

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

WASHINGTON WATER SUPPLY, INC.,

Respondent.

DOCKET UW-230997

COMMISSION STAFF'S RESPONSE
TO WWS'S MOTION FOR
RECONSIDERATION

I. INTRODUCTION

1 Washington Water Supply, Inc. (WWS) moves for reconsideration¹ of the Utilities and Transportation Commission's January 11, 2024, order suspending tariff pages authorizing the company to surcharge certain customers to pay for water obtained for service while the well was unable to adequately serve customers. The Commission should deny the motion because it is untimely and because WWS does not show a deprivation of a protected property interest without due process of law.

II. RELIEF REQUESTED

2 Staff respectfully requests that the Commission deny WWS's motion for reconsideration.

¹ As discussed below in Section VI.A, WWS has actually filed a petition for interim or interlocutory review. The incorrect title matters. Staff may respond to a petition for interim or interlocutory review as a matter of right, WAC 480-07-810(3)(b), but may not so respond to a petition for reconsideration. WAC 480-07-850(1)(c). Given the actual nature of the filing, Staff responds.

III. STATEMENT OF FACTS

3 After years of experiencing a decrease in well supply, the well serving WWS's Echo
Glen water system required water to be trucked in to provide adequate water supply and
system water pressure.² Additionally, the Department of Health put the system on a boil
water alert, which could only be lifted once bacteriological sample results show no
coliforms present.³

4 In July 2023, WWS filed tariff pages authorizing it to surcharge Echo Glen
customers \$60 per month to pay for the costs of obtaining additional water due to the well
issues.⁴ At an August 2023 open public meeting, the Commission allowed those tariff pages
to take effect, with conditions.⁵ One of those conditions terminated the surcharge on
November 15, 2023.⁶

5 In December 2023, WWS filed new tariff revisions to reinstitute the surcharge for a
period of six months or until it collected the cost of obtaining water remaining after the
expiration of the original surcharge.⁷ Staff determined that a \$60 surcharge collected over
six months risked over-collection and asked the company to reduce the surcharge rate.⁸ The
company disagreed and refused, and Staff recommended that the Commission suspend the
tariff revision, setting the matter for a hearing.

6 This docket was considered at the Commission's January 11, 2024, open meeting.⁹
The Commission experienced technical difficulties with the Zoom link initially circulated

² *Wash. Water Supply, Inc. v. Wash. Utils. & Transp. Comm'n*, Docket UW-230997, Staff Open Meeting Memo, 1, 2 (Jan. 11, 2024) (hereinafter Staff Memo). Declaration of Michael Young, ¶¶ 3-4.

³ Staff Memo at 2; Declaration of Michael Young, ¶ 5.

⁴ Staff Memo at 1; Declaration of Michael Young, ¶ 6; *See* Docket UW-230598.

⁵ Staff Memo at 1; Declaration of Michael Young, ¶ 6.

⁶ Staff Memo at 1; Declaration of Michael Young, ¶ 6.

⁷ Staff Memo at 1; Declaration of Michael Young, ¶ 7.

⁸ Staff Memo at 2.

⁹ Declaration of Michael Young, ¶ 7.

for the open meeting.¹⁰ These technical difficulties prevented anyone from joining the meeting on the Zoom platform.¹¹ The Commission delayed the start of the open meeting until 9:45AM and circulated a new meeting ID and passcode.¹²

7 Upon learning of the technical difficulties, Staff notified WWS that there was a problem with the Zoom link.¹³ Staff twice sent the new meeting ID, passcode, and Zoom link to WWS.¹⁴ Although Staff sent the correct access information by email to the Company, WWS did not attend the open meeting.¹⁵ After allowing some time for interested parties – including two Echo Glen customres – to join the open meeting, the Commission took comments and adopted Staff’s recommendation to suspend.¹⁶ The Commission issued Order 01 in this docket to give effect to its decision.¹⁷

8 On January 30, 2024, 19 days after the Commission’s order, WWS filed a motion with the Commission seeking reconsideration of Order 01.¹⁸

IV. STATEMENT OF ISSUES

9 Should the Commission deny WWS’s motion when it is untimely and does not demonstrate a deprivation of a protected property interest without due process?

¹⁰ Declaration of Michael Young, ¶ 8.

¹¹ Declaration of Michael Young, ¶ 8.

¹² Declaration of Michael Young, ¶ 8.

¹³ Declaration of Michael Young, ¶ 10.

¹⁴ Declaration of Michael Young, ¶ 10.

¹⁵ Declaration of Michael Young, ¶ 10.

¹⁶ Declaration of Michael Young, ¶ 8-10.

¹⁷ *Wash. Water Supply, Inc. v. Wash. Utils. & Transp. Comm’n*, Docket UW-230997, Order 01 (January 11, 2024).

¹⁸ *Wash. Water Supply, Inc. v. Wash. Utils. & Transp. Comm’n*, Docket UW-230997, Respondent’s Motion for Reconsideration of Order 01 (Jan. 30, 2024).

V. EVIDENCE RELIED UPON

10 Staff relies upon the declaration of Michael Young as well as the documents on file
in this docket.

VI. ARGUMENT

11 WWS's motion is untimely and meritless. The Commission should deny it.

A. WWS's Motion is Untimely

12 Although WWS styles its motion as a motion for reconsideration, it is actually a
petition for interim or interlocutory review. WWS's motion seeks rescission of an order
suspending WWS's tariff filing and setting this matter for hearing, and Order 01 is not a
final order resolving the issues presented by the company's initial filing. Regardless of how
the motion is styled or how the Commission construes it, it is untimely and should be
denied.

13 The Commission construes pleadings liberally to "effect justice among the parties."¹⁹
Accordingly, the Commission reviews pleadings "based primarily on the relief they request
and . . . not solely on the name of the document."²⁰

14 A party may petition for reconsideration of a final order "to request that the
[C]ommission change the outcome with respect to one or more determinations in the final
order."²¹ The party must file the petition for reconsideration within 10 days of service of the
final order at issue.²²

¹⁹ WAC 480-07-395(4).

²⁰ WAC 480-07-395(4).

²¹ WAC 480-07-850 (1)(a).

²² WAC 480-07-850(1).

15 A party may also seek review of any interim or interlocutory order.²³ An interim or interlocutory order is an “[o]rder the [C]ommission enters in an adjudicative proceeding prior to entering an initial or final order.”²⁴ Initial and final orders are entered by an ALJ or the Commission to resolve disputed issues.²⁵ A party must serve a petition for interim or interlocutory review within 10 days of when the Commission serves the order at issue.²⁶

16 In this case, WWS’s motion seeks interim or interlocutory review, not reconsideration. Order 01, the order at issue, suspends operation of WWS’s tariff and sets this matter for adjudication. It does not resolve the substantive issues in dispute between the parties. It is definitionally an interim or interlocutory order, and the Commission should construe the motion accordingly.

17 Because both petitions for interim or interlocutory review and petitions for reconsideration must be filed within 10 days of the Commission’s service of the order, WWS’s motion is untimely. The Commission served Order 01 on January 11, 2024, making a petition for review due by January 22, 2024.²⁷ WWS filed its motion on January 30, 2024, 18 days past the deadline. The Commission should deny the motion.

B. WWS’s Due Process Claims Fail as a Matter of Law

18 The Due Process Clause forbids states from depriving a person of “life, liberty, or property . . . without due process of law.”²⁸ A due process claim has two distinct elements. First, there must be a deprivation of a constitutionally protected liberty or property interest.

²³ WAC 480-07-810(2).

²⁴ WAC 480-07-810(1).

²⁵ WAC 480-07-820(1)(a), (b).

²⁶ WAC 480-07-810(3)(a).

²⁷ Ten days from January 11 is January 21, which was a Sunday. The following business day was January 22.

²⁸ U.S. CONST. amend. XIV, § 1; *accord* WASH. CONST. art. I, § 3. The federal and state due process clauses are coextensive.

Second, there must be denial of adequate procedural protections.²⁹ In the context of ratemaking, public service companies have property interests in the property used for public service.³⁰

19 Due process prevents the state (or one of its arms, such as the Commission) from exercising its power to regulate rates in a manner that effectively confiscates the company's property without providing just compensation.³¹ The Commission must set rates that provide a return on WWS's investment in property put to public service that is "reasonably sufficient to assure confidence in the financial soundness of the utility and . . . adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."³²

20 Order 01 did not deprive WWS of property without due process under that body of law.³³ Indeed, Order 01 did not set rates for the company, and thus could not have set confiscatory rates. It instead suspended the effectiveness of a surcharge tariff filed by WWS pending an investigation into the fairness, justness, reasonableness, and sufficiency of the surcharge. Put otherwise, Order 01 set WWS's tariffs for an adjudication.³⁴ That adjudication will provide WWS with the due process it claims Order 01 has denied it,

²⁹ *Webb v. Washington State Univ.*, 15 Wn. App. 2d 505, 516, 475 P.3d 1051, 1057 (2020).

³⁰ *People's Org. for Wash. Energy Res v. Wash. Utils. & Transp. Comm'n*, 104 Wn.2d 798, 809-810, 711 P.2d 319 (1985) (hereinafter *POWER*).

³¹ *POWER*, 104 Wn.2d at 812.

³² *POWER*, 104 Wn.2d at 813 (quoting *Bluefield Water Works & Impr. Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692, 43 S. Ct. 675, 67 L. Ed. 1176 (1923)).

³³ *Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 391-92, 94 S. Ct. 2315, 41 L. Ed. 2d 141 (1974) ("[a]ll that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level.").

³⁴ RCW 80.04.110 (authorizing the Commission to complain against a public service company, thus triggering a hearing); RCW 80.04.130 (authorizing the Commission to suspend a tariff and proceed to a hearing as to the lawfulness of the tariff); RCW 80.28.020 (authorizing the Commission to fix utility rates after a hearing).

including, among other things, the right to present witnesses and argument, to cross-examine the witnesses adverse to its position, and to introduce evidence relevant to the dispute here.³⁵

21 WWS instead seems to be claiming a constitutionally protected property interest in the effectiveness, on the date it specified, of the surcharge tariff rate that it filed. At least one court that has looked at a similar issue has rejected such claims.³⁶ In that case, South Carolina Electric & Gas Co. (SCEGC) claimed that a South Carolina statute deprived it of a property interest in “revised rates” without due process of law.³⁷ The federal court hearing the suit began its analysis with the premise that the type of property interest claimed by SCEGC existed, if at all, by virtue of state law.³⁸ It then applied Supreme Court precedent holding that for state law to create such a property interest, ““a person clearly must have more than an abstract need or desire for it . . . He [or she or they] must have a legitimate claim of entitlement to it.”³⁹ The court determined that the relevant statutes gave the South Carolina Legislature and Public Service Commission discretion such that SCEGC could not claim any legitimate entitlement in the revised rates.⁴⁰

22 The Commission should reject WWS’s claim for the same reason that the SCEGC court did. WWS cannot claim any entitlement to a surcharge rate effective at the filed amount on the date it listed as the effective date. The Commission’s ability to suspend such filings has been in force, uninterrupted, since 1911.⁴¹ The Commission’s discretion as to

³⁵ *E.g.*, WAC 480-07-400 through -425 (authorizing discovery in Commission adjudications); -470(4) (allowing the parties to introduce evidence), -470(6) (requiring testimony under oath), -470(10) (allowing parties to cross-examine witnesses), -825 through -870 (creating administrative remedies to cure errors in initial and final orders).

³⁶ *S. C. Elec. & Gas Co. v. Randall*, 333 F. Supp. 3d 552, 568-72 (D. S.C. 2018).

³⁷ *SCEGC*, 333 F. Supp. 3d at 568.

³⁸ *SCEGC*, 333 F. Supp. 3d at 568.

³⁹ *SCEGC*, 333 F. Supp. 3d at 568 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)).

⁴⁰ *SCEGC*, 333 F. Supp. 3d 568-72.

⁴¹ Laws of 1911, ch. 117, § 82 (currently codified as amended at RCW 80.04.130).

whether to suspend a filing is not constrained in any way relevant here.⁴² WWS had no entitlement to an unsuspended tariff and thus no property interest protected by due process.

C. WWS’s Due Process Claim Fails as a Matter of Fact

23 WWS claims that it was prevented from participating in the January 11, 2024, open meeting. While the initial Zoom link circulated to allow for remote participation was faulty, that error was timely discovered and remedied: the Commission distributed a new meeting ID and passcode, and Staff provided the corrected Zoom access information directly to WWS.

24 Additionally, the Commission delayed the start of the meeting, so interested parties could join. As relevant to this docket, Staff and two customers joined the meeting using the new Zoom access information. While no one was able to join the meeting using the initial faulty Zoom link, interested parties were able to join the meeting once the new Zoom information was distributed. The fact that two of WWS’s customers were able to join the meeting using the new access information establishes that the meeting was accessible to the public. As a result, WWS had the opportunity to attend and was not prevented from doing so. Thus, WWS’s due process claim fails as a matter of fact.

VII. CONCLUSION

25 Staff recommends that the Commission deny WWS’s motion for the reasons stated above.

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⁴² RCW 80.04.130(1) (the Commission “may” suspend the operation of a tariff change), .130(2)(a) (limiting the Commission’s ability to suspend certain telecom tariff filings), .130(2)(b) (limiting the Commission’s ability to suspend promotional tariffs).

DATED this 9th day of February 2024.

Respectfully submitted,

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