation.
- The interlocutory order incorrectly found that meetings between the Attorney General, Staff and the Commissioners regarding this case were proper.

- The interlocutory order improperly found that Commission Staff member James Ward did not waive the Commission's attorney-client privilege when he communicated to the public his belief that the Commission did not have jurisdiction over Cougar Ridge.
- The interlocutory order improperly concluded that Cougar Ridge's service connection fee was irrelevant to the attempt to exercise Commission jurisdiction in this case.
- The interlocutory order improperly found that Staff's calculation of the jurisdictional revenue amount was free of error.

10 We address these issues (in sequence) below.

What is the proper authority for review of Cougar Ridge's petition?

11 The Commission reviews interlocutory orders under WAC 480-07-810 and initial orders under WAC 480-07-825.

12 WAC 480-07-810 defines interlocutory orders as those entered during the course of an adjudicative proceeding. Under WAC 480-07-810, the Commission reviews an interlocutory order when such an order terminates a party's participation (WAC 480-07-810(2)(a)); when review is necessary to prevent prejudice to a party that may not be capable of later remedy (WAC 480-07-810(2)(b)); or when review would save effort or expense, or "some other factor is present that outweighs the cost in time and delay of exercising review" (WAC 480-07-810(2)(c)).

13 WAC 480-07-825 governs Commission review of initial orders. An initial order may propose to grant a dispositive motion or address contested issues (WAC 480-07-820), but initial orders are proposals that, if accepted, would resolve all issues in an adjudication.[2] The parties to the proceeding may challenge the initial

[2] RCW 34.05.461 and 34.05.464.

order's findings of fact, conclusions of law, remedies and recommendations for relief.

14 Cougar Ridge contends that the July 30th Order is, in fact, an initial order because it grants a dispositive motion and resolves contested issues. Cougar Ridge argues in the alternative that the July 30th Order may be considered an interlocutory order and that it meets all the criteria for review stated in WAC 480-07-810(2).

15 Staff points out that this docket is a combination of a classification proceeding under RCW 80.04.015 and a rate complaint under RCW 80.04.110. The two matters were consolidated for procedural efficiency. The Commission must first find jurisdiction in the classification proceeding before going ahead with the rate complaint. Staff contends that the July 30th Order is "much like an initial order in a stand-alone classification proceeding [and] interlocutory review is [proper] under the "some other factor" language in WAC 480-07-810(2)(c).

16 We determine that the July 30th Order in this docket is an interlocutory order in the combined classification/rate complaint proceeding. The July 30th Order did not dispose of the proceeding. Rather, after finding that Cougar Ridge was subject to Commission regulation, the Order set a schedule for further proceedings to address the company's rates.[3] We ordinarily would review all relevant matters after entry of the initial order, which provides a vehicle for challenging all of the decisions that culminate in the result. Under these circumstances, however, we may review the petition as an interlocutory order upon finding that it is appropriate for review under WAC 480-07-810(2)(c).

17 We find that the benefit to the process of resolving questions relating to jurisdiction in this docket renders the petition in this docket appropriate for review under the interlocutory review rule.

Did the interlocutory order properly interpret the meaning of the term "annual" in RCW 80.04.010?

18 RCW 80.04.010 provides that a water company falls under Commission jurisdiction if it serves more than one hundred customers or, if it serves less than one hundred customers, "where the average annual gross revenue per customer does not exceed three hundred dollars per year."[4] The statute does not provide a definition of the term "annual."

19 The July 30th Order found that because the statute provided no definition of the term "annual," rules of statutory construction require that the term be given its ordinary meaning. Consultation of the dictionary indicated that the term "annual" could mean either a calendar year or any twelve-month period.

20 Cougar Ridge insists that this statutory interpretation is incorrect and that by use of the terms "annual" and "per year" in the statutory provision, the legislature intended the term "annual" to mean a calendar year. The Company asserts that therefore, WAC 480-110-255, the Commission's rule for calculating the jurisdictional revenue amount, which relies on the most recent twelve-month period, violates the statute and cannot be used to determine jurisdiction in this case.

21 The Commission finds that the interlocutory order interpreted the statutory provision correctly. RCW 80.04.010 does not define the specific "annual" period required to determine jurisdiction, but directs the Commission to establish rules

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[3] *Order No. 2 at ¶39.*

[4] RCW 80.04.010 provides that the "the revenue figure may be increased annually by the commission by rule." The current version of WAC 480-110-255(1)(b) states the current threshold of $429.

governing how the jurisdictional average annual revenues should be calculated.[5] Because there is no statutory definition of the word "annual," we rely on the common meaning of the word for guidance. The word "annual" bears the following dictionary definition: recurring, done or performed every year; yearly; of, relating to, or determined by a year.[6] In turn, "year" is defined as: calendar year; sidereal year, solar year, equal to a calendar year but beginning on a different date, or a specific period of time shorter than twelve months such as an academic year.[7]

22 In adopting a calculation based on the most recent consecutive twelve-month period rather than a calendar or other type of year, the Commission adheres to well-established regulatory practice.

23 Regulatory agencies commonly use a twelve-month period rather than a calendar year as the "test period" in ratemaking proceedings.[8] In ratemaking proceedings at the Commission, a test period usually is defined as "the most recent 12-month period for which income statements and balance sheets are available."[9] In a recent proceeding, the Commission ordered an "annual" true-up of power costs that covered a twelve-month period from July 1, 2002, to June 30, 2003.[10] In summary, we find that the statutory meaning of "average annual

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[5] The legislature has provided specific definitions of the term "annual" in other instances. For example, for general fund expenditures, the term "annual" refers to a fiscal year. RCW 43.135.025. For state budget purposes, a fiscal year runs from July 1 through June 30 of the following calendar year. For contributions to the teacher's retirement fund, two consecutive extended school years may be used as the "annual" period, in lieu of two fiscal years. RCW 41.32.010. For increases to public employee retirement benefits, an "annual" increase may occur July 1st of each year. *RCW 41.40.010(41).*

[6] *The American Heritage Dictionary of the English Language, Third Edition*.

[7] *Id.*

[8] Leonard Saul Goodman, *The Process of Ratemaking*, Public Utilities Reports, Inc. (1998) at 142.

[9] *WUTC v. Avista Corporation*, Docket Nos. UE-991606 and UG-991607, Third Supplemental Order, September 29, 2000 at ¶ 16; see also *WUTC v. Rainier View Water Co*., Inc., 2002 WL 31432725, Wash. U.T.C., July 12, 2002 (No. UW-010877, ID 133134).

[10] *Petition of Puget Sound Energy for approval of its 2003 Power Cost Adjustment Mechanism Report*, Docket No. UE-031389, Order No. 4, January 14, 2004 at ¶ 5-6.

gross revenues" properly encompasses the use of twelve consecutive months' revenue data, and is not restricted to a calculation based on a calendar year.

Were Staff contacts with Commissioners improper?

24 RCW 34.05.458(2) provides that persons, including the heads of agencies, may determine probable cause related to an adjudicative proceeding before them and may still preside over the adjudicative proceeding. RCW 80.04.110(1) provides that the Commission may initiate a complaint on its own motion. In each instance, the Commissioners must determine whether there is probable cause to initiate the proceeding. In making this determination, the Commission may consult with legal counsel (the Attorney General) and Commission Staff. After the Commission determines probable cause and initiates the proceeding, contacts between Commission Staff, the Assistant Attorney General representing Commission Staff and the Commission, on issues related to the adjudication, become *ex parte.*[11]

25 This proceeding began on March 1, 2004, when the Commission entered an Order Initiating Classification Proceedings Under RCW 80.04.015 and Complaint Against Rates and Charges; and Notice of Prehearing Conference.[12]

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[11] RCW 34.05.455(1) prohibits a presiding officer from communicating with Staff, without notice to the other parties, during a proceeding, unless the communication is purely procedural in nature. WAC 480-07-310 prohibits ex parte communications during, but not before initiation of, an adjudicative proceeding RCW 34.05.455 (4)-(6) also state that if any *ex parte* communication occurs, it may be cured by disclosure of the communication on the record and permitting rebuttal by the communicating party. The provision also offers the possibility of other remedies, including disqualification of the presiding officer and reporting of the violation of the rule to the appropriate disciplinary body.

[12] RCW 34.05.413(5) states that an adjudicative proceeding begins when "the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted. *See also WAC 480-07-305(1).*

26 Cougar Ridge argues that Commission Staff and the Assistant Attorney General improperly met with the Commissioners during the course of the contested proceeding. The record evidence of meetings is strictly limited to those at which the Commissioners considered whether there was probable cause to initiate the proceeding.[13] These meetings occurred prior to initiation of the proceeding. They related to an essential pre-adjudication function of the Commission specifically recognized in RCW 34.05.458(2) as a matter that is proper for an agency head to take part in without – by itself – disqualifying the person from later presiding at the adjudication.[14] RCW 80.04.110(1) authorizes the Commission to bring complaints on its own motion,[15] which necessarily requires it to exercise judgment on whether or not to pursue a complaint.

27 The Commission rejects Cougar Ridge's contention. Neither the Administrative Procedure Act nor the statutory complaint provision prohibit the Commission from meeting with legal advisors and Staff prior to initiation of a proceeding, for the purpose of determining whether the proceeding should be commenced. There is no hint of any instance in which Staff improperly met with the Commissioners. We reject Cougar Ridge's arguments.

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[13] *Cougar Ridge Response to Motion for Summary Determination at ¶4; Cougar Ridge Petition for Review at ¶ 2; Eckhardt Deposition at 35-36.*

[14] RCW 34.05.458 reads in part as follows:

> (2) 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.

[15] RCW 80.04.110 reads in part as follows: 1) Complaint may be made by the commission of its own motion . . .."

Should Staff be required to disclose certain materials to Cougar Ridge?

28 Cougar Ridge requested in discovery a copy of the Attorney General Memorandum of advice to the Commissioners prior to the initiation of this proceeding, and any notes relating to the meeting. The purpose of the Memorandum was to provide the Commission with legal advice related to whether "probable cause" existed to commence the proceeding. Staff answered the data request, objecting that the Memorandum was protected by attorney-client privilege. The interlocutory order denied Cougar Ridge's request on grounds that the Memorandum and notes were privileged. [16]

29 Attorney-client privilege is the well-established protection of communications between an attorney and the attorney's client, so that the client will get the best and most candid advice and the attorney will have sufficient knowledge to provide accurate advice.[17] The Attorney General provides legal advice, including advice about litigation strategy, to the Commission under the privilege.[18]

30 Cougar Ridge argues in its petition that attorney-client privilege does not cover the Attorney General's Memorandum to the Commissioners, because Commission Staff member James Ward waived the privilege by his email disclosure to a Cougar Ridge customer in January 2004, in which he erroneously cited purported legal advice that the Commission did not have jurisdiction over Cougar Ridge.

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[16] *Tr at 40-63.*

[17] RCW 5.60.060(2)(a) provides that communications between an attorney and a client in the course of the attorney's professional employment are privileged. The privilege extends to written documents that contain a privileged communication. *Dietz v. Doe*, 131 Wash 2d 835 (1997); *Harris v. Pierce Cty*, 84 Wash. 222 (1996).

[18] Under RCW 80.01.100, part of the Attorney General's role is to act as legal counsel to state agencies and to assist in the formation of strategies for litigation before the agency.

31 Staff states that Mr. Ward's message mischaracterized the advice contained in the memorandum. Staff denies that Mr. Ward is capable of waiving the privilege or, even if he were capable, that his communication of a misinterpreted legal conclusion caused a breach of the privilege. Staff contends that only the Commission itself may waive the privilege as it relates to legal advice given by its attorney. Moreover, Staff argues that in *Northwest Securities v. SDG Holding Company, Inc.*,[19] the court held that a mere statement disclosing an attorney's legal conclusion does not constitute waiver.[20]

32 The Commission rejects Cougar Ridge's arguments regarding waiver of attorney-client privilege. In the *Northwest Securities* case cited by Staff, an attorney's letter to an opposing party, stating that there was a reasonable chance of success on a claim, was found insufficient to waive attorney-client privilege. The court found that the statement of a legal conclusion constitutes waiver of the privilege only if it discloses the bulk of the underlying legal opinion.[21] Penalizing the disclosure of such conclusory statements would "hamper attorneys in their ability to effectively represent and advise their clients."[22] Similarly, requiring disclosure of the legal advice such as the Assistant Attorney General's Memorandum in this case because Mr. Ward revealed its (misinterpreted) ultimate conclusion would hamper the ability of the Attorney General to provide the legal advice required to permit the Commission and its Staff to carry out their daily regulatory responsibilities.

33 Staff, through its counsel, asserts that the Commission should disclose portions of the memorandum that exclusively relate to the facts. As we explain here, we do not think disclosure is required, but we elect as an exercise of our discretion to disclose the factual portions of the memorandum.

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[19] *Northwest Securities v. SDG Holding Company, Inc (Northwest Securities),* 61 Wash. App. 725, 736, 812 P. 2d 488 (1991).
[20] *Id at* 739-40.
[21] *Northwest Securities* at 739.
[22] *Id*.

34 Staff cites *Amoss v. University of Washington*[23] in support of its recommendation. That decision concerned the termination of a person's professorial employment by the University of Washington, which had followed a hearing on that question before a faculty tribunal. The court *upheld* application of attorney-client privilege to legal memoranda provided by an Assistant Attorney General to the President of the University of Washington that analyzed the tribunal decision. The court's opinion observes that the memoranda were based solely on and reiterated facts in the record. Commission Staff suggests that the memoranda's repetition of facts of record was the reason the court upheld the existence of privilege. Staff concludes that, because the facts stated in the memorandum to the Commission regarding Cougar Ridge at the time of the probable cause decision are largely, but *not entirely*, in the record, the Commission should disclose the factual portions of the memorandum.

35 We disagree with the Staff interpretation of the judicial decision. Factual representations are essential in a legal opinion to provide a context for the advice it contains. References in the *Amoss* decision to the facts of record appear to be mere dicta. We are aware of no judicial decision that holds mandatory the release of statements of fact that are contained in a memorandum of legal opinion, and such a position is contrary to the plain language of the privilege statute, RCW 5.60.060(2)(a).

36 Here, no other statement of facts was presented to the Commission in conjunction with the decision to proceed. However, the statement of facts contained in the Memorandum are readily separable from the legal advice provided in the Memorandum. While we conclude that they fall within the privilege, we elect to waive the attorney-client privilege as to the statements of fact in the memorandum and direct the Attorney General to release a copy of the Memorandum to Cougar Ridge with redactions in accord with those suggested

in the Assistant Attorney General's July 21, 2004 letter to the ALJ. Otherwise, we decline to waive the attorney-client privilege with regard to that document, discussions about the document, or notes of the discussions. We also state expressly that this discretionary disclosure should not be considered as precedent of any kind.

Was Cougar Ridge's service connection fee improperly considered in determining whether Cougar Ridge is a regulated water company under RCW 80.04.010?

37 RCW 80.04.010 establishes two alternative criteria to determine whether a water company is subject to regulation: the number of customers the company has, and the level of average gross annual revenues per customer. The statute does not establish a precise methodology for calculating the average gross annual revenues. That methodology is set forth in WAC 480-110-255. Section 4 of the rule prohibits inclusion of connection fees in calculating the jurisdictional revenue threshold.

38 Cougar Ridge contends that assertion of jurisdiction in this case is improper because it is based on complaints about Cougar Ridge's connection fee rather than its monthly rates.

39 We determine that Cougar Ridge has not demonstrated that Staff included connection fees in the calculation of the jurisdictional revenue threshold. Complaints from the public about Cougar Ridge's connection fees do not render the calculation of the jurisdictional revenue threshold inaccurate or improper. Even if it such complaints did prompt the Commission to institute this proceeding, it is within the Commission's discretion to consider such factors, assuming that the company meets the statutory revenue or customer-number threshold. Further, it is possible that a company might improperly load

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[23] *Amoss v. University of Washington*, 40 Wash. App. 666 (1985)

operating costs into a "connection fee." If that were the case, which could only be determined after a careful examination of the facts, the Commission would not be prohibited from considering the true annual revenue. In this case, however, as discussed in the next section, the jurisdictional threshold is crossed without considering the connection fee. The Commission rejects Cougar Ridge's contention that Cougar Ridge's connection fee was improperly considered in determining whether it is subject to Commission regulation.

Did Staff correctly calculate the jurisdictional revenue threshold?

40 Staff followed the WAC 480-110-255(5) methodology for calculating the jurisdictional revenue threshold.[24] As a result of its calculation, Staff reached the conclusion that Cougar Ridge became a water company subject to regulation as of February 2003.[25]

41 Cougar Ridge contends that the method Staff used is very complex, to the point that even Staff committed errors in the calculation.

42 Staff points out that Cougar Ridge admitted on the record in this case that Staff properly calculated the annual revenue per customer under the rule. *Tr. at 31.*

43 The Commission is persuaded that Staff properly used the rule's methodology and correctly calculated the average gross annual revenue per customer. The rule is drafted to make the calculation as accurate as possible in situations where a number of complex factors may come into play. Cougar Ridge's own admission that Staff's calculation was correct belies Cougar Ridge's arguments about the rule or Staff's errors in calculation.

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[24] *Exhibit to Declaration of Gene Eckhardt attached to Commission Staff Motion for Summary Determination.*

[25] *Commission Staff Motion for Summary Determination* at ¶ *17.*

44 **Conclusion.** As a result of our review of the July 30th interlocutory order, we affirm those portions of the order that conclude that Cougar Ridge is subject to Commission regulation by virtue of the fact that the company's average gross annual revenue per customer reached the jurisdictional threshold established in RCW 80.04.010 and WAC 480-110-255. We reverse, in part, that portion of the order that denied Cougar Ridge's request for the Memorandum to the Commission submitted by the Assistant Attorney General prior to initiation of this proceeding. We conclude that the Memorandum is privileged, but for the reasons stated above, we elect to waive the privilege as to factual portions of the memorandum in this matter only.

ORDER

45 THE COMMISSION ORDERS That Cougar Ridge's Petition for Review is denied in part and granted in part. The Attorney General shall provide Cougar Ridge a redacted copy of the Attorney General's January 26, 2004, Memorandum to the Commissioners within five days of service after this Order.

46 THE COMMISSION ALSO ORDERS Cougar Ridge to file its tariff on or before December 22, 2004. A prehearing conference will be convened on February 3, 2005, to determine the necessity for further proceedings.

47 **NOTICE IS GIVEN That a prehearing conference in this proceeding is scheduled for Thursday, February 3, 2005, at 9:30 a.m. in the Commission's Main Hearing Room, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington.** Persons who cannot attend the conference in person may participate via the Commission's teleconference bridge line at

360-664-3846. Persons desiring to participate via the bridge line must make advance reservations by calling Margret Kaech at 360-664-1140, no later than noon on Wednesday, February 2, 2005.

DATED at Olympia, Washington and effective this 19th day of November, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner