FILED
SUPREME COURT
STATE OF WASHINGTON
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NO. ________

SUPREME COURT OF THE STATE
OF WASHINGTON

WEST TERRACE GOLF L.L.C., a Washington limited liability company, Plaintiff/Petitioner, and JOHN E. DURGAN, individual and as a class representative for all others similarly situated, TAWNDI L. SARGENT, individual and as a class representative for all others similarly situated; and KRISTOPHER J. KALLEM, individual and as a class representative for all others similarly situated, Plaintiffs/Petitioners, vs. CITY OF SPOKANE, a municipal corporation in and for the State of Washington, Defendant/Respondent.	)	**STATEMENT OF GROUNDS FOR DIRECT REVIEW BY THE SUPREME COURT**

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 Cross-Petitioners (collectively referred to as "Plaintiffs" or "Petitioners") hereby seek direct review by this Court of the Order Granting Defendant City of Spokane's Motion for Declaratory Relief and Denying Plaintiffs' Motion for Declaratory Relief entered by Spokane County Superior Court on December 2, 2021.

I. NATURE OF THE CASE AND DECISION

A. Background.

Since 2002, the Defendant City has utilized a two-tier customer classification (**inside/outside**) as a pretext to unlawfully impose wholly arbitrary and capricious higher water rates (1½ to 2 times) on "**Outside City**" (Spokane County) water users. To that end, the City has admittedly relied solely upon a purported "*intuitive or common sense approach*" to set outside water rates by applying a patently arbitrary 1.5 to 2x multiplier to the inside water

rates. See App. 291-2. The City offers a 3-page memo dated 3/27/02 entitled "City of Spokane Water Department Cost of Water Service Analysis" (colloquially the "Blegen Analysis") to somehow justify its Outside City water rates. Id. However, Blegen's analysis confirmed:

> "*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….*"

Id. In fact, Blegen has since testified his Memo was never intended to be a "*rate study*" much less a "*document of precision*." App. 291; 297. Blegen "*never became aware of any*" other cost of water service analysis that any predecessor City water director had created. App. 287.

To further justify its disparate inside/outside water rates, the City similarly seeks to rely upon a 2008 report commissioned from HDR Engineering ("HDR"). The City asked HDR to "*provide a comprehensive water… rate and general facility charge (GFC) study for the City of Spokane*." App. 254. Yet, when HDR

expressly requested the City to "*[p]rovide a copy of the most recent water rate studies completed by the City*", the City did not provide HDR the so-called Blegen Analysis. App. 259-60. Instead, the City implicitly acknowledged the Blegen Analysis was not a "*rate study*", responding "*[t]here is no record of a water rate study completed by the City*," because there "*[h]as never been one completed*." Id.

Notably, the City further deliberately instructed HDR to not analyze the basis for its historically excessive Outside City water rates. See App. 257. Indeed, Defendant bluntly misinformed HDR that "*[t]he City has established outside City rate differentials*", then instructed HDR to "***assume that these outside rate differentials are 'historically based'****....*" Id. (emphasis added). HDR's detailed scope of services accordingly acknowledged and confirmed that as demanded by the City, "***no analysis will be performed on the outside City rate differential***." Id. (emphasis added). Thus, the City willfully continued its deceptive practice of

avoiding any efforts to determine actual costs of providing water to Outside City customers.

B. **Relevant Procedural History.**

On June 5, 2017, Plaintiff West Terrace Golf L.L.C., filed its Complaint for Declaratory and Injunctive Relief, and on June 29, 2017, Plaintiffs Durgan, Sargent, and Kallem commenced this class action litigation. Less than a month later, on July 24, 2017, Plaintiffs filed a Motion to Certify Class. On May 25, 2018, the Court entered an Order formally certifying the following class:

> "*All current and former residents and businesses of Spokane County, Washington who (1) are or were at all times material hereto water utility customers of the Defendant City located outside the City's limits and within the City's Water Service Area, and (2) were charged by and required to pay to the City higher water services rates (i.e., "Outside City" water services rates) than water utility customers located within the City's limits were charged by and required to pay to the City.*"

On December 13, 2019, the Superior Court heard the parties' consolidated cross-motions for partial summary judgment. The Plaintiffs' Motion asserted that without any analytics to support the disparate water rates charged, Defendant has violated

applicable law, including the requirements imposed by RCW 80.28.010 et seq., warranting declaratory judgment in favor of the Plaintiff Class. Defendant's Motion asserted that its water rates were reasonable as a matter of law, based in part on its argument that its water rates and rate-setting activities were instead governed solely by RCW 35.92.010 and the Washington Constitution.

Both parties sought discretionary review by the Court of Appeals, relying on their respective positions regarding the applicable law in support of their arguments regarding the reasonableness of Defendant's rates. Both motions were denied. Defendant subsequently moved to modify the Commissioner's ruling, and when that was denied, the City sought discretionary review by this Court which was likewise denied. The case thus proceeded before the Superior Court.

C. Cross-Motions For Declaratory Relief.

On 11/15/2021, the Superior Court heard additional consolidated cross-motions for declaratory relief filed by both parties, this time on the narrow issue of which law applies to the

City's water rates and rate-setting activities. Plaintiffs contend that as a water company under Title 80 RCW, Defendant City in setting water rates is required to comply with the reasonableness and other requirements imposed on utility rates 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[1], and that the reasonableness requirements imposed pursuant to 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 December 2, 2021, the Court's Order Granting Defendant City of Spokane's Motion for Declaratory Relief and Denying Plaintiffs' Motion for Declaratory Relief ("Order") was entered, stating:

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[1]While Defendant initially appeared to dispute that its rates and classification of customers must also comply with the Spokane Municipal Code, Defendant has since conceded this point.

> "*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 are seeking discretionary review of that Order under RAP 2.3(b)(1), (2), and (4) pursuant to a motion for discretionary review filed contemporaneous with this Statement. Plaintiffs further seek direct review by this Court pursuant to RAP 4.2(a)(3) and (4).

II. <u>ISSUES PRESENTED FOR REVIEW</u>

Whether the City of Spokane, admittedly a "water company" pursuant to RCW 80.04.010, is required to ensure that its water rates and rate-setting activities comply with Title 80 RCW, including (1) RCW 80.28.010(1)-(3) mandating that all charges are to be just, fair, reasonable and sufficient, (2) RCW 80.28.090 prohibiting undue or unreasonable preferences, and (3) RCW 80.28.100 prohibiting discriminatory rates.

III. <u>GROUNDS FOR DIRECT REVIEW</u>

The Supreme Court should accept review of the Superior Court's Order Granting Defendant's Motion for Declaratory Relief and Denying Plaintiffs' Motion for Declaratory relief pursuant to RAP 4.2(a)(3) and (4). Direct review is appropriate under RAP 4.2(a)(3) when the matter involves "*an issue in which there is a conflict among decisions of the Court of Appeals or an inconsistency in decisions of the Supreme Court*". Direct review is also appropriate where the matter implicates a "*fundamental and urgent issue of broad public import which requires prompt and ultimate determination.*" RAP 4.2(a)(4).

Here, the Superior Court erroneously ruled that RCW 35.92.010 solely governs municipal water rates, and that the reasonable rate provisions in Title 80 RCW, and specifically RCW 80.28 <u>et</u> <u>seq</u>., do not apply to municipal water companies. This ruling significantly impairs not only Plaintiffs' claims in this case, but also the ability of the public at large statewide to challenge unreasonable, arbitrary, and capricious municipal water rates. As

such, the legal question presented by the Superior Court's Order clearly involves a fundamental issue of broad public import. Additionally, there are conflicting appellate court decisions regarding the application of Title 80 RCW to municipal utility rates, like those set by Defendant City in this case.

Thus, review in this matter is appropriate under both RAP 4.2(a)(3) and (4).

A. Ensuring The Rates Charged To The Class Of Outside City Water Users Are Just, Fair, Reasonable, And Otherwise Satisfy Title 80 RCW Is A Fundamental Issue Of Broad Public Import.

For decades, Defendant City of Spokane (the "City") has unlawfully overcharged water customers located outside the City's limits without a shred of analytics to justify the rate differential/surcharge. In doing so, the City has blatantly ignored the unambiguous plain language of the public utilities statutes codified in Title 80 RCW, and willfully disregarded black letter Washington law.

As explained in greater detail in Plaintiffs' Motion for Discretionary Review, filed contemporaneous with and

incorporated by reference into this Statement, 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). There is no dispute in this case 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, Defendant's classifications of customers are not in dispute in this case *per se*. Rather, it is Defendant's rates being charged that are at issue.

Title 80 RCW controls and identifies the duties "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).

Notably, Defendant openly *admits* it is a water company under RCW 80.04.010(30)(a). See App. 143 ("*Spokane is clearly a municipal water provider. We're not contesting that*."). Defendant also admits "*there's a number of sections of Title 80 that do apply to water companies, such as the water company of Spokane.*" App. 142-3. However, the City seeks to evade liability for its unreasonable rates, based on the disingenuous argument that municipal water companies are conveniently exempt from any provisions in Title 80 RCW requiring public utility rates to be reasonable. This includes the requirement to ensure water rates are just, fair and reasonable under RCW 80.28.010, and the prohibitions on undue or unreasonable preferences and discriminatory rates contained in RCW 80.28.090 and .100 respectively.

Instead, the City claims and the Superior Court ruled, that the sole statute governing Defendant's rates and rate-setting activities as a municipal water company is RCW 35.92.010, as constrained by the Washington Constitution. Ultimately, Defendant admits that even under its proposed standard, its water rates must be "reasonable". See App. 122 ("*Within the confines of RCW 35.92 et seq. and the Washington Constitution (art. 1, §§ 11-12), the City is required to ensure its rates are 'reasonable' and that action it takes in setting those rates is not arbitrary and capricious*.").

However, as Defendant previously succinctly summarized, the impact of the Superior Court's ruling that RCW 35.92.010 solely applies to and governs municipal water rates nevertheless is to severely limit the claims and legal avenues available to the public, including the Plaintiff Class of outside city water users, to effectively challenge unreasonable municipal water rates:

> "*While RCW 35.92 et seq. and the Constitution, and Chapter 80.28 RCW facially appear to have parallel requirements of 'reasonableness,' a ruling on which statutory scheme applies is vital. Under the appropriate and applicable law, the City's water rates are presumed valid, reasonable, and constitutional, and the high burden of proof lies with the Plaintiffs to demonstrate otherwise. Under Title 80 RCW and Plaintiffs' theories, those presumptions and high burdens of proof will not exist. Without the same, the broad, deferential treatment traditionally provided to municipalities is upended, as is nearly fifty years of municipal water rate-setting precedent*." App. 121-2.

Defendant's previous motion for discretionary review asking this Court to rule on the law applicable to its water rates further aptly explains why this question involves a fundamental issue of broad public import:

> "*It is vital to recognize that any decision in this matter will have wide-ranging impacts on nearly all municipal water suppliers in the State. The law governing Plaintiffs' challenges has been well-established for decades. The failure to apply this law upends this established law and precedent*." App. 182.

In fact, as discussed in Plaintiffs' Motion for Discretionary Review and below, it is Defendant's argument and the Superior Court's ruling that ignores the plain language of the statutes at

issue, and upends decades of precedent confirming that municipal utilities must set reasonable rates under and otherwise comply with RCW 80.28 et seq.

In that regard, this Court has previously recognized, "*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), as corrected (Mar. 3, 1998). This Court further recognized that properly construing and applying the Public Utilities Statutes contained in Title 80 RCW together is necessary to accomplish the legislature's purpose of protecting the public from unreasonable rates: "*All 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.*" US W. Commc'ns, Inc. v. Washington Utilities & Transp. Comm'n, 134 Wn.2d 74, 118 (1997).

In this case, RCW 35.92.010 and RCW 80.28.010 et seq., do not even remotely conflict with each other. 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 specifically RCW 80.28, et seq., further applies to require that all rates charged to such users must be "*just, fair, reasonable and sufficient*" and nondiscriminatory. Thus, these statutes can and should be read together to require municipal water rates to be reasonable under Title 80 RCW.

Notably, as discussed below, this construction is also consistent with the plain language of RCW 80.04.500 as interpreted by this Court in Fisk v. City of Kirkland, 164 Wn.2d 891, 895 (2008). It further comports with Washington cases applying RCW 80.28 et seq., to the rates set by municipal electric utilities. See e.g. See e.g. Hearde v. City of Seattle, 26 Wn. App. 219, 221 (1980); Okeson v. City of Seattle, 130 Wn. App. 814, 824 (2005).

Despite this, the Superior Court's ruling effectively limits the claims available to customers of municipal water companies, including the claims brought by the Class of outside city water users in this case, to those cognizable solely under RCW 35.92.010. As a result, the Superior Court's ruling clearly subverts the purpose of the Public Utilities Statutes by broadly exempting Defendant as a municipal water company from any obligation to comply with the very provisions in Title 80 RCW requiring it to provide service at just, fair, and reasonable rates.

Accordingly, this case implicates a fundamental issue of broad public import, and review should be accepted to ensure Plaintiffs, and indeed the public at large statewide, are assured that they will receive water at "fair and reasonable rates."

B. There Is A Conflict Among Appellate Decisions Regarding The Applicability of RCW 80.28 et seq. To Municipal Utility Rates.

Review should also be accepted to resolve inconsistent and conflicting appellate decisions regarding the applicability of RCW 80.28.010 et seq. to municipal utility rates. RCW 80.04.500

provides that while municipal utilities are exempt from oversight by the Utilities and Transportation Commission ("UTC"), they are required to comply with "*all other provisions enumerated*" in Title 80 RCW. This necessarily includes the requirement to charge reasonable rates under RCW 80.28 et seq.

Notably, 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 stated:

> "… ***'[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).

In fact, the Fisk court applied and analyzed the City of Kirkland's obligations as a water company 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.

Despite this, Defendant here argued and the Superior Court in this case ruled that RCW 35.92.010 solely governs municipal

water rates, and that the reasonable rate requirements imposed by Title 80 RCW, and specifically RCW 80.28.010, .090, and .100 do not apply. In making this ruling, the Superior Court principally relied upon Division I's decision in Geneva Water Corp. v. City of Bellingham, 12 Wash. App. 856, 868-70 (1975). Specifically, the Superior Court relied upon the Geneva court's analysis of *RCW 35.92.010* and dicta contained in a single footnote regarding the applicability of Title 80 RCW to municipal water rates, combined with the *absence* of any other appellate cases specifically discussing, much less deciding whether Title 80 RCW applies to such rates. App. 164. The Superior Court explained its rationale as follows:

> "*And the deciding factor for the Court is the Geneva Case, and that is because it discusses, even though it's not exactly on point, but at least discusses these two statutes together, and it clearly states that there's no longer any statutory requirement that the rates be just and reasonable after that language was taken out of 35.92.*" Id.

However, in fact, the Geneva court did not actually analyze whether such a statutory requirement exists under *RCW*

80.28 et seq. The Geneva court merely held that after the words "*just and reasonable*" were removed from *RCW 80.40.010*, the predecessor statute to RCW 35.92.010, **RCW 35.92.010** itself no longer contained an explicit reasonableness requirement. See Geneva, supra. Plaintiffs do not claim that RCW 35.92.010 *itself states* that rates must be reasonable. Rather, the question in this case is whether municipal water rates must be reasonable under *RCW 80.28.010* et seq.

In that regard, the Superior Court further relied upon the Geneva court's "discussion" in footnote 8 of its decision, expressing doubt that RCW 80.28.010 applied to municipal water rates. App. 164-5. However, the Geneva court did not actually reach the merits of that question, as it had already determined that the water rates under scrutiny were reasonable in that case. Geneva, supra, at fn. 8. To the extent the Geneva court discussed the applicability of RCW 80.28 et seq. to municipal water companies at all, the discussion was thus limited to mere

dicta in a single footnote which has not been cited or relied upon by any appeals court since.

The fact is, no other case has analyzed this issue in the context of municipal water rates since Geneva, much less since this Court confirmed 33 years later in Fisk, supra, that municipal water companies remain subject to Title 80 RCW. Indeed, the Geneva court's reasoning in the dicta relied upon by the Superior Court in this case, specifically conflicts with this Court's decision in Fisk, supra. This is because in its footnote questioning without deciding whether RCW 80.28 et seq. applies to municipal water rates, the Geneva court relied in part on the fact that municipal utilities are exempt from the control of the UTC under RCW 80.04.500. See Geneva, supra, at fn. 8. However, as noted above, this Court has since definitively confirmed that municipal water companies remain subject to Title 80 RCW, notwithstanding the exemption from UTC oversight. See Fisk, supra.

Additionally, Geneva conflicts with decades of subsequent Washington cases confirming that municipal *electric* utility

companies authorized under RCW 35.92 et seq. are required to set reasonable rates under RCW 80.28 et seq. Municipal electric companies are also exempt from UTC oversight under RCW 80.04.500, and are similarly authorized to sell power and set rates under RCW 35.92.050, the same title and chapter as municipal water companies.

Moreover, RCW 35.92.050 also does not state and does not appear to have ever explicitly stated that municipal electric rates must be "*just and reasonable*". This is significant, because the Superior Court specifically relied on Geneva for the proposition that the removal of that language from the predecessor to RCW 35.92.010 governing municipal water rates eliminated *any* statutory reasonableness requirement for water rates under *any* statutory scheme, including RCW 80.28 et seq. App. 164. Yet, although those words are and were not contained in RCW 35.92.050, just five years after Geneva was decided, Division I confirmed that municipal *electric* rates must nonetheless be just,

fair, and reasonable under RCW 80.28.010. See Hearde v. City of Seattle, 26 Wn. App. 219 (1980).

Three years later, this Court likewise acknowledged that municipal electric rates must be reasonable and need to comply with RCW 80.28.090, and .100. Earle M. Jorgenson Co. v. City of Seattle, 99 Wn.2d 861 (1983).[2] In 2005, Division I again applied RCW 80.28.010(1) and (2) to municipal electric rates in Okeson v. City of Seattle, 130 Wn. App. 814, 824 (2005), holding that the trial court properly prohibited the City of Seattle from using funds generated by its electric utility for advertising and public relations purposes under that statute. In doing so, the

[2]Defendant has previously argued that this Court "*distinguishes*" water rates from electrical rates in Jorgenson. However, this is a gross overstatement of this Court's language and holding in that case. The Jorgenson court merely noted, again in dicta, that water rates must be uniform under RCW 35.92.010, and confirmed that municipal electric rates must be reasonable and comply with RCW 80.28.090, and .100. The Jorgenson court did not, however, conduct any direct analysis whatsoever into whether municipal water rates must *also* be reasonable under and comply with RCW 80.28.010 et seq., presumably because that issue was not before the court, as the case dealt solely with electric rates.

Okeson court expressly stated: "*RCW 80.28.010, however, limits the charges imposed by electrical utilities on their ratepayers to amounts that are 'just, fair, reasonable and sufficient*.' RCW 80.28.010(1)." Id.

Here, Defendant has previously speciously argued below that these cases must all be disregarded, because they involved municipal *electric* utilities rather than municipal *water* companies. However, as shown above this is a distinction without a difference. RCW 35.92.010 authorizes municipal *water* companies to furnish water "*with full power to regulate and control the use, distribution, and price thereof*." RCW 35.92.050 pertaining to municipal *electric* utilities contains virtually identical language, authorizing cities to furnish gas, electricity, and other means of power, "*with full authority to regulate and control the use, distribution, and price thereof*." There is no meaningful distinction in the language in these two statutes that would render municipal electric companies subject to the reasonableness requirements imposed by

RCW 80.28, et seq. in setting rates, while exempting municipal water companies from the same requirements.

As a result, the above appellate cases clearly conflict, creating inconsistent and unpredictable decisions regarding the applicability of RCW 80.28.010 et seq. to municipal utility rates, including in particular municipal water rates. Thus, review should be granted pursuant to RAP 4.2(a)(3) to resolve this conflict and establish that municipal water rates are required to be reasonable under Title 80 RCW.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court accept direct review of Plaintiffs' appeal pursuant to RAP 4.2(a)(3) and (4).

Pursuant to RAP 18.17(b), this document contains 3,980 words, excluding parts of the document exempted from the word count by RAP 18.17.

DATED this 30th day of December, 2021.

DUNN & BLACK, P.S.

/s/ ALEXANDRIA T. DRAKE
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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 30th day of December, 2021, 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.

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

/s/ ALEXANDRIA T. DRAKE

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