

**MINUTES OF THE REGULAR
MEETING OF THE COMMISSION**

January 26, 2021

1. Call to Order | Pledge of Allegiance

The regular meeting of the Board of Commissioners of Public Utility District No. 1 of Whatcom County was called to order at 8:00 a.m. by Commissioner Atul Deshmane. Said meeting was open to the public and notice thereof had been given as required by law. Those present via Zoom teleconference included Commissioner Mike Murphy, Commissioner Christine Grant, Commissioner Atul Deshmane, and Legal Counsel Jon Sitkin. Staff attending via teleconference: Steve Jilk, General Manager, Ann Grimm, Executive Assistant; Rebecca Schlotterback, Manager of Contracts and Regulatory Compliance; Annette Smith, Director of Finance; Brian Walters, Assistant General Manager; Duane Holden, Director of Utility Operations; Paul Siegmund, Manager of Automation and Technology; Aaron Peterson, IT/SCADA Technician; Mike Macomber, IT/SCADA Technician; Jon Littlefield, Electric System Supervisor; and, Traci Irvine Accountant I.

Public attending via teleconference:

Carryn Vande Griend, PSE
Dave Olson, Citizen
Jon Humphries, Citizen
Lauren Turner, Phillips 66
Mary Rivkin, Citizen
Max Perry, Citizen
RB Tewksbury, Citizen
Rick Maricle, Citizen
Steve Spitzer, Citizen

2. Approval of Agenda

ACTION: Commissioner Murphy motioned to APPROVE THE AGENDA OF JANUARY 26, 2021. Commissioner Grant second the motion. Motion passed unanimously.

3. Approval of Consent Agenda

The Commission Clerk indicated the year was incorrect on the date of the draft Minutes; it has been corrected to reflect 2021.

ACTION: Commissioner Murphy motioned TO APPROVE THE MINUTES OF THE REGULAR MEETING OF JANUARY 12, 2021 AS CORRECTED; AND THE CLAIMS OF JANUARY 26, 2021. Commissioner Grant second the motion. Motion passed unanimously.

4. Old Business

Deshmane recapped the Special Meeting of January 19 and the Commissioners discussion on broadband. No formal action was taken at that meeting.

5. a) Approve Agreements with Northwest Intergovernmental Energy Supply

Background: The District's electric system has historically purchased 100% of its power supply to meet electric load requirements from the Bonneville Power Administration (BPA). The electric system's resource supply portfolio has been the same as BPA's federal base system resources, approximately 94% (hydro, nuclear generation) of which was non-carbon (non-emitting) resources in 2019.

Based on electric load forecasts for the District's electric system, the District has outgrown its allocation of federal power supply priced at the Tier 1 rate. Going forward the District must rely on BPA provided additional power priced at BPA's Tier 2 rate and/or power procured from non-federal sources. Given the requirements of the Washington State CETA legislation passed in 2019, the District resource acquisitions must be from renewable energy projects or non-emitting generation (i.e. nuclear power).

In planning for this energy resource acquisition future, District staff has engaged a consultant, The Energy Authority, to assist in helping District staff and Commission better understand what the power supply options are; what is requirement to manage non-federal power acquisitions; and what resource acquisition and management policies the Commission might need to implement.

District staff has also engaged in discussions with a utility organization about membership. The organization, Northwest Requirements Utilities (NRU) represents numerous public utilities (PUDs, Municipals, and Co-ops) that have similar power supply interests and issues. All members have BPA power purchase agreements and receive an allocation of Tier 1 priced federal power. All members have load following contracts under which BPA manages their load variations. Some of these members are impacted by Washington State's CETA legislation and others have forecasted load growth and are

looking at non-federal power.

NRU does not require a formal agreement for utilities to sign to become members. Existing members vote on accepting a new member. In the case of the District all that is required is the submission of a letter asking for membership status. NRU has already indicated a majority of the members would accept the District as a new member of the organization. Members are expected to pay their pro-rated share of the annual administrative expenses of the organization.

A related organization of NRU is Northwest Intergovernmental Energy Supply (NIES). Whereas NRU is an advocacy group that deals primarily with BPA power and transmission issues and rates, NIES focuses on investigating and acquiring new energy resources on behalf of those NIES members that desire to participate. While all members pay their pro-rated share of NIES’s administrative expenses, only those members participating in a particular resource investigation or acquisition pay the additional costs of these activities.

The two agreements listed above must be signed to become an NIES member and to be eligible to participate in NIES energy resource investigations and acquisitions. Execution of the two NIES Agreements will have no fiscal impact on the District. Annual dues for joining both groups is accounted for in the District’s 2021 Administrative Budget.

Deshmane asked if there are other organizations the PUD could engage with that are outside of the BPA grid, such as Canadian power resources. Walters replied several options are available and the wide variety of resources on and off the market

ACTION: Commissioner Grant motioned to APPROVE NORTHWEST INTERGOVERNMENTAL ENERGY SUPPLY (NIES) AGREEMENTS AND AUTHORIZE DISTRICT’S GENERAL MANAGER TO EXECUTE THE TWO AGREEMENTS: AGREEMENT 1: NORTHWEST INTERGOVERNMENTAL ENERGY SUPPLY (NIES) MEMBERSHIP AGREEMENT, AND AGREEMENT 2: JOINT RESOURCE PLANNING AND ACQUISITION AGREEMENT. Commissioner Murphy second the motion. Motion passed unanimously.

b) Award of Bid: Industrial Water Project Connection

Jilk explained the background on this project. The purpose is to convert the current potable (drinking) water connection at Healthy Pet to the Industrial Water Connection piping and metering so they will use industrial water for their processing instead of the Grandview potable water source. Healthy Pet uses approximately 40% of the potable water consumed at Grandview on a daily basis. The source of this water comes from a well and the potable water storage system. The capacity of the potable system would serve more customers if the water used at Healthy Pet could be converted to the industrial water supply system.

Making this change will prolong the need for costly upgrades to the Grandview Potable System for several years and give the PUD the opportunity to add new customers to the Grandview Potable Water System. It is also an important step, to lower the demand in the potable system, as a part of finalizing the PUD’s Water System Plan update.

Bid award: On January 19, 2021, the District received and publicly read aloud three (3) bids submitted for this project. The Engineer’s Estimate for the Industrial Water Connection Project is \$92,225.00, including tax. All three bids were responsive and only one was under the under the Engineer’s Estimate dollar amount.

Contractor	Bid Total, No Tax
P & P Excavating, LLC	\$65,932.20
Tiger Construction	\$108,391.50
Larry Brown Construction	\$159,364.80
Engineer’s Estimate tax included	\$92,225.00

Staff recommends awarding the Industrial Water Connection Project Bid to P & P Excavating, LLC. The total bid price for the equipment and installation is below the Engineer’s Estimate (including tax). Holden carefully reviewed the lowest bid, (less than Engineer’s Estimate) and had P & P Excavating confirm the amount was correct.

This is part of the approved Capital Improvement Projects Budget for 2021. There is no fiscal impact. In regards to large capital projects, there are none forecasted for the Grandview water system. As the economy picks back up, it will bring new business opportunities and developments.

ACTION: Commissioner Murphy motioned to AWARD THE BID TO P & P EXACAVATING, LLC FOR THE INDUSTRIAL WATER CONNECTION PROJECT IN THE AMOUNT OF \$65,932.20 (INCLUDING TAX) AND AUTHORIZE THE DISTRICT’S GENERAL MANAGER TO EXECUTE THE CONTRACT. Commissioner Grant second the motion. Motion passed unanimously.

c) Open Public Meetings Act and Public Records Training

Due to the estimated length of the training, this section will be moved to after the General Manager Report, Commissioner Reports and Public Comment

6. General Manager's Report

As determined at the Special Meeting last week, Jilk and Murphy are working on broadband plans and will have recommendations to present at the February 9 Commission Meeting in terms of staffing and budget issues.

Legislative Report

Jilk is following the House and Senate bills and reported on one water-related issue that would not impact the PUD directly, but perhaps create complications for agriculture regarding water use; and there are new guidelines for water banking.

Get-to-Know You

This is an opportunity for staff members to introduce themselves to the Commission. Holden introduced himself with a brief description of his current work as Director of Utility Operations at the PUD and other positions within the twelve plus years at the PUD and his prior experience.

Commissioner Grant said she appreciated taking this time to get to know the staff, especially since we are not able to meet in person right now. In follow up from the last meeting, she continued her self-introduction and background, sharing some family photos and interests.

7. Commissioner Reports

Commissioner Grant:

House Bill 1336: In regards to HB 1336 "creating and expanding unrestricted authority for public entities to provide telecommunications services to end users." Currently, PUDs cannot provide retail services. WPUDA is supporting this bill and encourages all PUDs to consider the need for broadband access statewide. Deshmane suggested preparing a Letter of Support of HB 1336 from Whatcom PUD.

ACTION: Commissioner Grant motioned THAT THE BOARD OF COMMISSIONERS OF PUD SUPPORT HOUSE BILL 1336, PUBLIC BROADBAND ACT. Commissioner Murphy second the motion. Motion passed unanimously.

On February 2, Grant, Jilk and Walters will meet with Gina Stark/Port to discuss the next steps in the PUD's role on the broadband project with the Port. Grant will follow up with a report at the next Commission meeting.

Grant and Jilk will be meeting with students from WWU who are interested in creating a social media strategy for the PUD. This could be combined with the PUD's efforts to update the logo/brand awareness and future website developments.

Commissioner Murphy:

Soil Regeneration

In regards, to public comment made at the January 12 Commission Meeting from Jill MacIntyre Witt on soil regeneration/planting trees for offset mitigation. Murphy spoke with Darryl Gray at Nooksack Salmon Enhancement Association, who confirmed that over the past years, the PUD has sponsored NSEA activities, and with the funding the PUD has provided, NSEA has purchased many trees, and several other means of preserving, creating and/or providing for salmon habitat, restoration and streamflow issues.

Murphy also attended a WPUDA meeting, and tomorrow will attend Energy NW's meeting. He is looking forward to further updates regarding their many upcoming projects such as the solar project near Richland.

Commissioner Deshmane:

Retail Authority Bill: Russ Elliot is being very cautious on access to funding, leverage and service, in terms of pressure from the private telecoms. Deshmane encouraged support of HB 1336. He has received information from Jon Humphries about speed testing/speed related thresholds, etc.; Data needs are going up much faster than electricity needs. Fiber is what we should focus on and that PUDs need to be vigilant in complying with the legislation set in 2020.

Comments made at last meeting:

Jill MacIntyre Witt – Deshmane had a conversation with Cynthia Mitchell regarding the study of municipalizing and he would like to have this topic for an upcoming agenda item and the PUD's involvement in looking at those issues.

Special Meeting on Energy Supply

Feb. 9 presentation by The Energy Authority – Jilk suggested planning a follow up discussion after that date to discuss program and policy development. Alternatively, hold a general discussion such as the last meeting on telecom. Jilk has provided a list of topics for future meetings as guidance. Deshmane would

like to call a Special Meeting to discuss energy resources, but wants Ms. Mitchell to provide a presentation. Jilk reminded Deshmane that allowing public participation would violate the rules of the Special Meeting.

Commissioner Grant said a meeting regarding energy resources would be preferred. There are also members of the public that would like to be heard as well. Jilk suggested a one-hour meeting for the Commissioners to discuss their thoughts on energy resources.

ACTION: Commissioner Deshmane motioned to hold a Special Meeting on February 2, 2021 from 8 AM to 9 AM to discuss energy issues related to the PUD. Commissioner Grant second the motion. Motion passed unanimously.

8. Public Comment

Jon Humphries commented on SB 5110 [Promoting greater access to the internet by modifying permitting, taxation, and other standards for telecommunications companies and facilities.] He noted wireless technology is not as efficient as fiber. To have a real standard, it should involve the price of cost to consumers, connection-testing standards, and to consider energy standards and footprints (environmental costs of launching, etc.) Humphries hopes HB 1336 (retail authority) will include certain standards that can be met.

Rick Maricle asked if the Commission can take action on items that are not on the agenda. Perhaps Legal Counsel can advise. In addition, on broadband, there is a reason why there are un- and underserved areas. He lives in an underserved area. Maricle says it is very expensive to get the fiber into these areas. Starlink is already up and running a speeds of 50mg and continue to build off their service; with plans for up to 150mg over the next year and a half. How can this type of technology compete with traditional pole-strung fiber?

Sitkin typically does not respond to public comment but at the Commission's request, he replied to Maricle: This is a regular meeting; not a Special Meeting and the Commission can add items at any time. Sitkin believes the topic that Maricle is referring to is the motion made to support HB 1336. Sitkin said because this is not a Special Meeting, it was entirely appropriate to take additional actions that are not on the agenda.

Deshmane wanted to be clear that there is substantial debate about the efficacy of Starlink as a stand-alone solution, because it depends upon a fiber backbone (retrieving data from satellite to internet), and has environmental and ecological impacts. Grant added the topic has come up and there will be more information forth coming.

Open Public Meetings Act and Public Records Training

After a five-minute recess, the Commission reconvened at 9:55 AM to the OPMA training.

As a Special Purpose District, the PUD is subject to the Washington State Legislature's rules and requirements under RCW 42 – Public Officers and Agencies. The law (RCW 42.30.205) states: *Every member of the governing body of a public agency must complete training on the requirements of this chapter no later than ninety days after the date the member either:*

- *Takes the oath of office, if the member is required to take an oath of office to assume his or her duties as a public official; or*
- *Otherwise assumes his or her duties as a public official.*

In addition to the training required under subsection (1) of this section, every member of the governing body of a public agency must complete training at intervals of no more than four years as long as the individual is a member of the governing body or public agency. Training may be completed remotely with technology including but not limited to internet-based training.

District Legal Counsel Jon Sitkin presented an overview and training on the rules and regulations of the Open Public Meetings Act and Public Records for Commissioners and District staff. This training also satisfies state requirements for Commissioners who also serve on other government boards. Highlights included:

Part I – District Authority

Title 54 RCW - Public Utility Districts are:

- Authorized by the state Legislature and created by vote of the people.
RCW 54; RCW 54.08 et. seq.
- A Special Purpose District
 - Not a general-purpose government
 - Only have those powers expressly designated to them by the laws of the state and those fairly and reasonably implied from the expressly granted powers.

Part II – Governance and Management

- Governance and Management are separated functions.
- Commission by resolution SHALL appoint a district manager
- Manager shall be the Chief Administrative Officer in control of all administrative functions of the District, responsible
- Manager is an at-will employee.
- Manager has the duties set forth in statute and imposed by the Commission.
- The Board acts as a “body” not as individuals.
- See Delegation of Authority.

Governance vs. Management

Elements of Governance:

- Strategical vs. Tactical
- Govern vs. Manage
- Respect the other Commissioners and your manager and staff
- Look at the big issues – set strategies
- Govern/manage to a budget set by Commission
- Focus on the “why” and the “what,” but not so much on the “how”
- Set the “culture” of the organization
- Avoid “freelancing”
- Overall – get the job done

Part III - Open Public Meeting Act

Washington’s Open Public Meeting Act (OPMA) requires meetings to be open to the public, gavel to gavel ~*RCW 42.30*

Purpose: “The people, in delegating authority, do not give public servants the right to decide what is good for the people to know and what is not good for them to know” and “the people insist on remaining informed so they may retain control over the instruments they have created.” ~ *RCW 42.30.010*

- The OPMA applies to the District and the business of the District conducted by the Commission and Staff. Any time a quorum of elected officials discusses Commission business whether or not they are in the same room. For example: telephone or video conference. The OPMA does not apply to social gatherings at which a quorum may be present. Examples: Awards banquets, similar events where no District business is conducted, discussions regarding labor negotiations (closed session).
- Fundamental Language: All meetings of the *governing body* of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in *RCW 42.30*.
- A governing body is defined as a commission (i.e. elected officials) or any committee of such public agency when the commit acts on behalf of the governing body, conducts hearings, or takes testimony or public comment. *RCW 42.30.020*

Meetings means meetings at which the public agency takes “action” – *RCW 42.30.020*

- **Physical presence is not required** – a meeting can occur by phone or e-mail. An exchange of email could constitute a meeting if, for example a quorum of the members participates in the e-mail exchange and discuss agency business. Simply receiving information without comment is not a meeting. It does not need to be titled “meeting” – OPMA also applies to retreats, workshops, study sessions, etc. No meeting occurs if the governing body lacks a quorum.
- **Action** means the transaction of the official business of the public agency and includes, but is not limited to: public testimony, all deliberations, discussions, considerations, reviews, evaluations, final actions. The requirements of the OPMA are triggered whether or not “final” action is taken. *RWC 42.30.020*.
- **Practical Consideration:** Consider the political impact and appearance. Perceived violations can be costly to a political bank account.
- **Final Action** is a collective positive or negative decision, or an actual volte by a majority of the governing body, or by the “committee thereof”. It must be taken in public, even if deliberations were in closed session. Secret ballots are not allowed. *RCW 42.30.060, RCW 42.30.020*.

Regular Meetings are reoccurring meetings held in accordance with a periodic schedule established by a motion or resolution. The resolution should be on file at the beginning of each year. *RCW 42.30.070, RCW 42.30.075; Chap. 61, 2014 Laws*

Special Meeting is a meeting that is not a regularly scheduled meeting, and is called by the presiding officer or majority of the members.

Notice/Timing: 24 hours before the special meeting, written notice must be

- (1) Given to each member of the governing body (unless waived),
- (2) Given to each local newspaper or general circulation, radio and TV station which has a notice request on file;
- (3) Posted on the district’s website; and

- (4) Prominently displayed at the main entrance of the District’s principal location and the meeting site (if not the same location).

Notice Contents of the Special Meeting: Must specify time, place, business to be transacted (agenda), note that final disposition cannot be taken on any other matter at such meeting. Untested whether other matters can be discussed. Best practice is to not discuss matters not disclosed to the public. ~ RCW 42.30.080.

Public Attendance: Public comment period is not required by the OPMA. An agency may not impose conditions on the public to attend meetings subject to OPMA. For example, it cannot require people to register their names or other information, complete a questionnaire, or otherwise fulfill any condition precedent to attendance ~ RCW 42.30.040

Executive Sessions are part of a regular or special meeting that is closed to the public. It is limited to specific purposes set out in the OPMA. The *presiding officer must announce the purpose of the Executive Session and the time it will end* before it begins; time may be extended by further announcement. Practice Tip: Be precise about the purpose and the statutory exemption. ~RCW 42.30.110

- No municipal officer may disclose confidential information gained by reason of the officer’s position nor may the officer otherwise use such information for his or her personal gain or benefit.
- The penalty is \$500.00 plus such other civil or criminal liability or penalty as may otherwise be imposed upon the officer by law.
- In addition to all other penalties, civil or criminal, the violation by any officer of the provisions of this chapter may be grounds for forfeiture of his or her office.
- ~ RCW 42.23040 Code of Ethics for Municipal Officers – Contract Interests

Executive Sessions cannot be used for

- Personnel issues
- Conference with Attorney - unless there is actual or threatened litigation being discussed.
- Discussion of interlocal agreement negotiation or strategy or other contract negotiations with third parties
- Interviews with potential Board candidates (evaluation may be done in Executive Session).

Penalties for Violating the OPMA: Personal liability: First offense - \$500; subsequent offenses - \$1,000; Costs and Attorney’s Fees; and, Action taken at meeting can be declared null and void. ~RCW 42.30.120; RCW 42.30.130; RCW 42.30.060.

Open Meeting FAQs:

- *Meeting locations – can we change them or hold outside of jurisdiction?*
- *What should you do if you believe a meeting or Executive Session violates the law?*
- *Can you allow third parties into Executive Session, jeopardizing Executive Session?*
- *Can you give “direction” to the Manager in Executive Session without taking a formal vote in the open portion of the meeting?*

Commissioner Issues

- *Pre-meeting discussions* (just chatting) can be easily misconstrued by the staff, public or other Commissioners.
- *Electronic or “In Person” Serial Meetings* – multiple meetings or emails from one Commissioner to everyone else is okay. It is the exchange of information or the email that violates the law
- *Two Commissioners attend Seminar but do not discuss matters*

OPMA: Current Situation | COVID-19 and Governor Proclamations:

Governor’s Emergency Proclamations 20-28 et. seq.

- **Statutory Framework:** RCW 43.06.210, et. seq., authorizes Governor to issue emergency proclamations.
- **OPMA In-Person Suspensions:**
 - March 24, 2020 (20-28) suspended in-person meetings.
 - Current: Governor’s Proclamation 20-28, extended until termination of Emergency or rescinded.
 - Statewide ban of in-person meetings until 11:59 p.m. on December 7, 2020, except for exceptions for Phase 3 counties of the Safe Start Washington Phased Reopening County-by-County Plan.
- **Remote Public Meetings:** Any public agency subject to RCW 42.30 is prohibited from conducting an in-person meeting subject to RCW 42.30 unless:
 - The meeting is not conducted in-person and instead provides option(s) for the public to attend the proceedings through, at a minimum, of telephonic access and may also include other electronic, internet or other means of remote access; and
 - Provides the ability for all persons attending the meeting to hear each other at the same time.
- **OPMA in a Phase 3 County:**
Requirements: Maximum number of persons limited to County phase; separated by six feet, wear a

face covering, must have room for all attendees – primary and secondary locations, and allow for remote attendance. If the meeting falls out of compliance, then meeting must be restored, adjourned, continued or terminated

Part IV – Public Records Act – Chapter 42.56 RCW

Public records act violations can be expensive. Most claims against agencies are successful, PRA claims are uninsurable and the penalty can be up to \$100/day/record withheld. The plaintiff (but not the agency) is entitled to an award of attorneys' fees if successful and the PRA penalties and attorneys' fees continue to accrue through each level of appeal (risk of reversal on appeal); and plaintiff's attorneys sometimes accept representation on contingency basis: no cost to plaintiff unless successful.

Public Records are defined as “Any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.”

- Writing is broadly defined and includes “handwriting, typewriting, printing, Photostatting, photographing, and every other means of recording any form of communication or representation including but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof...” *RCW 42.56.010.*
- Public records can include records of agency business when they are created or retained by agency employees or officials on home computers or in non-agency email accounts; electronic mail is a public record regardless of where it is sent from. Practice Tips: Use District email account, avoid using home computer or personal devices. Note, while less important in light of *Nissen* case, this is still the most prudent course if financially feasible. Agencies should create an email retention policy so that it meets the intent of the law without overburdening Agency resources.

General Public Records Procedures: Under the Act agencies must appoint a public records officer, publish procedures describing certain agency organization, operations, rules of procedure, and other items listed in the PRA. The agency should adopt rules/procedures to provide full public access to public records, protect public records from damage/disorganization, prevent excessive interference with other agency functions; provide fullest assistance to requesters; and provide most timely possible action on requests.

Additional Procedural Requirements: (1) If charging actual costs of copies of records, publish fee schedule; (2) Maintain a list of laws the agency believes exempts or prohibits disclosure; (3) Make non-exempt records available for inspection and copying during customary business hours for a minimum of 30 hours per week, excluding holidays.

Requests for Public Records: The request must be for identifiable public records (information request are not requests for records). The requestor cannot be compelled to use Agency's form. If an Agency request form is not used, the requestor must provide “fair notice” that he/she is seeking public records. Requests can be emailed, faxed or verbal. Requestors can ask to *inspect* records or request *copies* of records.

District Response to Request: The District has five (5) business days to respond to a public records request. The District can: (1) Acknowledge receipt of the request and provide a reasonable estimate for a further response or; (2) Fulfill the request; or (3) Provide an internet address and link to the records on the agency's website (which fulfills part or all of the request) or; (4) Seek clarification; or (5) Deny the request with an accompany written statement of the specific reasons.

Estimate of Time for Further Response: An agency can provide an estimate of time for further response, the estimate is to be reasonable, and it is good practice to briefly explain why more time is needed to process a request. An agency can extend the time if needed. If an agency can't produce all the records at once (particularly for large requests) an agency can provide records in installments. Practice Tip: Briefly explain why more time is needed to process a request. If challenged in court, it is an agency's burden to show why an estimate of time is reasonable. Factors may include: (1) Clarify ambiguous request; (2) Search; (3) Create an exemption log; (4) Notify third parties; and, (5) Perform other essential agency functions, consider agency resources including staff availability.

- *Time Extensions:* An agency can extend the time, if needed, as often as necessary. Again, it is a good practice to explain why. If an agency can't produce all the records at once (particularly for large requests) an agency should provide records in installments.

Searches for Responsive Records: Before beginning the search, know what to look for: (1) Clarify the request if needed; (2) Determine how to collect responsive records; (3) Consider all formats (paper, electronic, etc.); (4) Consider records of current staff/officials, and former staff/officials, if potentially responsive; (5) Consider possible locations (file cabinets, agency website, etc.); (6) Conduct an adequate search for responsive records.

The search must be reasonable calculated to uncover responsive records, and it must follow obvious leads to possible locations where records are likely to be found. Practice tip: Document the search efforts

(locations, search terms used, etc.) – the agency bears the burden of proof to show the adequacy of the search.

Exemptions: All public records are presumed open. Exemptions are narrowly construed and the burden is on the agency to justify exemption. An exemption log must be provided, containing: Date of record; type of record; author and recipient(s); total number of pages withheld; and the exemption with a brief explanation. Common Exemptions: Attorney–client privilege; protected health information; pending investigation records (in certain investigations); certain records/information contained in personnel files; and deliberative process exemptions where opinions expressed or policies formulated but only until the decision is made.

Enforcement and Penalties: Public records violations are enforced by courts for those claims listed in the Act. A court can impose civil penalties up to \$100/day/record (court can group records for penalty purposes). No proof of “damages” is required and a court will award the requester’s attorneys’ fees and costs.

~RCW 42.56, RCW 42.56.565; *Yousoufian v. Sims*

Public Records Officer: Each agency must designate a PRO. An employee or official of another agency to serve in this role may also be appointed. Ann Grimm is a Certified Public Records Officer, appointed by the District as the PRO:

- Duties: Serve as a point of contact for members of the public in requesting disclosure of public records; oversees the agency’s compliance with the public records disclosure requirements of this chapter
- Agency Duties: Provide name and contact information of the agency’s PRO, including posting at the local agency’s place of business, posting on its internet website, or including in its publications.

Public Records Act Reminders:

Emails: If it involves District business, it is a public record. Use only a District-provided device.

Social Media: Blog posts, Twitter accounts, Web pages

Content Concerns: NY Times test

Recent trends in technology are cause for concern: The ability to search massive amounts of data quickly. Combined together, the Public Records Act, court rules and technology are yielding a perfect storm.

Ethical Issues

Ninety-five percent of the time, it is unthinking actions. Commissioners and senior staff do not recognize the issue and do not think about it. The conduct of the Commissioners and senior staff set the culture of the organization – the staff, and now the public are watching all the time.

Conflicting Financial Interest

No Municipal Officer May:

1. Use his or her position to secure special privileges or exemptions for himself, herself or others.
2. Directly or indirectly, give or receive any compensation, gift, gratuity or reward from any source, except the employing municipality, for a matter connected to the related to the officer’s services, unless otherwise provided by law.
3. Accept employment or engage in business that one might reasonably expect would require him or her to disclose confidential information accessed by his or her official position.
4. Disclose confidential information gained by reason of the officer’s position, nor use such information for his or her personal gain.

The Washington State Supreme Court held that a councilmember may not vote on a matter where he or she would be benefitted by the action. *Smith v. Centralia*, 55 Wash. 573, 577; 104 Pac. 797 (1909). Not voting is not a remedy; the self-interest action of one member infects all other members.

Municipal Ethics Act:

- No municipal officer shall be beneficially interested, directly or indirectly, in any contract or offer be made by, through, or under the supervision of such officer, in whole or in part made for the benefit or his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein. RCW 42.23.030.

-It does not matter whether the member of the governing body voted on the contract in which he or she had a financial interest; the prohibition still applies. *City of Raymond v. Runyan*, 93 Wn. App. 127, 137; 967 P.2d 19 (1998).

Qualified Exceptions – “Remote Interests”: RCW 42.23.040 Permits a Municipal Officer to Have Certain Limited Interests in Municipal Contracts, Under Certain Circumstances:

1. Interest of a non-salaried officer of a nonprofit corporation
2. Interest of an employee or agent of a contracting party where the contract such employee or agent consists entirely of fixed wages or salaries (without commissions or bonuses)
3. A landlord or tenant of a contracting party; e.g., a county commissioner who rents an apartment from a contractor who bids on a county project

4. Holder of less than one percent of the shares of a corporation or cooperative which is a contracting party

In Order to Qualify as a Remote Interest, the Following Conditions Must be met:

1. Fully disclose the nature and extent of the interest; and it must be noted in the official minutes or similar records before the contract is made.
2. Approve the contract after disclosure.
3. Authorization, approval, or ratification must be made in good faith.
4. Votes for approval are by those without conflict – the Commissioner does not vote.
5. The officer having the remote interest must not influence or attempt to influence another officer to enter into the contract.

Penalties – RCW 42.23.050:

1. Up to a \$500 civil penalty “in addition to such other civil or criminal liability or penalty as may otherwise be imposed.”
2. Contract is void, and the jurisdiction may avoid payment under the contract even though it may have been fully performed by another party.
3. Possible forfeiture of office.

Judicial Doctrine of Incompatible Offices

- The same person may hold two or more public offices unless those offices are incompatible.
- Offices are incompatible when the nature and duties of the office are such as to render it improper, from considerations of public policy, for one person to retain both.
- The question is whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices would be detrimental to the public interest.
- To what entity does the official’s duty of loyalty lie?

Prohibition on Gifts/Lending of Credit:

The Washington State Constitution, Article 8, Section 7, has been the direct basis of several lawsuits against local governmental entities:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock or bonds of any association, company or corporation.

Prohibition on Using Public Office Facilities for Political Purposes

RCW 42.17.130: *No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency.*

Exceptions:

(1) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

(3) A city, county or special district may, however, make an “objective and fair presentation of facts relevant to a ballot proposition, “if such an action is part of the normal and regular conduct of the agency. WAC 390-05-271(2)(b); or

(4) Activities which are part of the normal and regular conduct of the office or agency.

Ethical Issues – Observations

- Ethical issues grow big and get expensive very quickly (Usually nobody spots the issue until it is too late, the gain is disproportionate to the risk)
- Ethical issues are often “perception based”
- Everything is now an “ethical issue”

- Ethical issues really hurt personally and hurt the organization
People today stand ready with vitriolic attacks
- Ethical issues damage the District’s “political bank account”
- Once ethical issues become systemic, the culture is hard to change
- The successful Commissioner and the Commission need to keep in mind:
Success builds complacency, typically blindsided by ethical issues, ultimately the result of a cultural lapse
- Always ask “why are we doing this?” and “is there an ethical issue, or will there be a perception of an ethical issue?”
- Everyone believes that they are ethical, but...
- If you have to ask the question, you know the answer.
- Misuse of public funds or assets (easy to become complacent, for a Commissioner, “everything of the District has value”
- Violation of the Open Public Meetings Act
- Directing a staff to help a “customer” or help with a Commissioner’s pet project
- Mixing District business and political business
- Destroying or mishandling public records
- Sexual misconduct, or off-color jokes, or hugs, or?

Investigations for Misconduct:

- If there is any allegation (any form of misconduct):
Assume that there will be an investigation, either by members of the public, the State Auditor or by the District
All Commissioners and most employees respond with “How could they even think that about me? I acted ethically!” (Rationalizing actions)
- An Investigation Serves to Protect the Commissioner or the Employee (allows the organization to defend itself and the Commissioner or employee)
- Report to Insurance Company (necessary step to provide insurance coverage)

Conclusion of training and Certificate of Completion of Training will be distributed to the Commissioners, General Manager Stephan Jilk and Public Records Officer Ann Grimm and will be attached to the Minutes as Exhibit A.

9. Adjourn

There being no further business for the meeting, Commissioner Deshmane adjourned the regular meeting at 11:58 a.m.

ACTION: Commissioner Murphy motioned to ADJOURN THE REGULAR MEETING AT 11:58 A.M. Commissioner Grant second the motion. Motion passed unanimously.

Atul Deshmane, President

Michael Murphy, Vice President

Christine Grant, Secretary

EXHIBIT A

Certificates of Completion

APPROVED: February 9, 2021

CERTIFICATE OF TRAINING

COMMISSIONER ATUL DESHMANE

Completed the following training:

- ✓ **Open Public Records Act Training** (RCW 42.56)
- ✓ **Open Public Meetings Act Training** (RCW 42.30)
- ✓ **Records Retention/Management Act Training** (RCW 40.14)

Date Training Received: January 26, 2021

Sponsor: Public Utility District No. 1 of Whatcom County

Format: In-person training by: Jon Sitkin, District Attorney



I hereby certify that I received this training: _____
Commissioner Atul Deshmane

CERTIFICATE OF TRAINING

COMMISSIONER CHRISTINE GRANT

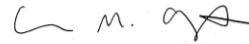
Completed the following training:

- ✓ **Open Public Records Act Training** (RCW 42.56)
- ✓ **Open Public Meetings Act Training** (RCW 42.30)
- ✓ **Records Retention/Management Act Training** (RCW 40.14)

Date Training Received: January 26, 2021

Sponsor: Public Utility District No. 1 of Whatcom County

Format: In-person training by: Jon Sitkin, District Attorney



I hereby certify that I received this training: _____

Christine M. Grant, Commissioner

CERTIFICATE OF TRAINING

COMMISSIONER MICHAEL MURPHY

Completed the following training:

- ✓ **Open Public Records Act Training** (RCW 42.56)
- ✓ **Open Public Meetings Act Training** (RCW 42.30)
- ✓ **Records Retention/Management Act Training** (RCW 40.14)

Date Training Received: January 26, 2021

Sponsor: Public Utility District No. 1 of Whatcom County

Format: In-person training by: Jon Sitkin, District Attorney

I hereby certify that I received this training _____
Commissioner Michael Murphy