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Supreme Court No. 1028644
Court of Appeals No. 387925-III

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SPOKANE, a municipal corporation in and
for the State of Washington,

Petitioner,

v.

WEST TERRACE GOLF L.L.C., a Washington limited
liability company, and JOHN E. DURGAN, individually and as
class representative for all others similarly situated; TAWNDI
L. SARGENT, individually and as class representative for all
others similarly situated; and KRISTOPHER J. KALLEM,
individually and as class representative for all others similarly
situated,

Respondents.

**APPELLANTS' ANSWER TO
BRIEF OF AMICUS CURIAE**

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I. INTRODUCTION

The amicus memorandum filed by Washington State Association of Municipal Attorneys (“WSAMA”) utterly fails to establish that there is any substantial public interest involved in the City’s Petition for Review of Division III’s ruling in this matter. Division III’s ruling merely confirms that if municipal water companies fail to set reasonable water rates, in addition to constitutional challenges, they likewise face liability under Title 80 RCW. WSAMA’s speculative argument that the standard of reasonableness applicable to municipal water rates somehow differs under the Washington Constitution and Title 80 RCW is unsupported by law or fact. Therefore, Plaintiffs respectfully request that this Court deny the City’s Petition for Review.

II. IDENTITY AND INTERESTS OF RESPONDING PARTY

Respondents West Terrace Golf, L.L.C. and John E. Durgan, Tawndi L. Sargent, and Kristopher J. Kallem, individually and as class representatives for all others similarly

situated, are the responding parties and request that the City's Petition for Review be denied.

III. ARGUMENT

WSAMA's claim that the City's Petition for Review somehow involves an issue of public interest is premised on its speculation that municipal water companies might find it "*confusing*" or "*difficult*" to set reasonable rates under Title 80 RCW. WSAMA's amicus brief is otherwise comprised entirely of improper, irrelevant, and insupportable argument regarding the merits of Division III's legal analysis. WSAMA utterly fails to establish that the City's Petition involves an "issue of substantial public interest." Thus, the City's Petition should be denied.

A. WSAMA's Vague Speculation Does Not Establish Substantial Public Interest In Division III's Ruling.

WSAMA's sole attempt to identify any "*issue of substantial public interest*" consists of nothing more than bald speculation that municipal water companies *may* find it "*difficult*" or "*confusing*" to set reasonable water rates under

Title 80 RCW. However, the amicus brief is devoid of even a scintilla of legal or factual support for this argument.

WSAMA's argument is premised on its claim that there is some difference in the standards for setting reasonable rates under RCW 35.92.010 and RCW 80.28.010, .090, and .100. This is based on WSAMA's misrepresentation that RCW 35.92.010 and the Constitution, merely require reasonable "class" rates and that Title 80 RCW requires reasonable individualized rates.

In reality, all public utilities, including water companies subject to UTC jurisdiction under Title 80 RCW, are permitted to create rate classifications in the same manner that RCW 35.92.010 authorizes cities to classify customers. Cole v. Washington U.T.C., 79 Wn.2d 302, 310-11(1971) ("*[r]ate classifications premised on reasonable differences in conditions and costs are an accepted part of utility rate making.*"); cf. RCW 35.92.010 (allowing cities to classify customers based on "*matters which present a reasonable difference as a ground for distinction.*").

Moreover, the relevant statutes in Title 80 RCW largely mirror the constitutional provision that WSAMA and the City agree prohibit discriminatory municipal water rates:

*“No law shall be passed granting to **any citizen**, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”*

WA Const., Art. 1, § 12 (emphasis added).

RCW 80.28.090 and .100 prohibit the exact same conduct:

no water company “*may make or grant any undue or unreasonable preference or advantage to **any person***”, or subject “***any particular person**... to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.*”

RCW 80.28.090 (emphasis added). No water company may charge “*a greater or less compensation*” for water than it charges or collects “*from **any other person** or corporation for doing a like or contemporaneous service*” under “*the same or substantially similar circumstances or conditions.*”

RCW 80.28.100 (emphasis added).

WSAMA's amorphous claim that RCW 35.92.010 and the Constitution somehow impose less particularized duty to avoid unreasonable and/or discriminatory classifications and rates is baseless. Division III's ruling that municipal water rates must be reasonable and nondiscriminatory under RCW 80.28.010, .090, and .100 does not actually alter the city's obligation to avoid unreasonable rates and/or discrimination inherent in other law.

However, even *if* the standards of reasonableness differed between RCW 35.92.010 and RCW 80.28.010, et seq., WSAMA offers only its self-serving and conclusory opinion that such differences would actually impact the public and/or the ability of municipal water companies to set rates. WSAMA utterly fails to explain *how* or *why* that would be the case.

Clearly, with few exceptions, privately-owned water companies are required to set reasonable rates under RCW 80.28.010 and otherwise comply with RCW 80.28.090 and .100. WSAMA's proposed brief does not purport to identify some unique process used solely by municipal water companies

to calculate reasonable rates under the Washington Constitution that might somehow yield *unreasonable* rates under Title 80 RCW. WSAMA also fails to explain how or even whether the process by which municipal water companies calculate rates differs from the process utilized by the UTC and/or private water companies to calculate rates.

Instead, WSAMA merely speculates that municipal water companies might face some unspecified challenge setting reasonable rates under Title 80 RCW. Yet, even if that supposition was supported by actual evidence, which it is not, WSAMA's speculation does not actually establish any *public impact*. Nor does it establish that the public is even remotely concerned about the fact that municipal water companies *might* find it *confusing* or marginally more "*difficult*" to set just, fair, reasonable, non-preferential, and nondiscriminatory water rates under Title 80 RCW.

Therefore, the proposed amicus brief wholly fails to establish a basis for review under RAP 13.4.

B. There Is No Conflict Between RCW 35.92.010 And The Relevant Statutes In Title 80 RCW.¹

WSAMA seeks to use the remainder of its amicus brief as a vehicle for challenging Division III's legal analysis on the merits. These arguments are premature and are not properly before the Court on the City's Petition for Review.

Additionally, WSAMA's argument that there is some conflict between RCW 35.92.010 and the relevant statutes in Title 80 RCW contradicts the City's own admissions and arguments in its Petition for Review. See Petition for Review at 22 (“*The statutes at issue here do not directly conflict.*”). This Court has previously made clear that it “*will not address arguments raised only by amicus.*” Citizens for Responsible Wildlife Management v. State, 149 Wn.2d 622, 649 (2003).

¹ To the extent WSAMA's brief improperly reiterates legal arguments already thoroughly briefed by both parties regarding the plain language and meaning of the statutes at issue and cases requiring reasonable municipal electric rates under Title 80 RCW, Plaintiffs hereby incorporate by reference their response to the City's Petition, and Plaintiff's opening brief and reply filed below.

Therefore, WSAMA's arguments should be disregarded on the City's Petition for Review.

In any event, WSAMA's analysis of the statutes at issue is fatally flawed and wholly fails to provide a basis for review under RAP 13.4.

1. The Plain Language Of Title 80 RCW Confirms Municipal Water Companies Must Comply With RCW 80.28.010, .090, And .100.

WSAMA's argument that municipal water companies are excluded and/or exempt from Title 80 RCW ignores the plain language of RCW 80.04.010(30) and black letter law. WSAMA makes the bizarre claim that the "*legislature has not treated municipal water companies as presumptive 'water companies'.*" Amicus Br., p. 14.

However, for more than a century, the legislature has **specifically defined** "water company" to **include** "*every city and town,*" owning and operating a water system for hire. RCW 80.04.010(30). Ironically, WSAMA nonetheless baselessly argues that this Court can use "*context*" to interpret

RCW 80.04.010(30) to *exclude* cities in the very same section of its brief in which it admits “*courts ‘must not interpret a statute in a way that renders any portion of it meaningless or superfluous.’*” Amicus Br., p. 12 (quoting Kellogg v. Nat’l R.R. Passenger Corp., 199 Wn.2d 205, 221 (2022)). Unsurprisingly, WSAMA utterly fails to cite to any actual authority for its spurious argument.

For example, WSAMA argues without authority that this Court can rewrite RCW 80.04.010 to exclude cities, because *some* language in RCW 80.28.080 purportedly conflicts with statutes in a *different* title.² However, as thoroughly discussed in Plaintiffs’ Answer to the City’s Petition, well-settled principles of statutory construction require that courts harmonize, not choose between, statutes that do not conflict.

² Contrary to Defendant and WSAMA’s tiresome mischaracterization, Plaintiffs do not concede and have never conceded that RCW 80.28.080 is wholly inapplicable to cities.

Thus, if and to the extent a conflict between the language in RCW 80.28.080 and statutes governing government gifting exists, it may be appropriate to employ canons of statutory construction to determine which *conflicting* statute controls. However, the mere fact that *part* of RCW 80.28.080 *might* conflict with other law applicable to cities does not somehow exempt cities from all other *nonconflicting* statutes contained in Title 80 RCW. This interpretation would render the inclusion of cities in the statutory definition of “water company” as contained in RCW 80.04.010(30) totally meaningless.

WSAMA’s reliance on subparagraph (e) to the statutory definition of water company fails for the same reason. That subparagraph provides only that water companies exempt from UTC jurisdiction are subject to the Consumer Protection Act RCW 19.86, et seq. WSAMA misrepresents that because this Court has previously found cities were not specifically included, and thus were intended to be excluded from the definition of

entities subject to the CPA,³ cities are somehow also “*exempt from RCW 80.04.010(30)(e), despite the lack of an express exemption.*” Amicus Br., p. 15. WSAMA does not even attempt to cite to authority for this contrived argument.

RCW 80.04.010(30), expressly *includes* cities in the definition of “water company.” The fact cities are *not included* in the definition of entities subject to the CPA does not somehow provide “context” allowing courts to interpret RCW 80.04.010(30) to exclude cities contrary to the express language of that statute.

In any event, this Court has already confirmed that cities are water companies under Title 80 RCW. Fisk v. City of

³ Plaintiffs do not concede that the CPA is inapplicable to cities. Washington courts do not appear to have specifically weighed in on whether RCW 80.04.010(e) provides a basis for holding cities liable under the CPA, notwithstanding the exclusion of cities from the statutory definitions in RCW 19.86, *et seq.*, following this Court’s decision that water companies are subject to Title 80 RCW, in Fisk, *supra*. See *e.g.* Silver Firs Town Homes, Inc. v. Silver Lake Water Dist., 103 Wn. App. 411, 422 (2000), *abrogated by Fisk*, *supra*. However, that issue is not presently before the Court.

Kirkland, 164 Wn.2d 891, 895 (2008) (holding “*cities are plainly included in the statutory definition of a water company*”); see also Lane v. City of Seattle, 164 Wn.2d 875, 885-6 (2008) (holding that a class of water ratepayers had standing to challenge a municipal water company’s unlawful tax and rate increases under RCW 80.04.440).

WSAMA’s argument that the legislature did not *really* mean to define water company to include cities is frivolous at best.

2. RCW 35.92.010 Primarily Governs Classifications.

WSAMA’s untenable observation that RCW 35.92.010 *references* water rates also fails to establish error much less a basis for review under RAP 13.4(b)(4). As has been repeatedly stated throughout this matter, there is no dispute that RCW 35.92.010 *generally* allows cities to sell water, classify customers, and set rates.

Yet, as Division III accurately noted, beyond requiring uniformity for customers in the same class and prohibiting rates

that are less than the cost of water, RCW 35.92.010 is otherwise silent as to the *amount* of those rates. The fact that RCW 35.92.010 specifically requires municipal water companies to ensure their *classifications* are fair and reasonable does not somehow establish that they are not *also* required to ensure their *rates* are fair and reasonable under RCW 80.28.010, .090-.100.

3. RCW 35.92.010 Does Not Conflict With RCW 80.28.090 And .100.

WSAMA's strained and improper argument that there is some conflict between RCW 35.92.010 and RCW 80.28.090 and .100 ignores the actual language of the statutes at issue.

First, WSAMA claims that RCW 80.28.100 conflicts with the City's authority to classify customers under RCW 35.92.010, because it prohibits charging customers different rates "*except as authorized in this chapter.*" Amicus Br., pp. 8-10. Since RCW 35.92.010 authorizes cities to classify customers based on reasonable differences, WSAMA apparently argues that such classifications are not "authorized" by Title 80 RCW.

However, RCW 80.28.100 does not prohibit charging customers different rates altogether. RCW 80.28.010 simply prohibits charging customers different rates for “*a like or contemporaneous service*” under “*the same or substantially similar circumstances.*” RCW 80.28.010. Nothing in RCW 35.92.010 authorizes municipal water companies to charge customers different rates for the *same service* under the *same or substantially similar circumstances.*

Rather, RCW 35.92.010 requires cities to base classifications of customers on “*matters which present a reasonable difference as a ground for distinction.*” RCW 35.92.010 (emphasis added); see Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 225 (2008) (interpreting omnibus clauses like the above as marking the “*common attribute*” that “*connects the specific items listed*”). As noted above, this Court has previously recognized that utilities are likewise authorized to create rate classifications based on reasonable differences under

Title 80 RCW. Cole, supra. Thus, there clearly is no conflict between these statutes.

WSAMA's convoluted argument that RCW 80.28.090 conflicts with RCW 35.92.010 because it "*allows for consideration of 'particular' customers*" is equally untenable. Amicus Br., pp. 10-11. RCW 80.28.090 prohibits granting customers "***undue or unreasonable***" preferences or advantages, or subjecting "*any particular person, corporation or locality or any particular description of service to any **undue or unreasonable** prejudice or disadvantage in any respect whatsoever.*" RCW 80.28.090 (emphasis added).

As previously stated, the Constitution likewise prohibits granting special "*privileges*" to "*any citizen,*" and RCW 35.92.010 requires that municipal water companies base customer classifications on "*reasonable differences.*" Nothing in RCW 35.92.010 authorizes cities to classify customers in the *absence* of "*reasonable differences*" so as to confer *undue or unreasonable* preferences on some customers, and *undue or*

unreasonable prejudice on others. These statutes require the same thing stated different ways.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the City's Petition for Review be denied.

This document contains 2,344 words, excluding parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 22nd day of May, 2024.

DUNN & BLACK, P.S.

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DECLARATION OF SERVICE

I, ALEXANDRIA T. DRAKE, make this declaration under penalty of perjury under the laws of the State of Washington:

1. That I am over the age of 18, am competent to testify to the matters herein and have personal knowledge of the same.

2. On this 22nd day of May, 2024, I caused to be served the foregoing on the individuals named below via the Washington appellate courts' portal.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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