Supreme Court No. 1028644
[Court of Appeals No. 38792-5-III]

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF SPOKANE,

Petitioner,

v.

WEST TERRACE GOLF LLC; et al.,

Respondents.

AMICUS CURIAE BRIEF OF THE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF PETITIONER

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I. INTRODUCTION

In this lawsuit, municipal water users living *outside* the City of Spokane claim Spokane unlawfully requires them to pay more for water than municipal water users living *inside* Spokane. In other words, this lawsuit involves a challenge to water rates based on Spokane's classification of "outside-City" water users. That classification is not based on the particular circumstances of any individual user; it is based on costs and other factors related to serving that "class" of customers with water.

Yet instead of seeking relief under RCW 35.92.010, which provides municipalities with the standards governing classification and related rates, Respondents West Terrace Golf, et. al., (Respondents) seek relief under various provisions of chapter 80.28 RCW. By their plain terms, the provisions Respondents rely on inform a water company's treatment of "persons," "corporations," and "particular" customer circumstances, not general "classes" of water users.

Historically, the statutes were correlated, but separate. By holding that *both* statutory schemes apply to the review of water rates a municipality sets by class, the court has imposed conflicting and confusing standards that impede the ability of Washington municipalities to set water rates based on classifications.

In its published opinion, the court focused on how the statutes are similar but ignored key differences. For example, although, under RCW 35.92.010, rates set by class must be reasonable and "uniform," RCW 80.28.090 prohibits unreasonable preferences given "in any respect whatsoever" to "particular" persons, corporations, or localities. Similarly, RCW 80.28.100 prohibits water companies from charging "any person or corporation" more or less than another "person or corporation" receiving water service under the same or substantially similar circumstances "except as authorized" in chapter 80.28 RCW, which by its plain terms does not include classification under RCW 35.92.010.

The court's error stems from its failure to heed (or acknowledge) RCW 80.04.010's express requirement that "context" informs whether a utility is a "water company" under Title 80 RCW. "Context" in this instance demonstrates that RCW 80.28.010, .090, and .100 do not inform the legality of classified water rates and would, in fact, hinder a municipality's ability to set such rates. The court's interpretation has muddied what was previously a straightforward analysis and raises substantial issues of public interest for every Washington municipal water supplier.

II. IDENTITY AND INTERESTS OF AMICUS

WSAMA is a non-profit corporation comprised of attorneys who represent Washington's 281 cities and towns. WSAMA's members frequently advise their clients on the legal framework that governs rate-setting for municipal water utilities. WSAMA also served as amicus curiae before the court of appeals.

III. STATEMENT OF THE CASE

WSAMA agrees with and adopts the petition for review's statement of the case.

IV. ARGUMENT

For decades, water rates based on customer classifications have been required to satisfy RCW 35.92.010 and the state constitution. Pet. at 14. Under RCW 35.92.010, municipalities have "full power to regulate and control the use, distribution, and price" of their water services so long as their charged rates are uniform, not less than the cost of service, and comply with the reasonableness requirements of Art. 1, 12 of the Washington State Constitution. *Geneva Water Corp. v. City of Bellingham*, 12 Wn. App. 856, 868–70, 532 P.2d 1156 (1975); *see also* Hugh D. Spitzer, *Taxes v. Fees: A Curious Confusion*, 38 Gonzaga L. Rev. 335, 343 (2002–2003) (water rates under RCW 35.92.010 are a type of user fee).

The court of appeals altered this scheme. It held that RCW 35.92.010 applies only to the classifications themselves, and

RCW 80.28.010, .090, and .100, which the Washington Utilities and Transportation Commission (WUTC) enforces, control rate *amounts* even when set by classification. *West Terrace Golf LLC v. City of Spokane*, 542 P.3d 1029, 1039 (2024). This is wrong for the reasons stated in the petition. WSAMA writes separately to emphasize the significant ramifications the court's interpretation, if not corrected and/or clarified, will have for Washington municipalities.

A. This Case is Not About "Nothing."

Under the court's ruling, challenges to municipal water rates fall under chapter 80.28 RCW and challenges to municipal water rate classifications fall under RCW 35.92.010. The court—and Respondents—suggest that under either statutory scheme, reasonableness is required,[1] and the standards are therefore interchangeable. Indeed, in a concurrence, Judge Fearing declared this appeal to be "about nothing" because RCW

[1] *See* Answer to Pet. at 7–8.

35.92.010 and RCW 80.28.010(1) "convey the same meaning" and no party had "enlightened the court as to how a ruling might differ" under either statute. 542 P.3d at 1040–41.

If the standards were interchangeable, there would be no need for separate statutory schemes and this litigation would not exist. The material point is not how the statutory schemes are alike, but how they differ. This litigation involves Respondents' attempt to leverage those differences and use legal standards pertaining to *individuals* and *particular* circumstances to challenge rates the City set *based on classification*. The standards are different, and what is reasonable under one is not necessarily reasonable under the other. The court's interpretation will impede the ability of every municipality in Washington to set and defend rates based on classifications. [2]

[2] Respondents attached to their answer a 2019 brief in which the City of Tacoma characterized Tacoma as a water company whose rates are subject to RCW 80.28.010, 80.28.090, and 80.28.100. Tacoma's assertion is not controlling or material because (1) The 2019 case did not concern water rates or classifications, and the applicability of RCW 80.28 was not

B. RCW 35.92.010 Expressly Addresses Rate Amounts, Not Just Classification.

RCW 35.92.010 limits the authority of municipalities to set rates based on classification in the following ways: water rates for any one class must be *uniform*; they must not be *less than the cost of service* to the class; and they must be *reasonable* under the Washington State Constitution.

Under those parameters, municipalities may consider any number of factors that, on their face, relate to the *costs* of providing water services, including differences in the costs of service between customers; whether customers live inside or outside the municipality; differences in cost of maintenance, operation, repair, and replacement for various parts of the water system; character of service provided; quantity and quality of

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argued, developed, or at issue; and (2) Even if considered, Tacoma's assertion should only be read as indicating a need for clarity. Regardless of Tacoma's statement, for reasons provided in this brief, applying RCW 80.28.090 and 80.28.100 to municipalities in the context of rate classification is unworkable and requires ignoring plain statutory text indicating that chapter 80.28 RCW does not apply in this context.

water provided; time of water use; water conservation goals; capital contributions, and "any other matters which present a reasonable difference as a ground for" distinguishing rates based on classification. RCW 35.92.010.

When utilizing this statute to set rates, "only a *practical* basis for the rates is required, not mathematical precision." *Teter v. Clark Cnty*, 104 Wn.2d 227, 238, 704 P.2d 1171 (1985). In other words, RCW 35.92.010 focuses on the fairness of rates set according to customer or service classifications. To interpret this statute as having nothing to do with rate amounts ignores the full scope of the statute's plain language.

C. By Their Plain Terms, RCW 80.28.100 and 80.28.090 Cannot Apply to Water Rates Based on Classification.

1. RCW 80.28.100

In sharp contrast with RCW 35.92.010's focus on classifications and related costs, RCW 80.28.100 states that no "water company" "may . . . charge, demand, collect or receive *from any person or corporation* . . . a greater or less compensation for . . . water . . . *except as authorized in this*

chapter, than it charges . . . any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions." (emphasis added).

By its plain terms, this statutory provision does not allow rate differentials based on classification under RCW 35.92.010 because that authorization exists in "chapter" 35.92 RCW, not chapter 80.28 RCW. Yet the court held that Respondents may use this provision to challenge the reasonableness of the City's rates based on its classifications of in-City and out-of-City customers. In other words, Respondents may use RCW 80.28 as a backdoor to challenge the City's rate classifications under standards that do not inform those rates, and under a statutory scheme that does not acknowledge the City's authority to classify under RCW 35.92.010.

The court appears to have ignored the "except as authorized in this chapter" restriction. It also appears to have assumed that customers inside and outside the City's limits

would not receive water under "the same or substantially similar circumstances or conditions," so could be charged different rates. Municipalities would likely argue the same, but, by its plain terms, RCW 80.28.100 focuses on differences between people and corporations, not classes for which rate uniformity is required. Indeed, this distinction forms the basis of Respondents' claims.

Chapter 80.28 RCW and RCW 35.92.010 belong to different statutory schemes. Those schemes might correlate, but they are not interchangeable. Requiring a municipality to satisfy both while attempting to set rates based on classification would needlessly introduce confusion and conflict into water-rate setting and restrict the ability of municipalities to set rates based on RCW 35.92.010.

2. RCW 80.28.090

RCW 80.28.090 prohibits "water companies" from making or granting "any undue or unreasonable preference or advantage to any person, corporation, or locality" or subjecting

"any particular person, corporation or locality . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Again, this provision speaks to "particular" persons, corporations, and localities, not classes.

The court assumed a "reasonable" rate classification system would not create an "undue" or "unreasonable" advantage under RCW 80.28.090, and, again, municipalities would likely argue the same. But, by its plain terms, RCW 80.28.090 allows for consideration of "particular" customers and localities, whereas particularity is not required under RCW 35.92.010. *Teter*, 104 Wn.2d at 238.

Under the court's interpretation, municipal water providers attempting to set uniform rates based on general classifications would have to inject into their decision-making process RCW 80.28.090's particularity standards. The legislature does not require this, for good reason. Doing so would limit the authority of municipalities to set rates based on classification.

D. The Court's Errors Stem from Its Failure to Consider "Context" When Defining "Water Company."

The Court's conclusion that RCW 80.28.010, .090, and .100 apply to municipal water suppliers turned largely on the fact that RCW 80.04.010(30)(d) defines "water company" as including "every city or town owning, controlling, operating, or managing any water system for hire within this state." But the definition of "water company" contained in RCW 80.04.010 applies "unless specifically defined otherwise *or unless the context indicates otherwise*." RCW 80.04.010 (emphasis added).

This Court has instructed that courts "must not interpret a statute in a way that renders any portion of it meaningless or superfluous." *Kellogg v. Nat'l R.R. Passenger Corp.*, 199 Wn.2d 205, 221, 504 P.3d 796 (2022). And yet the court did exactly that. The court's reasoning renders the emphasized language superfluous. In addition to express language, such as that contained in RCW 80.04.500, on which the court exclusively relied, "context" may (and often does) exempt municipal water suppliers from Title 80's definition of "water company."

1. RCW 80.04.500 Is Not Determinative.

When determining whether municipalities are "water companies" under chapter 80.28 RCW, the court cited RCW 80.04.500, which makes an express exception to that definition by prohibiting the WUTC from making or enforcing orders against municipal water suppliers. 542 P.3d at 1034, 1037, 1039. The court noted that RCW 80.04.500 also says, "all other provisions enumerated herein shall apply to public utilities owned by any city or town," and described this language as proof that the exemption of municipalities "always has been a partial exemption," limited to WUTC enforcement, and that the legislature therefore must have intended RCW 80.28.010, .090, and .100 to apply to municipalities. 542 P.3d at 1037. The court's use of RCW 80.04.500 to define the extent of RCW 80.28's application to municipalities was error. Title 80 RCW expressly allows for additional exemptions based on "context."

2. The Court's Interpretation Conflicts with the Legislature's Treatment of Municipal Water Suppliers.

The legislature has not treated municipal water suppliers as presumptive "water companies." For example, RCW 80.28.080 provides that "water companies" may charge free or reduced rates to employees and their families. Although the statute lacks an express exemption, municipalities are exempt because providing free or reduced water rates to City employees would be unconstitutional. Respondents have implicitly acknowledged this "context" exemption by abandoning their argument that this statute applies to municipal water suppliers.

Similarly, RCW 80.04.010(30)(e) applies the Washington State Consumer Protection Act, 19.86 RCW, (CPA) to "water companies" exempt from regulation unless the water company petitions the WUTC. But this Court has held that the legislature did not intend the CPA to apply to municipal corporations. *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). Municipalities are therefore

exempt from RCW 80.04.010(30)(e), despite lack of an express exemption.

Finally, the legislature did not provide municipalities with authority to set rates by classification under Title 80. It placed that authority in *Title 35*, which does not use the term "water company" or incorporate Title 80's corresponding definition. The court's ruling effectively injects Title 80's definition into RCW 35.92.010, even though the legislature did not include it there.

Given the plain language of the statutory provisions described above, "context" demonstrates that the better, and correct, interpretation is that the legislature did not intend "water company" as used in chapter 80.28 RCW to govern municipalities setting water rates based on classification under RCW 35.92.010.

E. The Electrical Services Statute the Court Cited Does Not Concern Classification.

The court also reasoned that chapter 80.28 RCW applies to rates set under RCW 35.92.010 because RCW 35.92.050,

which governs a municipality's authority to acquire and operate electrical utilities, applies the "just, fair, reasonable, and sufficient" standard contained in RCW 80.28.010 to electric rates. 542 P.3d at 1037–38. Again, the court focused on similarities in these statutes but ignored key distinctions. RCW 35.92.050 does not concern rate classification and lacks any reference to classes or rate standards. It therefore fails to create the same conflicts that arise when Title 80's standards are applied to rates set under RCW 35.92.010. Such "context" indicates that municipalities setting rates under RCW 35.92.010 are exempt from RCW 80.28.010, .090, and .100.

V. CONCLUSION

This Court should grant the City's petition under RAP 13.4(b)(1) and (4). RCW 35.92.010 and chapter 80.28 RCW are not interchangeable. They are separate statutory schemes whose plain language indicates they are intended to operate as such. Even if this Court agrees with the court of appeals that rates set by classification are subject to both schemes, clarification is

needed as to how municipalities should apply the standards and restrictions articulated in RCW 80.28.090 and 80.28.100 when setting rates under RCW 35.92.010.

RESPECTFULLY SUBMITTED this 6th day of May, 2024.

This document contains 2,498 words pursuant to RAP 18.17.

VAN NESS FELDMAN LLP

s/ Charlene Koski
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Washington State Association of Municipal Attorney - Amicus Curiae Committee

CERTIFICATE OF SERVICE

I certify that I e-filed the WSAMA's Brief of Amicus Curiae in support of Petitioner City of Spokane's petition for review through Washington State Court's Secure Access web portal to be served on all parties or their counsel of record on the date below as indicated.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of May, 2024, at Seattle, WA.

s/Amanda Kleiss
Amanda Kleiss, Legal Assistant

VAN NESS FELDMAN LLP

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