No. _____

SUPREME COURT
STATE OF WASHINGTON

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,

Plaintiffs/Petitioner,

v.

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

Defendant/Respondent.

PETITIONERS' MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Plaintiffs West Terrace Golf, L.L.C., a Washington limited liability company; and John E. Durgan, Tawndi L. Sargent, and Kristopher J. Kallem, individually and as class representatives for all others similarly situated, are the Petitioners and move this Court for discretionary review.

II. DECISION

Petitioners seek review of the Order entered by Superior Court Judge Charnelle Bjelkengren on 12/2/2021 granting Defendant City of Spokane's Motion for Declaratory Relief and denying Plaintiffs' Motion for Declaratory Relief. See Petitioners' Appendix ("App.") 1-3.

III. ISSUES PRESENTED FOR REVIEW

> Whether the City of Spokane, admittedly a "water company" under Title 80 RCW pursuant to RCW 80.04.010, is required to ensure its water rates and rate-setting activities comply with Title 80 RCW, including RCW 80.28.010(1)-(3) requiring that all charges are to be just, fair, reasonable and sufficient, RCW 80.28.090 prohibiting undue or unreasonable preferences, and RCW 80.28.100 prohibiting discriminatory rates.

IV. STATEMENT OF THE CASE

A. Background.

From at least 2002 to the present, Defendant City of Spokane ("City"), in violation of Washington law, has unlawfully overcharged the class of water customers located outside its limits. It is undisputed that the City has required residents and businesses located outside the City's limits to pay significantly higher water service rates (1.5x to 2x) than those located inside the City's limits.

The City's Water Utility Department is a separate department under the City Utility Division, operated as a separate business and referred to as an "enterprise fund." SMC § 07.08.399. App. 283-4. The Water Department is supported entirely by the rates charged to its customers for water services. App. 284. The City imposes a tax on its own Water Utility Department, collecting 20% of all Water Department revenues. App. 285. Pursuant to SMC § 07.08.010A, tax revenues collected by the City are deposited into its general fund. Thus,

the more money the Water Department collects from all its users, the more tax revenue ends up in the City's general fund!

Over the years, Water Department revenues have never gone down. App. 324. Rather, it became City Council 'policy' to arbitrarily set water rates for outside water users. App. 327. The City, pursuant to its 'policy,' sets and raises Outside City water rates without basing rates on any analysis or analytics. Id. To that end, the Defendant City utilizes a two-tier customer classification (**inside/outside**) as a pretext to unlawfully impose arbitrary, capricious, and unreasonable higher rates on the class of "**Outside City**" water users. Indeed, the City's own personnel previously admitted "***The 200% doubling of outside rates [in November 2001] was an arbitrary judgment made without water department input. We have never been comfortable with it***." App. 236-7.

The City further admits it relied solely on a purported "*intuitive or common sense approach*" to set outside water rates by applying a patently arbitrary 1.5x to 2x multiplier to the Inside

Water rates. See App. 291-2. Former Water Department Director Bradley Blegen's 3-page memo dated 3/27/02 entitled "City of Spokane Water Department Cost of Water Service Analysis" (colloquially the "Blegen Analysis") confirms this:

> "*Rather than doing a very time consuming and costly rate study, a more intuitive approach has been used in adopting our present rate structure. This intuitive or common sense approach yields close enough results….*"

See App. 291.

Notably, Blegen testified that his memo was never actually intended to be a "*rate study*," much less a "*document of precision*." App. 291, 297. Rather, he admitted "*really, I considered this is a study to look at multipliers for inside versus outside.*" App. 291. Blegen "*never became aware of any*" other cost of water service analysis that any predecessor City water director had created. App. 287.

Thereafter, in 2008, Spokane commissioned HDR Engineering ("HDR") to "*provide a comprehensive water… rate and general facility charge (GFC) study for the City of Spokane*."

App. 254. In August 2008, HDR requested that Defendant City "*[p]rovide a copy of the most recent water rate studies completed by the City*." App. 259-60. However, the City failed to provide HDR the Blegen Analysis, correctly advising that "*[t]here is* ***no record of a water rate study*** *completed by the City*," because there "*[h]as never been one completed*." Id.

HDR's "*proposed first task*" in conducting the City's first "*comprehensive*" rate study was thus to educate the City "*on the theory and methodology of establishing cost-based water… rates*." App. 255. HDR expressly advised the City that "*[r]ates should be cost-based*" and "*equitable*." App. 267. In addition, HDR identified the main objective of a cost-of-service study: "*Determine the cost to serve each class of service (Do cost differences exist?)*." App. 268.

Yet, the City intentionally ignored HDR's consulting expertise. See, e.g., App. 257. Instead, Defendant misinformed HDR that "*[t]he City has established outside City rate differentials*" and instructed HDR to "***assume that these outside***

rate differentials are 'historically based'…." Id. (emphasis added). Accordingly, HDR confirmed "***no analysis will be performed on the outside City rate differential***," and that "***within the cost of service analysis, no segregation of outside City customers will be provided***." Id. (emphasis added).

Thus, Defendant has continued to willfully charge more for water services to outside water users without any attempt to determine whether it actually costs more to do so. In fact, the cost of the City water services provided to Outside City users in actuality appears to be exactly the same as the cost of providing water services to adjacent Inside City users. As such, the City's outside water rates are and have been unreasonable, arbitrary, and capricious.

B. Cross-Motions For Declaratory Relief.

On 11/15/2021, the Superior Court heard the parties' cross-motions for declaratory relief seeking to establish the law applicable to the City's water rates. Plaintiffs contend that Defendant City, as a water company under Title 80 RCW, is

required to comply with the reasonable rate and other requirements imposed by RCW 80.28.010, .090, and .100. By contrast, Defendant claims that its water rates and rate-setting activities are governed solely by RCW 35.92.010 and the Washington Constitution, with no statutory requirement for reasonableness, and that RCW 80.28.010, .090, and .100 do not apply to its water rates.

Following oral arguments, the Superior Court denied Plaintiffs' Motion for Declaratory Relief and granted Defendant's Motion for Declaratory Relief. App. 165. On 12/2/21, the Court entered the Order Granting Defendant City of Spokane's Motion for Declaratory Relief and Denying Plaintiffs' Motion for Declaratory Relief ("Order"), stating: "*RCW 35.92.010 and the Spokane Municipal Code, within the confines of the Washington State Constitution, are controlling and govern the City's authority to establish the municipal water rates at issue in these proceedings. Title 80 RCW, including but not limited to RCW 80.28.010, .090, and .100, do not apply*." App.

1-3. Plaintiffs hereby seek discretionary review of that Order pursuant to RAP 2.3(b)(1), (2), and (4).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Following oral argument on the parties' cross motions for declaratory relief, the Superior Court succinctly and pointedly identified precisely why appellate review is not only appropriate in this case but also necessary to resolve the question of whether Title 80 RCW applies to municipal water rates: "*Unfortunately, I think we need more recent case law addressing the issue that is presented to the court. Appellate case law is quite old in that regard and not directly on point*." App. 162. Accordingly, the Superior Court subsequently certified its Order for appellate review in accordance with RAP 2.3(b)(4), ruling that the Order "*presents a controlling question of law as to which there is substantial ground for a difference of opinion, and immediate review of the order may materially advance the ultimate termination of the litigation*." App. 168-70 and 171-3. As such, review is appropriate under RAP 2.3(b)(4).

Discretionary review of the Court's Order is also appropriate under RAP 2.3(b)(1) and (2). RAP 2.3(b)(1), allows review of a Superior Court decision when "[t]*he superior court has committed an obvious error which would render further proceedings useless.*" Pursuant to RAP 2.3(b)(2), review may also be granted where "*[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act*." A court commits "probable error" when its decision is "untenable." See State v. Howland, 180 Wn. App. 196, 205 (2014). A decision that is based upon an "*errant interpretation of the law is an untenable reason for a ruling.*" Mineheart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 463 (2010).

In this case, as set forth in greater detail below, the Superior Court committed obvious and/or probable error when it ruled as a matter of law that RCW 35.92.010 solely governs the City's water rates and that Title 80 RCW, including

RCW 80.28.010, .090, and .100 do not apply. The Superior Court's ruling runs afoul of both the plain language of the statutes at issue and decades of precedent confirming that municipal utilities must comply with Title 80 RCW in setting rates. The Superior Court's ruling also ignores this Court's ruling in Fisk v. City of Kirkland, 164 Wn.2d 891, 895 (2008), holding that municipal water utilities are subject to Title 80 RCW.

The effect of the Order of the Court is to prejudicially narrow the scope and manner of proving Plaintiffs' claims to just those claims and legal theories cognizable under the Spokane Municipal Code, RCW 35.92.010, and the Washington Constitution. This erroneous ruling thus materially impacts Plaintiffs' remaining claims and burden of proof at trial. As such, the Superior Court's Order renders further proceedings useless, substantially alters the status quo, and limits the freedom of Plaintiffs to act.

Notably, in Glass v. Stahl Specialty Co., 97 Wn.2d 880, 883 (1982), discretionary review was granted under similar circumstances to determine whether the trial court committed "*obvious or probable error*" in interpreting the Tort Reform Act. Similarly, it is well established that "*[d]iscretionary review is appropriate in a case involving interpretation of a new statute, where the interpretation will have broad implications for governmental liability*." 2A Wash. Prac., Rules Practice RAP 2.3 (8th ed.) (citing Hartley v. State, 103 Wn.2d 768, 773-4 (1985)).

Discretionary review is equally appropriate here since, as Defendant has repeatedly asserted, the question of whether Title 80 RCW applies to municipal water rates likewise has broad implications for governmental obligations and liability. Indeed, Defendant has consistently claimed that if its water rates are governed solely by RCW 35.92.010 "*the City's water rates are presumed valid, reasonable, and constitutional, and the high burden of proof lies with the Plaintiffs to demonstrate*

otherwise." See App. 121-2. By contrast, if its rates are also required to comply with RCW 80.28.010, et seq., Defendant has admitted "[u]*nder Title 80 RCW and Plaintiffs' theories, those presumptions and high burdens of proof will not exist*." Id. Thus, review is appropriate and should be accepted under RAP 2.3(b)(1) and (2).

A. The Plain Language Of RCW 35.92.010 And Title 80 RCW Confirm That Title 80 RCW Applies To The City's Outside Water Rates.

In Washington, a "water company" under Title 80 RCW includes "*every city or town owning, controlling, operating, or managing any water system for hire within this state.*" RCW 80.04.010(30)(a). Here, Defendant undisputedly owns, controls, operates, and/or manages a water system for hire within Washington and is thus a "water company" under this definition. There is also no dispute that under Washington law, a city may maintain and operate water works "*as an integral utility service incorporated within general rates… with full power to regulate and control use, distribution, and price thereof: PROVIDED,*

that the rates charged must be uniform for the same class of customers or service." RCW 35.92.010 (emphasis added).

However, **Title 80 RCW** controls and identifies the duties public utilities, including "water companies," owe in setting rates. The plain language of Title 80 RCW is unambiguous: "*All charges made, demanded or received by any… water company for… water, or for any service rendered or to be rendered in connection therewith,* ***shall be just, fair, reasonable and sufficient.***" RCW 80.28.010(1) (emphasis added); see also RCW 80.28.010(2) and (3); RCW 80.28.090 (no unreasonable preferences); RCW 80.28.100 (no rate discrimination).

Defendant openly *admits* it is a water company under RCW 80.04.010(30)(a). Yet, despite this, the City has invented a contrived argument contending that only RCW 35.92.010 applies to its water rates. Defendant apparently claims this statute somehow replaces, exempts the City from, and/or preempts the reasonableness requirements imposed by Title 80 on rates charged by public utilities. This is simply not true.

"*The rule is universal that when the language of a statute is plain and free from ambiguity, it must be held to mean exactly what it says*." Shelton Hotel Co. v. Bates, 4 Wn.2d 498, 507 (1940). "*The first rule for judicial interpretation of a statute is that the court should assume that the legislature means exactly what it says. Plain words do not require construction*." City of Snohomish v. Joslin, 9 Wn. App. 495, 498 (1973). "*The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent*." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10 (2002). Plain meaning "*is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole*." Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526 (2010).

"*This court has the ultimate authority to determine the meaning and purpose of a statute*." Bour v. Johnson, 122 Wn.2d

829, 835 (1993). In that regard, this Court has stated that "*[a]ll of the provisions of the public utilities statutes must be construed together to accomplish the purpose of assuring the public of adequate service at fair and reasonable rates. Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other.*" US W. Commc'ns, Inc. v. Washington Utilities & Transp. Comm'n, 134 Wn.2d 74, 118 (1997).

The fact is, the plain language of RCW 35.92.010 merely generally authorizes cities to own and operate waterworks, classify customers, and to sell water. It focuses primarily on the "***classification** of services for rates.*" RCW 35.92.010 (emphasis added). More specifically, RCW 35.92.010 authorizes and addresses a city to create customer classifications and sets forth the procedural safeguards applicable to creating such "*customer classifications*."

Here, Spokane has developed two water user classes: Inside City water users and Outside City water users. Neither of

these classifications, nor the City's right to make classifications generally, is challenged in this suit *per se*. Rather, it is the rates being charged that is at issue in this case. Significantly, RCW 35.92.010 does not govern or provide any substantive criteria regarding the actual water rates charged to customers. It is entirely silent as to rates except in connection with classifications insofar as it generally requires that rates be uniform for the same ***class*** of customers or service.

In contrast, RCW 80.28, et seq. – titled "*duties as to rates, services, and facilities*" – does specifically delineate and govern the rate-making activities of all public utilities, including water companies such as Defendant. RCW 80.28, et seq., imposes upon all water companies – including cities – a mandatory, substantive statutory duty to establish rates that are "***just, fair, reasonable and sufficient***" and to avoid unduly discriminatory charges and unreasonable preferences. RCW 80.28.010, .090, and .100. Notably, RCW 80.28.010(1)-(3) explicitly pertains to "*all*" charges imposed by "*any*" water company, and pointedly

requires that "*every*" water company's services be "*in all respects just and reasonable*." RCW 80.04.440 further imposes liability on "*any public service company*" for "*all*" damages it causes. Use of the word "*all*" confirms that these provisions govern each and every water company, including Defendant.[1]

It is well established that "*statutes relating to the same subject are to be read together as constituting a unified whole, to the end that a harmonious total statutory scheme evolves which maintains the integrity of the respective statutes*." Waste Mgmt. of Seattle, Inc. v. U.T.C., 123 Wn.2d 621, 630 (1994); see also Employco Personnel Services, Inc. v. City of Seattle, 117 Wn.2d 606, 614 (1991). Courts "*read statutes as complementary, rather than in conflict with each other*." Waste Mgmt., supra. "*The principle of reading statutes in pari materia applies where statutes relate to the same subject matter. Such*

[1] See TracFone Wireless, Inc. v. Washington Dep't of Revenue, 170 Wn.2d 273, 283 (2010).

statutes must be construed together." Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126, 146 (2001).

RCW 35.92.010 and Title 80 RCW, including RCW 80.28.010, .090, and .100, can and must be read harmoniously together. Indeed, during oral arguments, Defendant was unable to identify any actual conflict between the language in the respective statutes. Instead, in response to a direct question from the Superior Court, Defendant confirmed that the City's argument relies on the fact that RCW 80.28.010 contains "*criteria [that] is not contained in RCW 35.92.010*." App. 135. Defendant further explained, "*80.28.010 imposes language not found within… 39.92.010*." App. 136.

However, the fact is, while the language in RCW 80.28.010, et seq., may contain additional reasonableness requirements, it does not in fact conflict with any of the provisions provided in RCW 35.92.010. RCW 35.92.010 authorizes cities to generally own and operate waterworks and create classes of water users amongst whom rates must be

uniform. Title 80 RCW, and in particular RCW 80.28, et seq., further applies to require that all rates charged to such users must be "*just, fair, reasonable and sufficient*" and not unreasonably or unduly preferential or discriminatory. As discussed below, this construction is further consistent with the plain language of RCW 80.04.500 as interpreted by this Court in Fisk, supra, and with Washington cases applying RCW 80.28, et seq., to the rates set by municipal electric utilities.

Thus, the Superior Court committed obvious and/or probable error when it ruled that the City is not required to set reasonable rates and otherwise comply with RCW 80.28, et seq.

B. RCW 80.04.500 And Supreme Court Precedent Confirm That The City Is Required To Comply With Title 80 RCW.

Notably, as stated above, Defendant City does not dispute that it is a water company under Title 80 RCW. Defendant further admits that as such, certain provisions of Title 80 RCW apply to govern its conduct. See App. 142-3 ("…*there's a number of sections of Title 80 that do apply to water companies,*

such as the water company of Spokane."). However, in a desperate bid to avoid its obligations and liability for setting unreasonable Outside City water rates in clear violation of Title 80 RCW, Defendant continually misrepresents that RCW 80.04.500 somehow exempts the City from compliance from the provisions of RCW 80.28, et seq., requiring reasonable rates. This argument rests on Defendant's cherry-picked misreading of the statute at issue. In full, RCW 80.04.500 states as follows:

> "***Nothing in this title authorizes the commission*** *to make or enforce any order affecting rates, tolls, rentals, contracts or charges or service rendered, or the adequacy or sufficiency of the facilities, equipment, instrumentalities or buildings, or the reasonableness of rules or regulations made, furnished, used, supplied or in force affecting any telecommunications line, gas plant, electrical plant, system of sewerage, or water system owned and operated by any city or town, or to make or enforce any order relating to the safety of any telecommunications line, electrical plant, system of sewerage, or water system owned and operated by any city or town,* ***but all other provisions enumerated herein apply to public utilities owned by any city or town***." RCW 80.04.500 (emphasis added).

By omitting the last half of the last sentence above, Defendant erroneously argues that by exempting the City from UTC oversight, RCW 80.04.500 somehow exempts and/or authorizes the City to selectively ignore the reasonableness requirements imposed by RCW 80.28, et seq. However, as an initial matter, by its terms, the last clause of RCW 80.04.500 in fact *confirms* that Defendant City is required to comply with "all" provisions in Title 80 RCW in its actions as a water company. This necessarily includes the requirement to charge reasonable rates under RCW 80.28, et seq.

Indeed, the continuing applicability of Title 80 RCW to municipal water companies was confirmed by this Court in Fisk v. Kirkland, 164 Wn.2d 891 (2008), when it unequivocally rejected the same strained interpretation of RCW 80.04.500 advanced by the Defendant City in this case:

> "*The city argues that it is not a 'water company' under RCW 80.04.010, because the statute does not regulate municipal corporations. It relies upon Silver Firs Townhomes, Inc. v. Silverlake Water Dist. 103 Wn. App. 411, 421, [] where the Court of*

> *Appeals concluded that a particular water district was 'a municipal corporation,' not a 'water company' and [] not subject to the [Washington Utilities and Transportation Commission]'s jurisdiction.* ***However, under RCW 80.04.010, a '[w]ater company' includes 'every city or town owning, controlling, operating, or managing any water system for hire within [Washington].'*** *We concede that the Silver Firs court was arguably imprecise. But* ***cities are plainly included in the statutory definition of water company.*** *The impression in Silver Firs may come from the fact that the Washington Utilities and Transportation Commission has limited control over municipal utilities. See RCW 80.04.010 (including cities); RCW 80.04.500 (limiting commission control). In Earle M. Jorgensen Co. v. City of Seattle, 99 Wn.2d. 861, 868 [] (1983), we put it more strongly,* ***'[m]unicipal utilities are exempted from the control of the Utilities and Transportation Commission.' But that does not lead to the conclusion that the water system operated by the City of Kirkland is not a water company under title 80 RCW. Under the plain language of the statute, it is.***" Id. at 894-5 (emphasis added).

Notably, the Fisk court applied and analyzed the City of Kirkland's obligations under the very same chapter of Title 80 RCW, and indeed, one of the very same *statutes* at issue in this case – RCW 80.28.010. In doing so, the Fisk court confirmed that Title 80 RCW, and specifically RCW 80.04.440, which

imposes liability for noncompliance with Title 80 RCW, applies to municipal water companies that are "*engaged in the marketplace with consumers*." Fisk, supra, at 895-96.[2]

"*The power to supply water beyond corporate limits is permissive, with supply being a matter of contract between the municipality and property owners*." Brookens v. City of Yakima, 15 Wn. App. 464, 465-66 (1976). "*In the absence of contract, express or implied, a municipality cannot be compelled to supply water outside its corporate limits*." Id. at 466. Thus, if, as occurred in this case, a city elects to provide water services to anyone outside its corporate limits, "*it acts in a proprietary capacity, and the relationship entered into between a city as a supplier and such users is purely contractual.*" People for Preservation and Development of Five Mile Prairie v. City of

[2] In a concurring opinion, Justice Madsen explained that "*RCW 80.04.440 authorizes a cause of action for damages arising from the activities of a municipal water system, but it does so only to the extent the activities of the water system are related to a proprietary function*." Id. at 898.

Spokane, 51 Wn. App. 816, 821 (1988) (emphasis added) see also Okeson v. City of Seattle, 130 Wn. App. 814, 821 (2005) ("*A municipality's actions taken under RCW 35.92.050 serve a business, proprietary function, rather than a governmental function. When the Legislature authorizes a municipality to engage in a business, it may exercise its business powers very much in the same way as a private individual.")* (internal marks and citations omitted).

This Court recently reaffirmed that providing water services to ratepayers is a proprietary function in Lakehaven Water & Sewer Dist. v. City of Fed. Way, 466 P.3d 213, 225-6 (2020), explaining "*[s]imply put, it is the* ***ratepayer structure*** *that makes the Districts' business activities, like any other utility billed directly to paying customers, proprietary*." Id. at 226 (emphasis in original). "*[P]roviding utility services 'cannot be a proprietary function for some purposes, but a governmental function for others.'*" Id. Thus, the City was and is performing a proprietary function and is "*engaged in the marketplace with*

consumers" by providing water to Outside City water users and setting rates for such water use.

Accordingly, the Superior Court committed obvious and/or probable error in rejecting that Title 80 RCW requires the City to ensure that its water rates are just, fair, and reasonable, and imposes liability where, as here, the City fails to do so.

C. Case Law Confirms That Title 80 RCW Applies To And Governs The City's Excessive Outside City Water Rates.

Defendant seeks to artificially narrow the scope of this Court's ruling in Fisk, arguing that since Fisk did not explicitly involve municipal water *rates,* RCW 80.04.500 still somehow exempts municipal water companies from any provisions in Title 80 RCW requiring that such rates be reasonable. See App. 73-5. In other words, Defendant apparently contends that under Fisk, it is only a water company for "some" purposes, subject to only "some" of the requirements imposed by Title 80 RCW. However, Defendant has never identified a single case supporting its strained interpretation of either the statute at issue

or this Court's ruling in Fisk that RCW 80.04.500 does not exempt municipal water companies from Title 80 RCW.

Rather, Defendant's argument is premised entirely on (1) Defendant's uncited misrepresentation that only the UTC has authority to enforce the requirement that utility rates be reasonable, and (2) dicta and/or the *lack* of analysis regarding the applicability of RCW 80.28, et seq., to water companies found in cases pre-dating Fisk. See, e.g., App. 72-3. As to the former, notably, Plaintiffs have never argued that the City is subject to UTC oversight. However, Defendant cites no cases in support of its claim that only the UTC can enforce the reasonable rate requirements contained in Title 80 RCW. Indeed, this Court expressly held otherwise in an earlier case involving the City of Seattle acting as a municipal electric utility. See, e.g., Earle M. Jorgenson Co. v. City of Seattle, 99 Wn.2d 861, 869 (1983).

In particular, in Jorgenson, supra, this Court acknowledged that "*municipal utilities are exempted from the control of the Utilities and Transportation Commission*." Yet,

this Court confirmed that municipal electric utilities rates nevertheless must "*be just and reasonable and nondiscriminatory under RCW 80.28.090, .100*." Id. at 870. This Court further held that where they are not, "*[a]s with water rates, courts may set aside arbitrary or discriminatory electrical rates*." Id. This is consistent with other cases confirming that Title 80 RCW applies to municipal utility rates and rate-setting activities. See, e.g., Hearde v. City of Seattle, 26 Wn. App. 219, 221 (1980) (municipal utility "*rates must be just, fair, reasonable and sufficient, RCW 80.28.010….*"); Okeson v. City of Seattle, 130 Wn. App. 814, 824 (2005) ("*RCW 80.28.010, however, limits the charges imposed*" by municipal utilities "*to amounts that are 'just, fair, reasonable and sufficient.'*").

Here, the Superior Court inexplicably disregarded these cases, presumably based on Defendant's argument that they are not applicable because they involved municipal electric utilities instead of municipal water companies. However, as discussed in greater detail in Plaintiffs' Statement of Grounds for Direct

Review, filed contemporaneous with and incorporated by reference into this Motion, this is a distinction without a difference. Municipal electric utilities are authorized to sell power and set rates under virtually identical language contained in the same title and chapter as municipal water companies, RCW 35.92.050. Thus, cases requiring municipal electric utilities to set reasonable rates pursuant to RCW 80.28, et seq., are directly relevant and confirm that municipal water companies are likewise required to comply with RCW 80.28, et seq.

However, Defendant instead convinced the Superior Court to rely exclusively on the inapplicable analysis of a different statute and conflicting dicta contained in a footnote in Geneva Water Corp. v. City of Bellingham, 12 Wn. App. 856, 868-70 (1975), as supposed support for its contrived argument that municipal water companies are solely exempt from the reasonable rate requirements of RCW 80.28, et seq. See App. 164. Specifically, Defendant argued below that the Geneva court purportedly "*rejected the standard set forth in RCW 80.28*

and unequivocally stated: '…there is no longer any statutory requirement that such [municipally established] water rates be just and reasonable. RCW 35.92.010.'" App. 69-70.

However, this is a blatant misstatement of what Division I actually held in Geneva. The language Defendant quotes and relies upon was not discussing RCW 80.28 *at all.* Rather, this language actually referred to ***RCW 35.92.010***, which the Geneva court simply held itself no longer contains a statutory requirement that rates be "*just and reasonable*" following the removal of those words from its predecessor statute – RCW 80.40.010 – in 1959. Geneva, supra, at 869.

In fact, the Geneva court did not reach the merits of and expressly *declined* to rule on the question of whether RCW 80.28, et seq., applied to and/or imposed additional requirements on municipal water companies, merely discussing the issue in dicta. Id. at fn 8. Thereafter, five years later, Division I did specifically apply RCW 80.28.010 to municipal utility rates when it confirmed that municipal electric utility rates

"*must be just, fair, reasonable and sufficient*" under RCW 80.28.010. Hearde, supra, p. 221. The same is true of Defendant City's water rates in this case.

Accordingly, the Superior Court committed obvious and/or probable error when it found Geneva to be dispositive and ruled as a matter of law that RCW 35.92.010 solely governs the City's water rates and that Title 80 RCW does not apply.

D. RAP 18.1 Motion For Attorney Fees And Costs.

Petitioners respectfully request an award of reasonable attorney fees and costs pursuant to RAP 18.1 and RCW 80.04.440.

VI. CONCLUSION

Petitioners respectfully request that Petitioners' Motion for Discretionary Review be granted.

This document contains 4,991 words, excluding parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 30th day of December, 2021.

DUNN & BLACK, P.S.

/s/ ALEXANDRIA T. DRAKE
ROBERT A. DUNN, WSBA #12089
ALEXANDRIA T. DRAKE, WSBA #45188
Attorneys for Petitioners

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 30th day of December, 2021, I caused to be served the foregoing on the individuals named below via the Washington appellate courts' portal.

Michael F. Connelly Megan C. Clark Etter, McMahon, Lamberson Van Wert & Oreskovich, P.C. 618 W. Riverside Ave., Suite 210 Spokane, WA 99201	Salvatore J. Faggiano Elizabeth L. Schoedel Assistant City Attorneys 808 W. Spokane Falls Blvd., 5th Floor Spokane, WA 99201

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

DATED this 30th day of December, 2021, at Spokane, Washington.

/s/ ALEXANDRIA T. DRAKE

DUNN AND BLACK, P.S.

December 30, 2021 - 4:05 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,521-1
Appellate Court Case Title:	West Terrace Golf et al. v. City of Spokane
Superior Court Case Number:	17-2-02120-7

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- 1005211_Motion_Discretionary_Review_20211230160351SC074656_3428.pdf
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