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' ANSWER TO BRIEF OF AMICUS CURIAE

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I. IDENTITY OF RESPONDING PARTIES

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, submit this Answer to the Amicus Curiae Brief submitted by the Washington State Association of Municipal Attorneys ("WSAMA").

II. INTRODUCTION

WSAMA's amicus brief not only fails to provide helpful or novel information to the Court, it further dramatically misinterprets the law and the purported impact of requiring Washington cities to set reasonable water rates under Title 80 RCW. In particular, WSAMA, in exaggerated rhetoric, posits that requiring reasonable rates under RCW 80.28.010, .090, and .100, "*could negatively impact cities and towns throughout the state by upending a state-wide system of legislative autonomy for municipal water rate-setting with appropriate sideboards*

dictated by the legislature and Constitution." Amicus, p. 3. Nothing could be further from the truth.

Even the Defendant City admits that irrespective of the applicable statutory framework, its Outside City water rates must be reasonable. 11/15/21 RP 14. Thus, holding that Defendants' rates must be reasonable under Title 80 RCW, in addition to RCW 35.92.010 and the Constitution, does not even remotely alter the *obligation* of municipal water companies in Washington State to set reasonable rates. Rather, Defendant and WSAMA merely argue that applying Title 80 RCW to municipal water rates alters *burden of proof* that the *public* must bear in court to prove such rates are *unreasonable.*

This distinction is particularly significant where, as here, the unreasonable City rates at issue are being imposed on non-resident water users who have no voting voice or ability to challenge the unreasonableness of the City's imposed rates. In this context, it is clear that the "*system*" WSAMA fears will be "*upended*" is one that has been systematically abused for

decades, allowing municipal water companies, like the City, to evade liability in court for setting *unreasonable* rates on Outside City water users.

However, the fact is, the plain language of Title 80 RCW (which expressly *includes* cities and towns that own and operate waterworks) confirms that our legislature never intended to insulate solely municipal water companies from the obligation to set reasonable rates or from liability for failing to do so. Consequently, the brief submitted by WSAMA provides no factual, legal, or substantive assistance to this Court and thus should be disregarded. Accordingly, the Trial Court's order should be reversed.

III. ARGUMENT

As noted, the brief submitted by the amicus party adds nothing new of substance or value to this case. Instead, WSAMA

merely rehashes and attempts to improperly bolster the same arguments made by Defendant City of Spokane[1].

For example, WSAMA perpetuates the City's misrepresentations that the exemption from UTC oversight in RCW 80.04.500 somehow exempts municipal water companies from the obligation to set reasonable rates pursuant to RCW 80.28.010, .090, and .100. However, both the plain language of RCW 80.04.500 and Supreme Court precedent confirm this argument fails as a matter of law.

WSAMA further cites almost exclusively to the very same cases cited by Defendant and addressed in extensive briefing

[1] Egregiously, both the City and the amicus party fail to disclose that the City's attorney in this matter, Megan Clark, is a member of the WSAMA amicus committee, which "*reviews request [sic] for amicus curiae assistance from WSAMA and approves participation in selected cases*." (https://wsama.org/index.asp?SEC=2FDB584D-E92F-4B3A-B1D4-377C516B58AC) Thus, the amicus party's brief appears to be nothing more than an improper attempt by the Defendant City to submit an additional "bite at the apple" brief, prepared for and by new attorneys, retained and/or represented by its current attorney, masquerading as a purported "friend of the court."

submitted by both parties, to argue that RCW 35.92.010 solely governs municipal water rates. However, other than its reliance on *dicta* contained in two cases decided over four decades ago, WSAMA fails to identify a single case that actually holds that municipal water companies are exempt from the obligation to set reasonable rates under RCW 80.28.010, .090, and .100.

Thus, WSAMA's arguments fail based on common sense and well-settled black letter law.

A. Municipal Water Companies Must Set Reasonable Rates Under RCW 80.28.010, .090, And .100.

WSAMA's entire argument that municipal water companies cannot be required to set reasonable rates under RCW 80.28.010, .090, and .100 is premised on its mistaken assumption that only the UTC can enforce those statutes. Remarkably, it bears repeating that Plaintiffs do not now and have never suggested that municipal water companies *or rates* are subject to *UTC* jurisdiction or oversight. RCW 80.04.500 clearly confirms they are not. However, this argument is not even clever misdirection. WSAMA's argument suffers from the

same fatal defect as the City's identical argument: WSAMA apparently failed to read or outright ignores the plain language of the statutes at issue.

As was comprehensively discussed in Petitioner's Opening Brief and Reply, incorporated by reference herein, the plain language of RCW 80.04.010(30) and Supreme Court precedent both confirm that the City is unquestionably a water company under and subject to Title 80 RCW. See, e.g., RCW 80.04.010(30) (definition of "*water company*" to include "*every city or town owning, controlling, operating or managing any water company for hire within this state*."); see Fisk v. City of Kirkland, 164 Wn.2d 891, 894-5 (2008).

The plain language of the relevant statutes contained in 80.28, RCW is equally 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).

Like the Defendant City, WSAMA does not (and cannot) identify any language anywhere in Title 80 RCW or elsewhere that expressly exempts solely municipal water companies from the obligation to set reasonable rates under RCW 80.28.010, .090, and .100. Instead, WSAMA inanely claims municipal water companies alone are exempt from this obligation, because RCW 80.28.010, .090, and .100 are purportedly "*inexorably intertwined*" with UTC jurisdiction and oversight. See Amicus, p. 11.

However, WSAMA conveniently ignores that the very statute exempting municipal utilities from UTC oversight (RCW 80.04.500), expressly confirms that "*all other provisions enumerated herein apply to public utilities owned by any city or town*." RCW 80.04.500. Thus, the legislature made clear that the exemption from *UTC oversight* does not actually exempt

municipal utilities from the *obligations* set forth in Title 80 RCW.

In that regard, Washington courts have repeatedly held that municipal *electrical* companies, also exempt from UTC oversight under RCW 80.04.500, 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). Notably, neither the City nor WSAMA have identified any precedent or statutory language in Title 80 RCW differentiating between municipal *electrical* and *water* companies for purposes of the exemption from UTC oversight under RCW 80.04.500.

This is of course because there is none. Rather, cases requiring municipal electrical utilities to set reasonable rates under RCW 80.28.010, .090, and .100 confirm that although the *UTC* does not enforce these statutes against municipal utilities, the *courts* certainly do.

Furthermore, as alluded to above, the Washington Supreme Court has also confirmed that RCW 80.04.500 does not exempt municipal water companies from the obligation to comply with Title 80 RCW. In Fisk, supra, the Washington Supreme Court unequivocally rejected the City of Kirkland's virtually identical argument that the exemption from UTC oversight somehow exempts municipal water companies from Title 80 RCW altogether:

> *Municipal utiliites 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 is not a water company under Title 80 RCW. Under the plain language of the statute, it is*. Fisk, supra, at 895 (internal marks omitted).

In the 15 years since Fisk was decided, no other appellate decision even cites to RCW 80.04.500. There has certainly not been any case since Fisk limiting the scope of the Court's ruling, or otherwise interpreting RCW 80.04.500 as exempting solely municipal *water* companies from the obligation to set reasonable rates under RCW 80.28.010, .090, and .100.

Accordingly, the Trial Court here erred by disregarding the plain language of Title 80 RCW and the cases requiring municipal electrical companies to set reasonable rates pursuant to RCW 80.28.010, .090, and .100. Thus, the Trial Court's order holding that solely RCW 35.92.010 and the Washington Constitution apply to municipal water rates should be reversed.

B. RCW 35.92.010 And RCW 80.28.010, .090, And .100 Can And Must Be Read Together.

WSAMA also claims that Title 80 RCW does not apply to municipal water rates, because RCW 35.92.010 and the Washington Constitution purportedly provide "*adequate safeguards*" against unreasonable water rates. Amicus, p. 5. The undisputed facts of this case clearly prove that is not true.

More to the point, WSAMA's argument, like the City's, ignores black letter law requiring that courts harmonize and construe together statutes governing the same subject matter in the absence of a conflict. See, e.g. State v. Numrich, 197 Wn.2d 1, 15 (2021); Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126, 146 (2001); Walker v. Wenatchee Valley Truck and Auto

Outlet, Inc., 155 Wn. App. 199, 208-9 (2010). The statutes at issue in this matter, RCW 35.92.010 and RCW 80.28.010, .090, and .100, simply do not conflict.

The reality is, the authority of a municipal corporation "*is limited to those powers expressly granted and to powers necessary or fairly implied in or incident to the power expressly granted, and also those essential to the declared objects and purposes of the corporation*." Arborwood Idaho, L.L.C. v. City of Kennewick, 151 Wn.2d 359, 374 (2004). To that end, as WSAMA notes, there is no dispute that RCW 35.92.010 sets forth "*[t]he* ***general grant*** *of authority to cities and towns to acquire, operate and maintain municipal waterworks*." Amicus, p. 5 (emphasis added).

This grant of authority is of course necessary for the City to operate waterworks *at all.* However, it does not in any way signify a legislative intent to exempt the City from the obligation to set reasonable water rates pursuant to Title 80 RCW. Were that the case, the legislature could and presumably would have

removed "cities and towns" from the definition of "water company" under that Title and/or altered the definitions in RCW 80.28 to specifically exclude municipal water companies from the obligation to set reasonable rates. See RCW 80.04.010(30). It has not done so.

The legislature's actual goal in authorizing cities to own and operate utilities was instead succinctly summarized by the Washington Supreme Court over a century ago: "*The object of municipal ownership is to give the citizen the best possible service at the lowest possible price*." Uhler v. City of Olympia, 87 Wash. 1, 14 (1915). Notably, beyond authorizing the City to classify customers and generally requiring uniformity of rates amongst the classes created, RCW 35.92.010 is utterly silent as to exactly *how* the City is to accomplish this objective.

That is where the detailed framework and guardrails provided by Title 80 RCW, and specifically RCW 80.28.010, .090, and .100, are both instructive and necessary to fully accomplish the legislature's goal. Unlike RCW 35.92.010, RCW

80.28.010, .090, and .100 provide clear and specific guidance to all "water companies," instructing that they charge only reasonable, non-preferential, and non-discriminatory water rates.

Like the City, WSAMA does not identify any actual conflict between the "*general grant of authority*" contained in RCW 35.92.010, and the obligation to ensure that the rates charged by water companies are just, fair, and reasonable under RCW 80.28.010[2]. WSAMA also does not identify any conflict between RCW 35.92.010 and the prohibitions on undue preferences and unreasonable discrimination in setting rates

[2] WSAMA reiterates Defendant's irrelevant references to *different* provisions of RCW 80.28, et seq. These too are clumsy diversionary distractions. The Trial Court 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. Even *if* some *different* provisions contained in *different statutes* in Title 80 RCW potentially conflict with statutes governing municipal corporations, the City remains obligated to comply with those that do not conflict. Indeed, the City begrudgingly *admits* that it is a water company subject to *some* statutes in Title 80 RCW.

pursuant to RCW 80.28.090, and .100. In fact, the word "conflict" does not appear once in the brief filed by WSAMA.

The fact that courts have consistently required municipal *electrical* utilities to set reasonable rates under RCW 80.28.010, .090, and .100 confirms that those statutes can in fact be read together with the "general grant" of authority contained in RCW 35.92.010. See Earle M. Jorgensen Co. v. City of Seattle, 99 Wn.2d 861, 869 (1983); Hearde, supra; Okeson, supra. Without explanation or citation to any authority whatsoever, WSAMA argues that cases pertaining to electrical utilities are "inapposite." Amicus, p. 6.

Yet, in relevant part, the "*general grant of authority*" contained in RCW 35.92.050 allowing municipal *electrical* companies to sell power and set rates is virtually identical to that contained in RCW 35.92.010. WSAMA certainly fails to identify any statutory language in Title 80 RCW itself differentiating between municipal electrical and water

companies for purposes of the obligation to set reasonable rates under RCW 80.28.010, .090, and .100.

Instead, WSAMA claims this Court can simply disregard these cases and the plain language of Title 80 RCW based on the Defendant City's strained and overly broad mischaracterization of *dicta* in Geneva Water Corp., v. City of Bellingham, 12 Wn. App. 856, 868-70 (1975) and Jorgensen, supra. More specifically, WSAMA misleadingly suggests that the Geneva and Jorgensen courts held that solely RCW 35.92.010 applies to and governs municipal water rates. However, not only were both cases decided decades before the Supreme Court's decision in Fisk, supra, WSAMA further grossly overstates their holdings.

The Geneva court held only that after the words "*just and reasonable*" were removed from RCW 80.40.010, the predecessor to RCW 35.92.010, *RCW 35.92.010* no longer contains an explicit reasonableness requirement. The Geneva court did not reach the merits of the question at issue here;

namely whether municipal utility water rates must nonetheless be reasonable under RCW 80.28, et seq.

To the extent the Geneva court discussed this issue at all, the discussion was mere *dicta* in a single footnote which has not been cited or relied upon by any appeals court in the 48 years since Geneva was decided. No other case has analyzed this issue since Geneva, much less since the Supreme Court confirmed in 2008 in Fisk, supra, that municipal water companies remain subject to Title 80 RCW. However, five years *after* Division I's decision in Geneva, Division I expressly confirmed that municipal utility *electrical* rates must be just, fair, and reasonable under RCW 80.28.010. See Hearde, supra. As stated above, there is simply no statutory or other basis for distinguishing between municipal water and electrical companies with respect to the obligation to set reasonable rates.

Three years later, the Jorgensen court in fact also confirmed that municipal utility electrical rates must be reasonable under RCW 80.28.090 and .100. However, contrary

to WSAMA's misrepresentation, the Jorgensen court did not do so by drawing a "*clear distinction between the statutes that apply to water rates (RCW 35.92.010) from those that apply to electrical rates (RCW 80.28.090).*" Amicus, p. 9.

Rather, the Jorgensen court merely noted, again in *dicta*, that water rates must be uniform under RCW 35.92.010, and municipal electric rates must be reasonable and comply with RCW 80.28.090, and .100. The Jorgensen court did not conduct any direct analysis whatsoever into *whether* municipal utility *water* rates must *also* be reasonable under RCW 80.28.010, et seq. That issue was not before the Court, as the case dealt solely with electric rates.

Contrary to WSAMA's claim that "*[l]ongstanding jurisprudence*" supports their assertion that solely RCW 35.92.010 and the Constitution govern municipal water rates, no other cases have been found to have examined that question at all. Amicus, p. 5. Certainly, the absence of cases directly applying RCW 80.28.010, .090, and .100 to municipal

water rates, provides no basis for ignoring the plain language of those statutes, particularly since courts have repeatedly applied them to municipal utility electrical rates.

There was and is no legal authority or basis supporting the trial court's Order holding RCW 80.28.010, .090, and .100 inapplicable to municipal water rates. The Trial Court's order is further 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.

IV. CONCLUSION

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

This document contains 2,843 words, excluding parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 12th day of June, 2023.

DUNN & BLACK, P.S.

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DECLARATION OF SERVICE

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

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

2. On this 12th day of June, 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.

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