

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of Determining the Proper)	DOCKET UW-091006
Carrier Classification of:)	(consolidated)
)	
)	ORDER 03
LOWPER, INC. D/B/A LOWPER)	
CORPORATION, A/K/A LOWPER)	
WATER COMPANY AND ILIAD INC.)	
D/B/A LOWPER WATER SYSTEM)	
.....)	
In the Matter of the Penalty Assessment)	DOCKET UW-110213
Against)	(consolidated)
)	
LOWPER, INC.)	ORDER 02
)	
In the Amount of \$10,500)	
)	
.....)	

**INITIAL ORDER APPROVING AND ADOPTING PARTIAL SETTLEMENT
AGREEMENT AND GRANTING MITIGATION REQUEST**

1 **Synopsis.** *This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this order. If this Initial Order becomes final, the Partial Stipulation entered into by Commission Staff and Lowper will be approved and adopted. By this Partial Stipulation, the parties establish that Lowper is a water company subject to the Commission’s jurisdiction under Chapter 80.28 RCW. The parties also agree to the entry of an initial order that would require Lowper to file its tariff by May 13, 2011. Furthermore, this Initial Order grants Lowper’s request for mitigation of the penalty assessment and requires payment in the amount of \$8,400.*

INTRODUCTION

2 **Nature of Proceeding.** On February 14, 2011, the Washington Utilities and Transportation Commission (Commission) instituted a proceeding to determine

whether Lower, Incorporated (Lower or the Company) is subject to regulation under Chapter 80.28 RCW and is performing any act requiring approval of the Commission without securing such approval. This matter has been designated as Docket UW-091006. Specifically, the Commission alleges that Lower is a water company, as defined in RCW 80.04.010 and WAC 480-110-255,¹ and has failed to file a tariff pursuant to RCW 80.28.050² and WAC 480-110-433(3).

- 3 Also on February 14, 2011, the Commission assessed a penalty against Lower in the amount of \$10,500 for violations of WAC 480-110-433(3)³ requiring a water company to file an initial tariff when it becomes subject to the Commission's jurisdiction. This matter has been designated as Docket UW-110213.

¹ WAC 480-110-255 provides:

- (1) The commission only regulates investor-owned water companies that:
- (a) Own, operate, control, or manage one or more water systems; except that control or management does not include management by a satellite management agency as defined in chapter 70.116 RCW if the satellite management agency is not an owner of the water company.
 - (b) Meet jurisdictional thresholds of one hundred or more customers, or have average revenue of more than four hundred seventy-one dollars per customer per year.

² RCW 80.28.050 states:

Every gas company, electric company and water company shall file with the commission and shall print and keep open to public inspection schedules in such form as the commission may prescribe, showing all rates and charges made, established or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations relating to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed by such gas company, electric company or water company.

³ WAC 480-110-433(3) requires:

Initial tariffs – when a company becomes jurisdictional.

- (a) An initial tariff must be filed in a standard tariff format. The commission will provide illustrations of the standard format upon request.
- (b) The tariff must be accompanied by a cover letter describing the filing as an initial tariff.
- (c) Customers must be notified before the commission receives the filing.
- (d) The filing must be accompanied by supporting financial data justifying the proposed rates. See WAC 480-07-530 (General Rate Proceedings – Water Companies).

On February 23, 2011, Lowerper responded to the penalty assessment with a request for hearing. The Commission consolidated Dockets UW-091006 and UW-110213 on March 24, 2011.

4 **Background and Procedural History.** David Dorland acquired Lowerper in approximately 2005.⁴ Lowerper owns the Lowerper Water System, which provides water services to seven customers in Clallam County, Washington.⁵ Mr. Dorland also owns Iliad, Inc. which manages and operates Lowerper's water system, as well as the systems of other water companies, some of which the Commission regulates.⁶

5 In May 2009, one of Lowerper's customers contacted the Commission's Consumer Protection Division (Consumer Protection) regarding a rate increase imposed by the Company.⁷ Consumer Protection informed this customer that Lowerper was not regulated and referred the matter to the Commission's regulatory staff (Commission Staff or Staff).⁸ On June 23, 2009, Commission Staff contacted Lowerper via letter inquiring into the Company's business operations.⁹ This correspondence included a questionnaire to assess whether Lowerper meets the jurisdictional requirements under the statute.¹⁰ Lowerper responded on July 2, 2009, indicating that the Company was negotiating a sale of the water system and that the transaction "should be completed

⁴ Dorland, TR 48:11-13.

⁵ Dorland, TR 48:22.

⁶ Dorland, TR 48:22-23, 57:25-58:2, and 58:24-59:5.

⁷ Pearson, Exh. No. RP-1 at 3.

⁸ *Id.* In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

⁹ *See* Pearson, Exh. No. RP-2.

¹⁰ *See Id.*

within 60-90 days.”¹¹ Further, Lowerper stated that it would “keep [Commission Staff] informed of the progress and the information on the new owner.”¹² Commission Staff did not receive an additional update on the progress of the transaction.¹³

- 6 On January 20, 2010, another Lowerper customer contacted Consumer Protection regarding the Company’s rates and service.¹⁴ Commission Staff again sent a request to the Company for information regarding Lowerper’s business operations.¹⁵ Lowerper responded on February 24, 2010, asserting that the Clallam County Public Utility District (Clallam County PUD or PUD) had stated its intention to acquire the water system.¹⁶ The Company stated that “[o]nce the paperwork is prepared and approved Clallam County PUD will be operating the Lowerper Water System.”¹⁷ At this point, Staff closed its investigation.¹⁸
- 7 In June 2010, Consumer Protection received a third query from one of Lowerper’s customers.¹⁹ This individual confirmed that the Clallam County PUD had not

¹¹ Pearson, Exh. No. RP-3.

¹² *Id.* While the letter claimed the sale would be “to a Water purveyor in Clallam County,” Lowerper clarified at hearing that it has been in negotiations with the Clallam County Public Utility District for the acquisition since 2009.

¹³ Pearson, TR 18:10-13.

¹⁴ Pearson, Exh. No. RP-1 at 3.

¹⁵ *See* Pearson, Exh. No. RP-7.

¹⁶ Pearson, Exh. No. RP-8. Iliad, Inc., d/b/a Lowerper Water System purchases water from the Clallam County PUD pursuant to a contract executed in November 2003. *See* Pearson, Exh. No. RP-5. The contract provides that the PUD may acquire, at no cost, the water system within twenty years from the date the contract was executed. *Id.* at 8.

¹⁷ Pearson, Exh. No. RP-8.

¹⁸ Pearson, Exh. No. RP-1 at 4.

¹⁹ *Id.*

purchased the Company's water system, and that Lowerper was still providing unregulated services to its customers.²⁰ Commission Staff reopened its investigation and referred the matter to the Compliance Investigations Division.²¹

8 Staff calculates that Lowerper's annual revenues per customer exceeded the \$471 jurisdictional threshold on or about October 4, 2009.²² Staff bases the \$10,500 penalty on each of Lowerper's seven customers paying revenues to the Company causing it to become subject to Commission jurisdiction from October 2009 until the penalty was assessed in February 2011. Staff recommends that the Commission assess the maximum penalty of \$100 per violation for each of these 105 violations of RCW 80.28.050 and WAC 480-110-433(3).²³ This results in a penalty assessment of \$10,500.²⁴

9 The Commission convened an evidentiary hearing in the consolidated dockets on April 27, 2011, at which time Lowerper and Staff informed Administrative Law Judge (Judge) Marguerite E. Friedlander that the parties had reached a Partial Stipulation Regarding Docket UW-091006 (Stipulation), attached as Appendix 1 and made a part of this Order. By this Stipulation, Lowerper acknowledges that its water operations are subject to the Commission's jurisdiction and agrees that the Company will file its

²⁰ *Id.*

²¹ *Id.*

²² Pearson, TR 29:2-5. Staff bases its calculation on the letter that Lowerper sent its customers on March 4, 2009, stating that the Company "will have to charge the existing (7) seven customers a base rate of \$59.15 per month plus PUD charges and utility taxes." Pearson, Exh. No. RP-4. The letter provides that the rates would go into effect on or about April 4, 2009. *Id.* Assuming that it takes 30 days for the rates to be reflected in customer bills, the charges would have shown up for the first time in the customers' May 2009 bills. Pearson, TR 22:11-17. From the May 2009 bills, Commission Staff determine that it would take 5 months for revenues per customer, at the above rate, to become subject to the Commission's jurisdiction, or approximately October 4, 2009. Pearson, TR 29:2-23.

²³ Pearson, TR 31:5-12.

²⁴ Pearson, Exh. No. RP-1 at 6.

tariff and supporting financial documents by May 13, 2011.²⁵ Lower does not, however, acquiesce to the Commission's penalty assessment, and the evidentiary hearing proceeded on this issue.

- 10 On April 28, 2011, the Commission issued a bench request (Bench Request No. 2) asking for correspondence and Lower's proposed purchase agreement between Lower and the Clallam County PUD regarding negotiations the PUD may have entered into with Lower to acquire the Company. On April 29, 2011, Lower provided a response to Bench Request No. 2. This response included several e-mail chains from March 2011 detailing the Clallam County PUD's concerns with the purchase agreement and the preliminary issue of whether the Company has obtained the necessary easement rights.²⁶
- 11 **Appearances.** Richard A. Finnigan, Olympia, Washington, represents Lower. Michael A. Fassio, Assistant Attorney General, Olympia, Washington, represents Commission Staff.

DISCUSSION AND DECISION

- 12 There are two issues²⁷ for determination in these proceedings: (1) whether the Commission should approve and adopt the Agreement establishing the Commission's jurisdiction over Lower and (2) whether the Commission should grant Lower's request and reduce the penalty assessment.

²⁵At the hearing, the parties stated that the Stipulation had not yet been reduced to writing. The Commission issued Bench Request No. 1 asking the parties to file the Stipulation, which they did on May 2, 2011.

²⁶Lower's Response to Bench Request No. 2.

²⁷Neither Lower nor Staff challenges the Commission's authority to mitigate the penalty assessment under RCW 80.04.405.

- 13 **Settlement Agreement.** Pursuant to WAC 480-07-750(1), the Commission will approve a settlement agreement when doing so is lawful, when the terms of the settlement are supported by an appropriate record, and when the result is consistent with the public interest. This Stipulation resolves the primary issue in the case, namely whether the Company falls within the Commission's jurisdiction. In doing so, the Stipulation has conserved judicial and administrative resources that would otherwise have been necessary to litigate this issue.
- 14 Furthermore, evidence in the record supports Lowerper's admission that its business operations are subject to the Commission's jurisdiction. WAC 480-110-255 states that water companies are subject to regulation when the company has at least 100 customers or serves fewer than 100 customers but has average annual revenue per customer over \$471. At least since March 2009, Lowerper charged its customers a base monthly water rate of \$59.15.²⁸ The amount of this base rate alone, without factoring in the PUD Master Meter rate, generates \$709.80 in annual revenue per customer. This total surpasses the jurisdictional threshold in WAC 480-110-255.
- 15 The Agreement also includes a commitment by the Company to file its tariff with supporting financial information in compliance with WAC 480-110-433(3) by May 13, 2011. By having Lowerper's tariff on file, customers of the Company will be able to inspect the rates charged, and the Commission can ensure that Lowerper is collecting just, fair, reasonable and sufficient rates pursuant to RCW 80.28.010(1). Based on the above, approval and adoption of the Stipulation is lawful, supported by an appropriate record, and in the public interest.
- 16 **Mitigation Request.** Lowerper has offered two points for the Commission to consider regarding the Company's mitigation request: (1) Staff's lack of follow up with the Company should be considered in determining the severity of the penalty and (2) the penalty far exceeds Lowerper's small annual revenues.²⁹

²⁸ Pearson, Exh. No. RP-4 and Exh. No. RP-9.

²⁹ Finnegan, TR 71:7-11.

- 17 The Company argues that Staff has mischaracterized the rationale for the penalty.³⁰ Lowerper disagrees with Staff's argument that the failure of the Company to file its tariff hurts customers.³¹ Specifically, the Company asserts that it prudently delayed filing its tariff due to the ongoing negotiations with the Clallam County PUD.³² The Company expands on this argument by alleging that it is Commission Staff's responsibility to follow up with Lowerper to determine its status.³³ If customers were at risk of being harmed by Lowerper's delay, the Company contends that it is, essentially, Staff's fault.³⁴
- 18 Lowerper's claim is unpersuasive. To date, Lowerper has only produced a few e-mail chains it exchanged with the Clallam County PUD in March 2011.³⁵ These communiqués indicate that the PUD is very concerned that the Company may not possess the necessary easement right that would have to be transferred to the PUD before it acquired the water system.³⁶ In addition, these e-mails were created during a one month time frame, March 2011, and do not address the time period of October 2009 to February 2011 during which Lowerper claims to have been in negotiations with the PUD. Even assuming that the Company was engaged in such negotiations, it still chose to disregard the Commission's rules requiring it to file a tariff for over one year.

³⁰ Finnegan, TR 70:2-6.

³¹ *Id.*

³² The unspoken principle being that, pursuant to WAC 480-110-255(2)(b), the Commission does not regulate water services provided by public utility districts.

³³ Finnegan, TR 70:11-17.

³⁴ Finnegan, TR 70:18-25.

³⁵ Lowerper's Response to Bench Request No. 2.

³⁶ *See* Lowerper's Response to Bench Request No. 2, Letter from Patrick Irwin, Platt Irwin, to Mike Kitz and Doug Nass, Clallam County PUD (March 17, 2011).

- 19 As Mr. Dorland, Lowerper's owner, admitted during the hearing, the onus of compliance with the Commission rules and regulations falls squarely upon companies, not the Commission Staff.³⁷ Furthermore, as the owner of Iliad, Inc., Mr. Dorland manages several regulated water systems³⁸ and has testified in at least one water general rate case before the Commission.³⁹ Mr. Dorland cannot now claim to have been ignorant of the Commission's rules on tariff filings. Thus, the Commission rejects Lowerper's argument.
- 20 The second point Lowerper makes in support of mitigation is that the penalty amount is egregious given the small size of the Company. Lowerper argues that the penalty amount, \$10,500, far exceeds the annual revenue of the Company.⁴⁰ The Company states that much of its annual revenue is paid to the PUD as reimbursement for the water going to serve customers.⁴¹ In his explanation for the long delay in filing a water tariff on behalf of Lowerper, Mr. Dorland stated that he "didn't want to go to the expense of regulation hoping that [the Clallam County PUD would] take over the system so that we wouldn't continue to lose money on it."⁴²
- 21 The Commission cannot condone Lowerper's inaction and will not permit companies to avoid regulation because they don't want to go to the expense of regulation. That being said, the Commission recognizes that the penalty as assessed is sizeable given the Company's representation that it makes no profit and that a substantial portion of its revenues are pass-through costs for the water it supplies. Further, the Commission notes that Lowerper did file its tariff and supporting documents as agreed on May 13,

³⁷ Dorland, TR 61:3-21.

³⁸ Dorland, TR 48:22-24.

³⁹ Dorland, TR 42:24-44:20. *See* Docket UW-051444.

⁴⁰ Dorland, TR 57:2-4.

⁴¹ Dorland, TR 57:5-8.

⁴² Dorland, TR 51:18-20.

2011.⁴³ This action shows good faith on the Company's part. As a result, good cause exists for a slight mitigation of the penalty in the amount of 20% or \$2,100. Commission Staff has presented adequate evidence to justify assessment of the remainder of the penalty, \$8,400, against Lowper for its failure to file its tariff in accordance with RCW 80.28.050 and WAC 480-110- 433(3).

FINDINGS OF FACT

- 22 Having discussed above in detail the evidence received in this proceeding concerning all material matters the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:
- 23 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including water companies.
- 24 (2) Lowper, Incorporated is a "public service company" and a "water company" as those terms are defined in RCW 80.04.010 and as those terms are used in Title 80 RCW. Lowper, Incorporated supplies utility services and commodities to the public for compensation in Washington.
- 25 (3) From at least October 2009 to February 2011, Lowper received annual revenues of more than \$471 per customer for its water services.
- 26 (4) The parties propose that the Commission approve and adopt the Partial Stipulation Regarding Docket UW-091006 filed on May 2, 2011, which is attached as Appendix 1 and made a part of this Order.

⁴³ See Docket UW-110871.

- 27 (5) In the Stipulation, Lower acknowledges that it is a water company that is subject to the Commission's jurisdiction, and agrees to file its tariff and supporting financial data in full compliance with WAC 480-110-433(3) by May 13, 2011.
- 28 (6) Lower filed its tariff on May 13, 2011.

CONCLUSIONS OF LAW

29 Having discussed above all matters material to this decision, and having stated its findings, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

- 30 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings.
- 31 (2) Lower's business operations are subject to the Commission's jurisdiction and have been since at least October 2009.
- 32 (3) As a regulated water utility, Lower is required to, and did not, file its tariffs and supporting financial data with the Commission when it became subject to Commission jurisdiction.
- 33 (4) The Stipulation between Commission Staff and Lower acknowledging the Commission's jurisdiction over the Company and pledging that Lower will file its tariff and supporting financial data by May 13, 2011, is lawful, supported by an appropriate record, and in the public interest.
- 34 (5) The Stipulation attached to this Order as Appendix 1 and incorporated by prior reference, should be approved and adopted.

- 35 (6) Given that the penalty assessment is substantially greater than the Company's annual revenue, that most of Lowerper's annual revenue consists of pass-through water costs going to Clallam County PUD, and the Company has shown good faith in filing its tariff in accordance with the Stipulation, the assessment should be mitigated in the amount of \$2,100.
- 36 (7) The Commission should retain jurisdiction over the subject matters and the parties to this proceeding to effectuate the terms of this Order.

ORDER

THE COMMISSION ORDERS THAT:

- 37 (1) The Partial Stipulation Regarding Docket UW-091006, attached and incorporated into this Order by prior reference, is approved and adopted.
- 38 (2) Lowerper, Incorporated's request for penalty mitigation is granted in the amount of \$2,100.
- 39 (3) Lowerper, Incorporated shall remit the remainder of the penalty assessment, \$8,400, immediately.
- 40 (4) The Commission retains jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective May 18, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

NOTICE TO THE PARTIES

This is an initial order. The action proposed in this initial order is not yet effective. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this initial order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this initial order to file a *Petition for Administrative Review*. Section (3) of the rule identifies what you must include in any petition as well as other requirements for a petition. WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the petition.

WAC 480-07-830 provides that before the Commission enters a final order any party may file a petition to reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will not accept answers to a petition to reopen unless the Commission requests answers by written notice.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion. You will be notified if this order becomes final either by operation of law or on administrative review.

You must serve on each party of record one copy of any Petition or Answer filed with the commission, including proof of service as required by WAC 480-07-150(8) and (9). To file a Petition or Answer with the Commission, you must file an original and eleven (11) copies of your Petition or Answer by mail delivery to:

Attn: David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

[Service Date May 18, 2011]

APPENDIX 1