No. 38792-5

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

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,

Appellants,

v.

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

Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Defendant City of Spokane is engaging in predatory and discriminatory pricing conduct against its nonresident water customers. Unable to refute the facts or law confirming its unlawful conduct, the City simply urges this Court to ignore both. Instead, Defendant asks this Court to adopt a circular and internally inconsistent argument: that the City is uniquely exempt from any non-conflicting portions of Title 80 RCW which the City is expressly violating. That position is simply not supported by Washington law. Neither Defendant nor the Trial Court have the authority to pick and choose which non-conflicting statutory requirements in Title 80 RCW govern the City's conduct. Accordingly, the Trial Court's Order should be reversed.

II. ARGUMENT

Despite verbosity, Defendant ultimately advances just two arguments to support its claim that the Trial Court properly held that RCW 35.92.010 and Washington's Constitution solely

govern its water rates. First, Defendant asserts that the statutory provisions in Title 80 RCW somehow expressly or impliedly exclude municipal water companies from the obligation to set reasonable, non-preferential, and non-discriminatory rates under RCW 80.28.010, .090, and .100, respectively. Second, failing that, the City asserts that RCW 35.92.010, the enabling statute generally authorizing cities to own and operate waterworks, somehow conflicts with or preempts the requirement to set reasonable rates under Title 80.

Defendant's sole support for these arguments is *dicta* contained in a single footnote in a nearly 50-year-old case[1], as well as *absence* of any other cases, before or since, specifically addressing – much less answering – the question of whether RCW 80.28.010, .090, and .100, apply to municipal water rates. In reality, the plain language of those statutes *in conjunction with* RCW 35.92.010 all confirm that municipal water companies, like

[1] See City's Resp., p. 13, citing Geneva Water Corp., v. City of Bellingham, 12 Wn. App. 856, 868-70 (1975).

municipal electrical companies, must set reasonable water rates and avoid undue preferences and unjust discrimination pursuant to RCW 80.28.010, et seq.

Thus, the Trial Court erred when it denied the motion brought by outside city water customers and granted Defendant's motion holding that RCW 35.92.010 and Washington's Constitution solely govern municipal water rates.

A. Standard Of Review.

Defendant acknowledges the standard of review in this matter is de novo and that the issue before this Court is whether the Trial Court erred in holding that solely RCW 35.92.010 and the Constitution govern Plaintiffs' claims against Defendant's water rates. Despite this, Defendant City disingenuously claims that Plaintiffs' appeal is somehow misleading as to the question before this Court and the standard of review.

The fact is, the Trial Court did not fully dispose of the parties' respective claims for declaratory relief pursuant to formal findings of fact and conclusions of law. Rather, the Court

merely addressed the narrow question of which statutory scheme applies to the Plaintiff's claims and the City's conduct as a matter of law. While not specifically denominated as such in the parties' briefing, the parties' cross-motions were in effect motions for summary judgment on the applicable law and not motions for judgment on the merits of their respective declaratory judgment claims.

Nevertheless, as Defendant appears to concede, this is largely a distinction without a difference, as both parties agree that the applicable standard of review is de novo.

B. The Plain Language Of Title 80 RCW Confirms Municipal Water Rates Must Comply With RCW 80.28.010, .090, and .100.

Contrary to the plain language of the statutes and decades of precedent, Defendant defiantly claims and the Trial Court erroneously held that "*RCW 80.28, et seq. is wholly inapplicable to municipal ratemaking*." City's Response, p. 15. Yet, Defendant City and the Trial Court totally failed to identify any statutory language, much less any ambiguity in Title 80 RCW

solely exempting municipal *water* companies from the "*miscellaneous requirement*" to set reasonable rates under RCW 80.28.010, .090, and .100.[2] City's Resp., p. 35.

Defendant City undisputedly is clearly a "water company" as defined in Title 80 RCW. That definition expressly includes "*every city or town owning, controlling, operating or managing any water system for hire within this state*." RCW 80.04.010. Defendant even *admits*, "*there's a number of sections of Title 80*

[2] In addition to mischaracterizing the fundamental duty to charge reasonable water rates as "miscellaneous," Defendant also inexplicably suggests it is somehow *improper* to assert claims under RCW 80.28.010, et seq., because it purportedly imposes a lower burden of proof than a constitutional challenge to Defendant's outrageous water rates. This is nonsensical. It is actually *Defendant* who seeks to impose a heightened criminal "*beyond a reasonable doubt*" burden of proof on Plaintiffs, who as City nonresidents, notably, have no avenue *except* the courts to challenge Defendant's unreasonable, discriminatory, arbitrary, and capricious water rates. However, while Plaintiffs dispute Defendant's representation regarding the applicable standard of proof under either statutory scheme, that standard is not actually before the Court or relevant to the legal question at hand.

that do apply to water companies, such as the water company of Spokane." RP 1 at 13.

Municipal *electrical* utilities, like municipal water companies, also fall within and are subject to Title 80 RCW. See RCW 80.04.010(13). Under the plain language of RCW 80.28.010, "*All charges made, demanded or received by* ***any****… **electrical company**, …**or water company** for… electricity or water, or for any service rendered or to be rendered in connection therewith, shall be* ***just, fair, reasonable and sufficient***." RCW 80.28.010 (emphasis added).

Similarly, RCW 80.28.090 provides that "***No****… **electrical company**… **or water company** may make or grant any undue or unreasonable preference*." RCW 80.28.090. RCW 80.28.100 provides that "***No****… **electrical company**… **or water company** may, directly or indirectly… charge, demand, collect or receive*" a greater or lesser rate than it charges to or receives from other persons or corporations for the same services "*under the same or*

substantially the same circumstances or conditions." RCW 80.28.100.

Defendant does not dispute that Washington courts have consistently applied RCW 80.28, et seq., to municipal *electrical* company ratemaking. Defendant nonetheless incongruently and without rational or legal support claims that municipal water companies are somehow solely exempt from those same requirements. However, there is no language in RCW 80.28, et seq., or elsewhere in Title 80 RCW that *differentiates* between municipal water and electrical companies for purposes of the obligation to set reasonable rates. There is certainly no language anywhere in Title 80 RCW that purportedly *exempts solely* municipal water companies and not municipal electrical companies from the reasonable rate requirements of RCW 80.28.010, .090, and/or .100.

Rather, under the plain language of Title 80 RCW, including, without limitation RCW 80.04.010 and RCW 80.28.010, .090, and .100, municipal water companies, like

electrical companies, must set reasonable, non-preferential, and non-discriminatory water rates.

1. RCW 80.04.500 And RCW 80.04.440 Confirm Municipal Water Companies Are Liable For Violations Of RCW 80.28.010, .090, and .100.

Defendant nonetheless insists that RCW 80.04.500 somehow exempts solely municipal water companies from RCW 80.28.010, .090, and/or .100. This is purportedly because municipal utilities are exempt from *UTC oversight* under that statute. City's Resp., p. 29. However, as an initial matter, this argument ignores the actual language of RCW 80.04.500. When read in full, RCW 80.04.500 unambiguously *confirms* that while municipal utilities are not subject to UTC oversight, "*all other provisions enumerated herein apply to public utilities owned by any city or town*." RCW 80.04.500.

Critically, Defendant also ignores RCW 80.04.440, which expressly authorizes any party harmed by a public service company's violation of and/or failure to comply with "*any law of this state*" to bring their claims before "*any court of competent*

jurisdiction." RCW 80.04.440. Municipal electrical companies and municipal water companies both clearly fall within the definition of a "*public service company*." See RCW 80.04.010(23) (which includes "*every… electrical company… and water company*," defined per above to specifically include cities and towns).

Thus, without question, the exemption from UTC oversight did not, and was never intended to, exempt Defendants from the obligation to *comply* with "*all other provisions*" in Title 80 RCW. It simply left *enforcement* of those provisions to the courts instead of the UTC.

2. Precedent Confirms Municipal Utilities Are Liable For Violations Of RCW 80.28.010, .090, and .100.

Moreover, by Defendant's distorted and strained logic, municipal *electrical* utilities would likewise be exempt from RCW 80.28.010, .090, and .100, as they too are exempt from UTC oversight under RCW 80.04.500. Yet, as noted in Plaintiffs' opening brief and alluded to above, our Washington

Supreme Court held otherwise in Earle M. Jorgensen Co. v. City of Seattle, 99 Wn.2d 861, 869 (1983), an earlier case involving the City of Seattle acting as a municipal electric utility.

The Jorgensen court expressly confirmed that notwithstanding the exemption from UTC oversight in RCW 80.04.500, "*[a]s with water rates, courts may set aside arbitrary or discriminatory electrical rates*." Id. This is also consistent with other decisions, similarly conveniently disregarded by Defendants and mistakenly overlooked by the Trial Court, reaffirming that municipal electrical utilities are required to set reasonable rates under RCW 80.28.010, .090, and .100. 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). These cases all confirm that the exemption from UTC oversight does not even remotely exempt municipal utilities, including municipal water companies, from obligations to set reasonable rates under Title 80 RCW.

Defendant condescendingly dismisses municipal electrical rate-making cases as "inapposite" because they do not specifically deal with water rates. Yet, as noted above, nothing in the relevant statutory language in Title 80 RCW even remotely distinguishes between electrical and water companies for purposes of the exemption from UTC oversight or the requirement to set reasonable rates under RCW 80.28.010, et seq. Defendant neglects to explain how RCW 80.04.500 could possibly exempt municipal *water* companies but not municipal *electrical* companies from the obligation to set reasonable rates. The reason for this neglect is because no such rational explanation exists.

3. Cases Analyzing Solely RCW 35.92.010 Are Irrelevant In Interpreting The Plain Language Of RCW 80.28.010, .090 And .100.

Instead, Defendant misrepresents that "*courts have found it inappropriate to impose the requirements of Title 80 RCW onto municipal water rates and cases interpreting electrical rates are inapposite*." City's Resp., p. 33. This too is simply untrue.

Other than the aforementioned dicta Defendant dogmatically relies upon within the Geneva, supra, footnote, the City does not actually identify a single case where any Washington court discusses much less "*found it inappropriate*" to require municipal water companies to comply with RCW 80.28.010, .090, and .100 in setting rates. That is because, as the Trial Court here correctly noted, there are none. See RP 1, at 33 ("*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*.").

Defendant's reliance on the Geneva footnote continues to be misplaced. In reality, the Geneva court's actual holding addressed only whether *RCW 35.92.010 itself* contained an explicit requirement that rates be reasonable once the words "*just and reasonable*" were removed from its predecessor statute, RCW 80.40.010. Geneva, supra, at 868-70.

Contrary to Defendant's argument, the Geneva court did not, however, actually rule on the issue of whether such a

requirement was supplied by *Title 80 RCW* itself and specifically pursuant to RCW 80.28.010, .090, or .100. Rather, the Geneva court merely expressed doubt that RCW 80.28.010 applied to municipal water rates in dicta in a single footnote, which significantly has not been cited or relied upon by any appeals court since. Id. That dicta is premised solely upon the fact that an earlier case, Faxe v. Grandview, 48 Wn.2d 342 (1956), did not specifically analyze rates under RCW 80.28.010 and an erroneous interpretation of the exemption from UTC oversight in RCW 80.04.500. See Geneva, supra, fn 8.

However, the holding in Faxe, supra, has been misconstrued and exaggerated by both the City here and the Geneva court. The Faxe court did not address *whether* RCW 80.28.010 applied to municipal water rates. It simply cited to RCW 80.28.010 as an aid in construing a municipal water company's obligations under *RCW 80.40.010* (now RCW 35.92.010), which at that time itself still expressly stated that rates must be "*just and reasonable*."

Additionally, as set forth in greater detail below, the Washington Supreme Court has since overruled cases suggesting that the exemption from UTC oversight somehow exempts municipal water companies from Title 80 RCW. See Fisk v. City of Kirkland, 164 Wn.2d 891, 894-5 (2008). Thus, the dicta in the Geneva footnote is not even premised on good law.

Other than Geneva, supra, and Faxe, supra, the only case relied upon by Defendant that even references, cites to, or discusses Title 80 RCW *at all* is Jorgensen, supra. However, even the Jorgensen court did not analyze or rule on the question of whether RCW 80.28, et seq., governs municipal *water* rates. Defendant's claim that the Jorgensen court "*highlighted the differences*" between water rates and electrical rates is again a gross overstatement. City's Resp. at 34.

The Jorgensen court merely noted, also in dicta, that water rates must be uniform under RCW 35.92.010 and confirmed that municipal electric rates, solely at issue in that case, must be reasonable and comply with RCW 80.28.090, and .100. See

Jorgensen, supra. The Jorgensen court did not, however, conduct any direct analysis into or engage in discussion regarding *whether* municipal water rates must *also* be reasonable under RCW 80.28.010, et seq. That issue was simply not before the court.

Defendant otherwise relies entirely on cases construing solely *RCW 35.92.010* and points to the absence of cases specifically analyzing water rates under Title 80 RCW. However, the mere fact that Washington courts have not previously analyzed and ruled on claims that municipal water rates are unreasonable under RCW 80.28.010, et seq., does not establish as a matter of law that municipal water companies are exempt from such statutes.

Indeed, our Supreme Court's 2008 rulings in Lane v. City of Seattle and Fisk, supra, confirm that municipal water companies *are* subject to liability under and for violations of Title 80 RCW. In particular, those cases confirm that under RCW 80.04.440, the *courts* have jurisdiction to hear claims

against municipal water companies for violations of Title 80 RCW and other applicable law. Lane v. City of Seattle, 164 Wn.2d 875, 889-90 (2008); Fisk v. City of Kirkland, 164 Wn.2d 891 (2008).

Notably, in Lane, supra, our Supreme Court specifically held that *water ratepayers* were entitled to recover statutory interest under RCW 80.04.440 on amounts the Defendant municipal water company had illegally and unconstitutionally passed on to them for fire hydrant costs. See Lane, supra, at 888-9. [3]

[3] Incidentally, Lane confirms that even under Defendant's convoluted theory (that solely the Washington Constitution and RCW 35.92.010 solely govern its water rates), the Trial Court here erred in holding that "*Title 80 RCW, including but not limited to RCW 80.28.010, .090, and .100 do not apply*" to Plaintiff's claims. CP 002. As the Washington Supreme Court explained in Lane, supra, "RCW 80.04.440 allows people to sue water companies for 'all loss, damage or injury' resulting from an illegal act." Id. at 888. Thus, if the City's rates violate RCW 35.92.010 and/or the Constitution, it is still subject to liability and suit under RCW 80.04.440.

In Fisk, as mentioned above, the Supreme Court unequivocally rejected and overruled the decisions of earlier courts which, like the Geneva court and the Trial Court here, had erroneously interpreted the exemption from UTC oversight in RCW 80.04.500 as exempting municipal water companies from Title 80 RCW altogether. Fisk, supra, at 894-5. The Fisk court confirmed that to the contrary, although "*municipal utilities are exempted from the control of the [UTC]… 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. (internal marks omitted).

Defendant seeks to artificially narrow the scope of Fisk, arguing that since it did not explicitly involve municipal water *rates*, RCW 80.04.500 can still be interpreted as exempting municipal water companies from Title 80 RCW's requirements that such rates be *reasonable*. See CP 3315-7. In other words, Defendant contorts Fisk, claiming that under Fisk, it is only a

water company under Title 80 RCW for "some" purposes, subject to only "some" of the requirements in that title.

Even setting aside the inherent inconsistency in this argument, Defendant cites to absolutely no cases decided in the 13 years since the Supreme Court's 2008 decision in Fisk limiting that case or endorsing Defendant's strained reasoning. Likewise, no other case since Geneva, supra, has discussed the question of whether RCW 80.28.010, et seq., applies to municipal water rates and certainly not since the Supreme Court 33 years later in Fisk, supra, confirmed that such companies remain subject to Title 80 RCW.

The Trial Court erroneously disregarded these cases without comment or explanation. However, these cases and other decisions applying RCW 80.28.010, et seq., to municipal electrical companies all confirm that under the plain language of the statutes, municipal utilities, including water companies, are required to set reasonable rates under Title 80 RCW.

4. Legislative History Actually Confirms Municipal Water Companies Must Comply With RCW 80.28.010, .090, and .100.

Defendant's self-serving interpretation of the legislative history at issue is wholly irrelevant. Defendant grossly exaggerates the import of the legislative changes to the statutes at issue in support of its strained argument that "*RCW 80.28 et seq. is wholly inapplicable to municipal ratemaking*." City's Resp., p. 15.

For example, Defendant relies heavily on (1) the removal of RCW 80.40.010, the predecessor statute to RCW 35.92.010, from Title 80 RCW which specifically governs public utilities, and (2) its subsequent recodification in Title 35 RCW, which more generally governs "cities and towns." However, this does not even remotely evidence a legislative intent to exempt solely municipal *water* companies from the reasonableness requirements of RCW 80.28, et seq.

As stated above, Fisk, supra, confirms and Defendant readily *admits* that municipal water companies, including the

City, remain subject to at least *some* of the requirements contained in Title 80 RCW. Thus, it is inconsistent and defies common sense to argue that the mere act of moving RCW 80.40.010 to Title 35 somehow implies an intent to exempt only municipal water companies from *other* provisions of Title 80 RCW, such as rate reasonableness.

Further, the predecessor statute to RCW 35.92.050 governing municipal electric utilities was *also* formerly codified in Title 80 as RCW 80.40.050 and was moved to Title 35 as RCW 35.92.050. This was done **at the same time and in the same Session Law**. See 1965 Wash. Sess. Laws, ch. 7, p. 430-433; see also 1957 Wash. Sess. Laws, ch. 209, §§ 2, 6; 1957 Wash. Sess. Laws, ch. 288 c. §§ 2, 6. Yet, again, Washington courts have confirmed that municipal electric utilities must set reasonable rates under RCW 80.28, et seq.

The removal of the words "*just and reasonable*" from RCW 80.40.010 in 1959 is immaterial for the same reason. This language was *never* contained in RCW 80.40.050 or its

predecessors governing municipal electric utilities. Thus, the removal of this redundant language from the predecessor statute governing municipal water companies in no way suggests such companies are solely exempt from the obligation to set reasonable rates under Title 80 RCW.

Defendant further conveniently ignores that the predecessor statute to the modern-day RCW 35.92.010 was originally enacted as early as 1893. See 1893 Wash. Sess. Laws, ch. 8, § 1, p. 12; see also 1909 Wash. Sess. Laws, ch. 150, pp. 580-7. This was at least *18 years before* the Public Service Commission Law, now codified as the Public Utilities Act at Title 80 RCW, was enacted in 1911. See 1911 Wash. Sess. Laws, ch. 117, p. 538.

Despite this, even in 1911, the legislature clearly deliberately defined "water company" for purposes of what is now Title 80 RCW to include "*every city or town owning, controlling, operating or managing any water system for hire within this state*." See Id., p. 545. Similarly, the relevant

portions of the predecessor statutes to RCW 80.28.010, .090, and .100 were virtually identical to the current statutes in requiring all water and electrical rates to be reasonable and nondiscriminatory. Id., p. 558-61.

The definition of "water company" in RCW 80.04.010(30), has been modified by the legislature numerous times over the years. This includes amendments occurring *after* RCW 80.40.010 (now RCW 35.92.010) was amended in 1959 to authorize the city to classify customers and after it was moved to Title 35 RCW in 1965. See e.g. 1977 Wash. 1st. Ex. Sess. Laws, ch. 47; 1985 Wash. Sess. Laws, ch. 161, p. 2. However, the legislature has nonetheless consistently included cities and towns in the definition of "*water company*."

Similarly, despite multiple modifications to RCW 80.28.010, .090, and .100 over the years, the legislature has never excluded *municipal* water or electrical companies or companies not subject to UTC jurisdiction from the requirement to set reasonable rates. This confirms that the legislature clearly

intended municipal water companies would be subject to and required to comply with the obligation to set reasonable rates under Title 80 RCW.

In fact, where the legislature *actually* intended to limit the application of a particular statute or chapter in Title 80 RCW to exclude municipal utilities and/or other entities exempt from UTC jurisdiction, it expressly said so. For example, RCW 80.12.010 specifically modifies the expansive general definition of "*public service company*" to exclude companies not subject to UTC jurisdiction *solely* for the purpose of the statutes in Chapter 80.12, RCW. See also RCW 80.08.010 (same); RCW 80.20.010 governing investigation of public service companies (same).

By contrast, Chapter 80.28, RCW contains no such limitation or modification to the standard definitions of water company, electrical company, and/or public service company for purposes of the obligation to set reasonable rates. If the legislature intended to limit the application of those reasonable

rate requirements to solely entities subject to the jurisdiction and oversight of the UTC, it could have and would have done so.

Because it did not, it is clear that the legislature intended exactly what the plain language of RCW 80.28.010, et seq. requires: that all charges made by water companies, including municipal water companies, be just, fair, and reasonable, and not unduly preferential or unjustly discriminatory.

5. Case Law And Legislative History Are Inadmissible To Contradict The Plain Language Of RCW 80.28.010, .090, and .100.

In any event, the cases relied upon by Defendant construing *RCW 35.92.010* and Defendant's self-serving interpretation of legislative history are inadmissible and utterly irrelevant in "interpreting" the plain language of Title 80 RCW.

Washington law is very clear. As this Court previously stated, "*[o]nly if a statute remains ambiguous after a plain meaning analysis may the court resort to external sources or interpretive aids, such as canons of construction, case law, or legislative history.*" Ellerbroek v. CHS Inc., 13 Wn. App.2d 278,

282-3 (2020) (internal citations omitted); see also Leishman v. Ogden Murphy Wallace, PLLC, 196 Wn.2d 898, 904 (2021). However, "*[i]f the plain language of the statute is unambiguous, our inquiry is over*." Leishman, supra. That is the case here.

Defendant readily admits "***[t]he City does not contend that RCW 35.92.010 is ambiguous***. ***Nor does it contend that RCW 80.28.010, .090, or .100 are ambiguous***." City's Resp., p. 15 (emphasis added). In that regard, as the Washington Supreme Court confirmed in Fisk, supra, the plain language of RCW 80.04.010 defines water companies to include *municipal* water companies. RCW 80.28.010, .090, and .100 likewise unambiguously require all water companies to set reasonable and nondiscriminatory rates.

Thus, it is neither necessary nor appropriate to resort to case law or legislative history to determine whether the legislature "intended" to require municipal water companies to comply with RCW 80.28.010, .090, and .100. Rather, the legislature's intent is to be determined solely by looking to the

plain language of those statutes, which plainly require all water companies, including Defendant, to set reasonable rates and avoid undue preferences and unjust discrimination.

C. RCW 35.92.010 Can And Must Be Read Together With RCW 80.28.010, .090, and .100.

Unable to refute the plain language of Title 80 RCW[4], Defendant apparently argues that the obligation to set reasonable rates pursuant to Title 80 RCW either conflicts with or is preempted by RCW 35.92.010. This too fails.

[4] Defendant's absurd references to *different* provisions of RCW 80.28, et seq., are clumsy, diversionary distractions. Plaintiffs have never "*abandoned*" the claim that Defendant violated RCW 80.28.080 or any other statute and dispute that Defendant is exempt from the entirety of that statute. However, the motions below focused on the narrow question of whether municipal water companies must set reasonable rates under RCW 80.04.440 and 80.28.010, .090, and .100. RCW 80.28.080 was not at issue and is wholly irrelevant to the question before the Court. See also RCW 80.98.030 ("*If any provision of this title, or its application to any person or circumstance is held invalid, the remainder of the title, or the application of the provision to other persons or circumstances is not affected*.").

As this Court succinctly summarized in Walker v. Wenatchee Valley Truck and Auto Outlet, Inc., 155 Wn. App. 199, 208-9 (2010), Washington law is clear:

> "*In the case of multiple statutes or provisions governing the same subject matter, effect will be given to both to the extent possible. Efforts will be made to harmonize statutes, particularly if the legislation itself recognizes that multiple statutes may govern.* ***Only when two statutes dealing with the same subject matter 'conflict to the extent that they cannot be harmonized' will a more specific statute supersede a general statute.***" Walker, supra (internal citations omitted) (emphasis added).

Defendant's spurious argument that overlapping statutes are read together only if they are contained in the *same title* is contrary to black letter law. See City's Resp., p. 24. See Columbia Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 80, 95-6 (2017) (holding that since SEPA (chapter 43.21C RCW) and the EFSLA (Chapter 80.50 RCW) do not conflict, both statutes applied to the Port of Vancouver); see also Matter of Dependency of G.M.W., 24 Wn. App.2d 96, 117 (2022) (holding that RCW 13.34.070(8) could be harmonized with and thus did

not supersede RCW 4.28.080(16)). As the Columbia court noted, *overlapping statutes do not necessarily conflict*." Id.

There are clearly some overlapping statutes in Title 35 RCW governing solely municipal utilities and Title 80 RCW governing all public utilities, including specifically cities and towns operating waterworks. Plaintiffs do not dispute that RCW 35.92.010 in fact authorizes municipal water companies to own and operate waterworks, classify customers, and generally set rates for the water it sells.

However, the question before the Court is not whether the statutes in Title 80 RCW and Chapter 35.91 RCW generally *overlap*. It is whether the obligation to set reasonable rates under RCW 80.28.010, .090, and .100 *conflicts* with RCW 35.92.010.[5] It is readily apparent it does not. Indeed, nowhere in Defendant's

[5] While Plaintiffs do not even remotely concede that Defendant's classifications are reasonable or appropriate, the motions below focus on whether Defendant's *rates* must be reasonable *under Title 80 RCW*. The propriety of Defendant's *classifications* is not currently before the Court.

briefing does the City even *attempt* to identify any actual conflict between these statutes. Defendant merely claims that RCW 35.92.010 contains *additional* requirements specific to municipal utilities.

For example, Defendant relies heavily on the fact that RCW 35.92.010 allows municipal water companies to classify customers and requires that rates be uniform amongst classifications. However, notably, Defendant fails to explain how that in any way *conflicts* with the requirement to ensure that the rates charged to *all* customers are reasonable and not unduly prejudicial or unjustly discriminatory under RCW 80.28.010, .090, and .100.

Defendant certainly does not identify any language in RCW 35.92.010 specifically authorizing municipal water companies to set *unreasonable* rates or to grant undue preferences or treat similarly situated customers differently. To the contrary, Defendant has begrudgingly admitted that such actions would run afoul of Washington's Constitution. Thus, any

interpretation of RCW 35.92.010 as somehow authorizing the City to set *unreasonable and discriminatory* rates in conflict with RCW 80.28.010, .090, and/or .100, would render the statute unconstitutional and void.

Defendant's clumsy argument that the Court can nonetheless disregard the plain language of Title 80 RCW because RCW 35.92.010 is purportedly "*self-contained*" as to municipal water rates also fails. See City's Resp., p. 24. Contrary to applicable law, Defendant misrepresents that "*[s]imply because two statutes may relate to 'water' or 'water rates,'*" the Court is not required to read them together. Id. Yet, that is *precisely* what the law requires. See Walker, supra; Columbia Riverkeeper, supra.

Notably, Defendant again cites to absolutely no authority to support its claim that *in the absence of a conflict*, this Court can pick and choose between statutes pertaining to the same subject matter. Actually, as noted above, the opposite is true. Even *if* RCW 35.92.010 was "*self-contained*," which as

explained below, it is not, absent a conflict, courts are still required to read it in harmony with other statutes governing public utilities and utility rates, including RCW 80.28.010, .090, and .100. See Columbia Riverkeeper, supra; see also Gold Bar Citizens for Good Government v. Whalen, 99 Wn.2d 724, 728 (1983) (explaining it was error to presume "…*that whenever two statutes govern the same area, the more specific statute preempts the general.* ***This is not the law. Only when the two statutes conflict must the court choose between the two***.") (emphasis added).

While convoluted, it appears that what Defendant is really trying to argue is that RCW 35.92.010 somehow *preempts* statutes in Title 80 RCW requiring reasonable water rates as to *municipal* water companies. Defendant cites to International Export Corp. v. Clallam County, 36 Wn. App. 56, 57-8 (1983), as supporting this frivolous argument. Specifically, Defendant misrepresents that under this case, legislative intent to exempt municipal water companies from RCW 80.28.010, et seq., is

expressly or impliedly established by the fact that "*there is no reference in RCW 35.92.010 to any provision of Title 80*." City's Resp., p. 14. This a gross misstatement of the holding in that case.

The International Export Corp. court noted only that where a statute specifically "*adopts by reference*" part of another statute, "*[t]he terms referred to and only those terms must be treated as if they were incorporated into the referring act.*" Id. However, the International Export Corp. court did not even address, much less limit or overrule, decades of precedent requiring statutes pertaining to the same subject matter to be harmonized in the absence of a conflict. International Export Corp., supra does not even remotely support Defendant's specious argument that the *absence* of a reference to Title 80 RCW in RCW 35.92.010 somehow establishes that RCW 35.92.010 *preempts* or conflicts with statutes in Title 80 RCW requiring reasonable water rates.

The fact is, the legislature did not need to reference Title 80 RCW *in RCW 35.92.010* for the statutes in Title 80 to apply to municipal water companies and rates. The plain language of the statutes *in Title 80 RCW* unambiguously confirms that all cities and towns operating waterworks for hire must set reasonable rates. See RCW 80.04.010(30); RCW 80.28.010; see also RCW 80.28.090 and .100.

Ironically, Defendant further argues that the well-settled canon of construction requiring courts to look to the plain language of statutes to determine legislative intent somehow authorizes the Court to *ignore* the plain language of Title 80 RCW. City's Resp., p. 24. However, nothing in Title 35 RCW or RCW 35.92.010 in particular *states* that it preempts other law or exclusively governs municipal water rates or expressly authorizes *unreasonable* rates.

In any event, RCW 35.92.010 is clearly *not* self-contained. As stated above, Defendant *admits* it is a "water company" defined by and subject to at least *some* requirements in Title 80

RCW. See also Fisk, supra. This alone confirms RCW 35.92.010 is not "self-contained" and that Title 80 RCW continues to generally apply to and govern municipal utilities authorized under Title 35 RCW.

Defendant nonetheless continues to illogically claim that municipal water companies are conveniently and selectively exempt from any of those provisions in Title 80 RCW governing water *rates*. However, municipal *electric* rates must be reasonable under RCW 80.28.010, .090, and .100, notwithstanding the virtually identical authorization for municipal *electric* companies to sell power and set rates under RCW 35.92.050. See Jorgensen, supra. Thus, the "power" and/or "authority" created by RCW 35.92.010 and .050, respectively, does not establish that either statute is "self-contained" as to utility rates.

RCW 35.92.010 does further allow municipal water companies to classify customers amongst whom rates must be uniform and requires that rates must not be less than the cost of

the system. However, RCW 35.92.010 is otherwise silent as to any standards governing the *amount* of those rates.

Defendant's own arguments confirm that RCW 35.92.010 is not self-contained and must instead be read together with other law in order to impose restraints on the rates it can charge to customers. Specifically, while Defendant *admits* its rates must be reasonable and non-discriminatory, it vehemently denies that this requirement comes from the language of RCW 35.92.010 itself. Instead, Defendant claims this requirement is imposed by the *Washington Constitution*, when read *together* with RCW 35.92.010. Thus, it is clear RCW 35.92.010 can and must read together with other non-conflicting statutes, including RCW 80.28.010, .090, and .100, requiring that all rates be reasonable and non-discriminatory.

The official notes to the 1985 amendment to RCW 35.92.010 also expressly confirm that the legislature did *not intend* RCW 35.92.010 to be "self-contained" or to supplant or preempt other law:

> "***Nothing in this act exempts any city or town, water district, or sewer district from compliance with applicable state and federal statutes and regulations including but not limited to****: State environmental policy act, chapter 43.21C RCW...; federal power act, 16 U.S.C. Sec. 791 et seq.; public utility regulatory policies act, 15 U.S.C. Sec. 717f; … energy financing voter approval act, chapter 80.52 RCW; water resources act, chapter 90.54 RCW…*" 1985 Wash. Sess. Laws, ch. 444, p. 1938.

Ultimately, if the legislature had wished to remove solely municipal water companies from the requirement to set reasonable rates under RCW 80.28.010, .090, and .100, it could have done so. It did not.

There was and is no legal authority supporting the Trial Court's Order holding RCW 80.28.010, .090, and .100 inapplicable to municipal water rates, contrary to the plain language of the relevant statutes at issue. Accordingly, the Trial Court erred as a matter of law, and the Order granting Defendant's Motion for Declaratory Relief and denying Plaintiffs' cross-motion should be reversed.

D. Attorney Fees And Costs.

Defendant has provided absolutely no statutory basis for its request for an award of costs. Accordingly, even if Defendant prevails, its request for an award of costs should be denied.

Based on RAP 18.1 and RCW 80.04.440, Plaintiffs respectfully request an award of reasonable attorney fees and costs incurred below and on appeal.

III. CONCLUSION

Based on the foregoing, Plaintiffs request that the Trial Court's Order granting Defendant's Motion and Denying Plaintiffs' Motion for Declaratory Relief be reversed.

This document contains 5,886 words, excluding parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 17th day of April, 2023.

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 17th day of April, 2023, 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 17th day of April, 2023, at Spokane, Washington.

/s/ ALEXANDRIA T. DRAKE

DUNN AND BLACK, P.S.

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