

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

In the Matter of Determining the Proper)	DOCKET UW-091006
Carrier Classification of:)	(<i>consolidated</i>)
)	
LOWPER, INC. D/B/A LOWPER)	ORDER 04
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)	(<i>consolidated</i>)
)	
LOWPER, INC.)	ORDER 03
)	
In the Amount of \$10,500)	
)	
.....)	

**ORDER DENYING STAFF’S MOTION TO REOPEN THE RECORD,
MOTION FOR CLARIFICATION OF THE INITIAL ORDER, AND MOTION
FOR RECONSIDERATION OF THE INITIAL ORDER**

1 **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 alleged that Lower is a water company, as defined in RCW 80.04.010 and WAC 480-110-255, and has failed to file a tariff pursuant to RCW 80.28.050 and WAC 480-110-433(3).¹

¹ WAC 480-110-433(3) requires:
Initial tariffs – when a company becomes jurisdictional.

- 2 Also on February 14, 2011, the Commission assessed a penalty against Lowerper in the amount of \$10,500 for violations of WAC 480-110-433(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. 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.
- 3 **Background and Procedural History.** The Commission convened an evidentiary hearing in the consolidated dockets on April 27, 2011, at which time Lowerper and the Commission's regulatory staff (Commission Staff or Staff)² informed Administrative Law Judge Marguerite E. Friedlander that the parties had reached a Partial Stipulation Regarding Docket UW-091006 (Stipulation). By this Stipulation, Lowerper acknowledged that its water operations are subject to the Commission's jurisdiction and agreed that the Company would file its tariff and supporting financial documents in full compliance with WAC 480-110-433(3) by May 13, 2011. Lowerper, however, did not acquiesce to the Commission's penalty assessment, and the Commission conducted an evidentiary hearing on this issue.
- 4 On May 13, 2011, Lowerper filed its tariff and certain financial data.³ This filing was designated as Docket UW-110871.

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- (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).

² 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.

³ Staff's Motions ¶ 6.

- 5 On May 18, 2011, the Commission entered an Initial Order approving and adopting the Stipulation and granting Lowerper's mitigation request (Initial Order). The Commission mitigated the Company's penalty by 20% or \$2,100 based on the following factors: (1) The Company's representation that its water business does not make a profit and that a substantial portion of Lowerper's revenues are pass-through costs for the water it supplies to customers, and (2) Lowerper's good faith in filing its tariff and supporting documentation as agreed on May 13, 2011.⁴
- 6 On June 6, 2011, Commission Staff filed a Motion to Reopen the Record (Motion to Reopen), Motion for Clarification of Initial Order (Motion for Clarification), and Motion for Reconsideration of Initial Order (Motion for Reconsideration) (collectively, Staff's Motions). Commission Staff alleges that Lowerper did not file all required financial information with its tariff on May 13, 2011, and requests that the Commission reopen the evidentiary record, clarify the Initial Order to reflect that Lowerper did not comply with the Stipulation, and reconsider the mitigation of Lowerper's penalty assessment.
- 7 Lowerper filed its Reply to Staff's Motions (Lowerper's Reply) on June 17, 2011. The Company counters that it cannot give Commission Staff what it does not have.⁵ Lowerper explains that Iliad, Inc. (Iliad), is a construction company, and that, in the construction industry, bonding firms require that an independent accounting firm review the balance sheet and income statement of a company requesting a construction bond.⁶ Lowerper asserts that Iliad's normal accountant prepares the financial documents as a draft, and these documents are sent to a separate accounting firm for review.⁷ The income statement and balance sheet are not considered final

⁴ Initial Order ¶ 21.

⁵ Lowerper's Reply at 1-2.

⁶ *Id.* at 2.

⁷ Lowerper's Reply, Declaration of David K. Dorland ¶ 2.

until the independent analysis is completed.⁸ According to Lowerper, this process is underway.⁹ In its Reply, the Company asks that the Commission further mitigate its penalty assessment in order to compensate for the “costs and inconvenience of responding to Staff’s Motion[s].”¹⁰

- 8 **Appearances.** Richard A. Finnigan, Olympia, Washington, represents Lowerper. Michael A. Fassio, Assistant Attorney General, Olympia, Washington, represents Commission Staff.

MEMORANDUM

- 9 Staff asks that the Commission reopen the record in this proceeding to receive as evidence information from Docket UW-110871 that Lowerper failed to file the balance sheet and income statement of its affiliated entity, Iliad. Staff also requests that the Commission reconsider its decision to mitigate Lowerper’s penalty assessment based on Lowerper’s good faith in filing its tariff and supporting financial documents as agreed in the Stipulation. Specifically, Staff disagrees with two of the Commission’s statements in the Initial Order that Staff alleges incorrectly determine that the Company has complied with the Stipulation.¹¹
- 10 Staff mistakenly assumes that, since the Stipulation was filed in this proceeding and the Stipulation required the tariff filing, this proceeding is the appropriate venue for demanding additional financial documentation from Lowerper. Such is not the case.

⁸ *Id.*

⁹ Lowerper’s Reply at 2.

¹⁰ *Id.* at 3.

¹¹ Specifically, Staff requests clarification of the following sentences:

Further, the Commission notes that Lowerper did file its tariff and supporting documents as agreed on May 13, 2011. Initial Order ¶ 21.

Lowerper filed its tariff on May 13, 2011. Initial Order ¶ 28.

The Commission is currently adjudicating Lowerper's initial tariff filing and rates in a complaint in Docket UW-110892. In fact, Staff recommended to the Commission that it issue a complaint based on the Company's May 13, 2011, tariff filing and financial documents. Therefore, if additional financial information is needed to adjudicate Lowerper's water rates, Staff should pursue that information in Docket UW-110892.

- 11 Further, Staff disagrees with the Commission's decision to mitigate a small portion of Lowerper's penalty assessment based on the good faith the Company demonstrated in filing its tariff and financial documentation before the Commission had even issued an order approving and adopting the Stipulation requiring such a filing. Staff contends that the Commission erroneously based part of its \$2,100 penalty mitigation on Lowerper's full compliance with the Stipulation requirements. Staff is mistaken.
- 12 The Stipulation provided for the "entry of an initial order requiring Lowerper to file a tariff pursuant to RCW 80.28.050 with supporting financial data for its water system(s) in full compliance with WAC 480-110-433(3) (with reference to WAC 480-07-530), by May 13, 2011."¹² The parties agreed to an initial order that would require Lowerper to make a filing by May 13, 2011, which assumes the Commission would issue an Initial Order prior to that date. Such an occurrence proved unworkable given that the Commission did not receive the hearing transcript until May 11, 2011. Thus, in our Initial Order entered May 18, 2011, we recognized Lowerper's good faith in complying with a Stipulation deadline (May 13, 2011) in an agreement we had not, as yet, approved or adopted. Our mitigation of the penalty had nothing to do with the substance of the filings because those filings would still have to be reviewed by Staff in another proceeding. Following Lowerper's May 13 filing, the Commission could have determined, for example, that the Stipulation was not in the public interest and rejected the agreement. Lowerper took the chance that the Stipulation would be approved and adopted, and showed good faith in filing its documents, as agreed, on the date indicated in the Stipulation.

¹² Stipulation ¶ 2.

- 13 Staff may well be justified in seeking Iliad's financial data, but not in this forum. Staff's Motions are denied.
- 14 In addition, Lowerper requested further mitigation of the penalty assessment by an additional \$1,000.00 to compensate for the time it took to respond to Staff's Motions. We are not persuaded by Lowerper's suggestion. Lowerper has failed to demonstrate that Staff's Motions were egregious. The Company's request for additional mitigation is denied.

ORDER

THE COMMISSION ORDERS THAT:

- 15 (1) Staff's Motion to Reopen the Record, Motion for Clarification of Initial Order, and Motion for Reconsideration of Initial Order are denied.
- 16 (2) Lowerper's request for additional mitigation is denied.
- 17 (3) The Commission retains jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective June 23, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge