

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. WASHINGTON WATER SUPPLY, INC., Respondent.	DOCKET UW-230997 ORDER 02 DENYING MOTION FOR RECONSIDERATION
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BACKGROUND

- 1 On July 12, 2023, Washington Water Supply, Inc. (Washington Water or Company) filed with the Washington Utilities and Transportation Commission (Commission) a tariff revision in Docket UW-230598. The revision included a surcharge of \$60 per month to 42 customers for the recovery of purchased water expenses due to well issues and high summer usage on the Echo Glenn water system located in Maple Valley. At the time, the system was on a Boil Water Advisory and the Company was taking steps to rehabilitate the well.
- 2 On August 10, 2023, the Commission issued Order 01 in Docket UW-230598 that allowed the surcharge of \$60 per month, effective August 15, 2023. Order 01 included the following conditions:
 - (1) the surcharge will expire on November 15, 2023,
 - (2) the Company file a general rate case with an effective date no later than February 15, 2024, and
 - (3) per WAC 480-110-455(4), the Company report to the Commission within 60 days of the end of each calendar quarter that the surcharge is in effect:
 - i. Quarter beginning balance,
 - ii. Amounts received, detailed by source (i.e., customer billing, customer one-time payments, or interest earned on amounts held in accounts),
 - iii. Amounts spent, detailed by project or type of expense,
 - iv. Quarter ending balance, and
 - v. Reconcile the bank balance to the general ledger.

- 3 The Company completed well rehabilitation and ceased trucking water in September of 2023. The system is no longer on a Boil Water Advisory.
- 4 On December 8, 2023, the Company filed tariff pages to re-instate the \$60.00 per month surcharge for six months or until it collects \$13,710.00, to collect the remainder of water trucking costs initiating this Docket.
- 5 Commission Staff (Staff) reviewed the Company's documentation, and the review shows the original surcharge did not provide sufficient recovery and that an additional surcharge is in order. However, Staff's calculation shows the \$60.00 the Company requests should be reduced to \$54.40 for six months to avoid overcollection. Staff shared their calculations with the Company.
- 6 On December 27, 2023, the Company informed Staff it disagrees with Staff's review and would not file revised tariff pages at the suggested rate. Staff subsequently recommended that the Commission suspend the revised tariff and set the matter for adjudication.
- 7 On January 11, 2024, this matter came before the Commission at its regularly scheduled open meeting. At the meeting, the Commission heard additional comments from Staff and from two Washington Water customers. Staff reiterated its recommendation and expressed concern that the Company sometimes relied on one customer to provide notice to others. One customer, who received notice of the proposed surcharge by email, expressed frustration that the Company had not repaired the well earlier and was seeking to recover costs for trucking water from customers. The other customer requested assistance from state agencies in securing their water supply.
- 8 Washington Water did not appear at the open meeting as will be discussed further below.
- 9 On January 11, 2024, following the open meeting, the Commission issued Order 01 in this Docket. The Order addresses the following:
- (1) the tariff revisions Washington Water filed on December 8, 2023, might injuriously affect the rights and interest of the public,
 - (2) Washington Water has not yet sufficiently demonstrated that the tariff revisions would result in rates that are fair, just, reasonable, and sufficient,
 - (3) as required by RCW 80.04.130(4), Washington Water bears the burden to prove that the proposed increases are fair, just, reasonable, and sufficient,

- (4) the tariff revisions Washington Water filed on December 8, 2023, are suspended,
- (5) the Commission will institute an investigation of Washington Water's books, accounts, practices, activities, property, and operations, and
- (6) the Commission will hold hearings at such times and places as may be required.
- 10 On January 30, 2024, the Company filed an Answer to Complaint (Answer) and a Motion for Reconsideration (Motion). The Company's Motion, at issue here, alleges that the Company was prevented from participation in the open meeting because access to the virtual hearing was disabled and therefore the Company had no opportunity to appear during the open meeting.
- 11 The Company alleges that the inability to appear at the open meeting violates due process and requests reconsideration and withdrawal of Order 01.
- 12 On February 10, 2024, Staff filed a Response to Washington Water's Motion for Reconsideration (Response).
- 13 In their Response, Staff argues three points. First, Staff argues that the Company's Motion was not timely filed. Second, Staff argues that the Motion is mischaracterized as one for reconsideration under WAC 480-07-850(1)(a) and should instead be reviewed as seeking review of an interim or interlocutory order pursuant to WAC 480-07-810(2). Finally, Staff argues that the Company's rights to due process were not violated because the Company had no protected interest which was confiscated and because while the initial Zoom link allowing participation was faulty, the Commission distributed a new meeting ID and passcode. Staff notes that because of the error, the Commission delayed the start of the open meeting to allow interested parties to join and that Staff provided the changed access information directly to Washington Water.
- 14 On February 15, 2024, Washington Water filed a declaration from their President, John Poppe. In the declaration, Poppe contests Staff's position on several points. First, the declaration asserts that the details provided of discussions at a meeting with customers regarding well rehabilitation and the Boil Water Advisory are hearsay and are a mischaracterization of the facts. The declaration also reiterates the Company's understanding that Staff would support a subsequent filing of a revised tariff for further recovery of costs related to trucking water. Regarding the open meeting, the declaration alleges John Poppe made multiple attempts to join and that an email containing the updated link to the meeting was not received until after the meeting concluded. Finally, the declaration expressed concerns with communications with Staff and that Staff did not work with the Company to resolve issues.

DISCUSSION

- 15 WAC 480-07-820(1)(b) defines final orders as “orders that a majority of the commissioners enter that resolve the substantive disputed issues in an adjudication in which the commissioners preside...” WAC 480-07-810(1) defines interim or interlocutory orders as “orders the commission enters in an adjudicative proceeding prior to entering an initial or final order...” and “include, but are not limited to, orders ruling on a party’s participation in a proceeding, scheduling issues, discovery disputes, and evidentiary issues.” The Commission liberally construes pleadings and motions to effectuate justice and reviews such pleadings and motions primarily on the relief sought and will not rely solely on how the document is titled.¹
- 16 Order 01 does not resolve the substantive issues in this Docket. Those issues being the rates to be charged so that the Company might recover costs expended on trucking water during the time when well rehabilitation was ongoing. While Order 01 does not fit within the enumerated list of actions classified as an interim or interlocutory order, the list contained in WAC 480-07-810(1) is not exhaustive and explicitly states that the list includes the enumerated types of orders but is not limited to those explicitly contained therein. Accordingly, we review the Company’s Motion as one for review of an interim or interlocutory order.
- 17 WAC 480-07-810(3) allows for parties to petition for review of an interim or interlocutory order, but the party seeking review must file the petition within ten days after the commission serves the interim or interlocutory order. As described above and in Staff’s Response, Order 01 was entered and served on the parties on January 11, 2024. The Company filed its Motion on January 30, 2024, 19 days late.
- 18 However, the Company’s Motion also alleges the Company’s right to procedural due process was violated because it was unable to appear during the open meeting.
- 19 The Commission may accept review of interim or interlocutory orders if it finds that:
- (1) The order terminates a party’s participation in the proceeding, and the party’s inability to participate thereafter could cause it substantial and irreparable harm;
 - (2) Immediate review is necessary to prevent substantial prejudice to a party that would not be remediable in the Commission’s final order; or

¹ WAC 480-07-395(4).

(3) Immediate review could save the Commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.²

20 The Company's Motion fails to demonstrate that participation would be terminated, that review is necessary to prevent substantial prejudice, or to demonstrate resource savings that parties and the Commission would realize from review. Nevertheless, we exercise our discretion to accept review of the determinations in Order 01 to suspend the Company's tariff revisions because the Company alleges a violation of procedural due process.

21 The Company alleges a due process violation because of an inability to virtually attend an open meeting where the Company's tariff revisions were suspended. Staff admits that while the initial Zoom access link was faulty, the problem was remedied, and a new Zoom link to the delayed meeting was sent out. Interested parties – including two of the Company's customers – were able to join the open meeting with the new Zoom link. Accordingly, we find the Company's argument that they had no opportunity to join unconvincing.

22 We find that there is no procedural due process violation because the Company has not demonstrated a protected interest of which it has been deprived. The Fourteenth Amendment protects against any State depriving "any person of life, liberty, or property, without due process of law."² Due process does not entitle those holding property interests to notice and a hearing on decisions leading up to a deprivation.³

23 A claim alleging a violation of due process must establish that the nature of property interests protected are ones in which "a person clearly must have more than abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."⁴ Further, a deprivation must involve a real harm, one that is not theoretical in nature, and an injury resulting from lawful government action does not result in a deprivation.⁵ In *Carlisle v. Columbia Irrigation District*, which involved an assessment that would result from the adding of lands to an irrigation district, the Washington Supreme Court held that where an alleged deprivation is contingent upon

² U.S. Const. amend. XIV, § 1, *accord* Wash. Const. art. I, § 3.

³ *City of Seattle v. Kaseburg*, 13 Wn. App. 2d 322, 332, 467 P.3d 115, 121 (2018)

⁴ *Wash. Ind. Telephone Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wash.2d 17, 65 P.3d 319, 322 (2003) (*citing*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

⁵ *Carlisle v. Columbia Irr. Dist.*, 168 Wn.2d 555, 570-71, 229 P.3d 761, 768-69 (2010).

further action, a property owner is not entitled to constitutional due process until such a time as when a final decision will be made.⁶

24 Here, the Company alleges a due process violation because of an inability to attend an open meeting where the Company's tariff revisions were suspended. We agree with Staff that Order 01 does not set rates for the Company nor does it include a determination that the Company is not entitled to recover expenses incurred to serve its customers. Instead, Order 01 suspends the effectiveness of the surcharge for further proceedings to determine the fairness, justness, reasonableness, and sufficiency of the surcharge. During those proceedings Washington Water will have the opportunity to present its case and respond to Staff and any other intervenors. Like in *Carlisle*, a final decision on the surcharge has not been made and therefore there is no deprivation of due process.

25 Further, although it is unfortunate that the Company was unable to join, Staff made multiple attempts to remedy the problem with accessing the meeting. The meeting start time was delayed, accommodating those who wished to appear. Once the issue was resolved, others, including customers of the Company, were able to join the meeting using the new link. This is further evidence that no deprivation occurred in the process itself. The meeting went forward and interested parties were given the opportunity to appear before the Commission.

26 Accordingly, the Company's Motion should be denied.

FINDINGS AND CONCLUSIONS

27 (1) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates, rules, regulations, practices, accounts, securities, transfers of property and affiliated interests of public service companies, including gas companies.

28 (2) Washington Water is a water company and a public service company subject to Commission jurisdiction.

29 (3) Pursuant to WAC 480-07-820(1)(b) final orders are defined as "orders that a majority of the commissioners enter that resolve the substantive disputed issues in an adjudication in which the commissioners preside..."

30 (4) Pursuant to WAC 480-07-810(1) interim or interlocutory orders are

⁶ *Id.* at 572-73, 229 P.3d at 770 (While the *Carlisle* decision pertains to an assessment, the logic applies that if no property interest exists in a procedure itself, and no deprivation of a property interest occurred here, then there was no violation of due process).

defined as “orders the commission enters in an adjudicative proceeding prior to entering an initial or final order...” and “include, but are not limited to, orders ruling on a party’s participation in a proceeding, scheduling issues, discovery disputes, and evidentiary issues.”

- 31 (5) WAC 480-07-810(3)(a) allows for parties to petition for review of an interim or interlocutory order within ten days after the Commission serves the interim or interlocutory order.
- 32 (6) The Fourteenth Amendment protects against any State depriving “any person of life, liberty, or property, without due process of law.” Additionally, according to *City of Seattle v. Kaseburg*, due process does not entitle those holding property interests to notice and a hearing on decisions leading up to a deprivation.
- 33 (7) On January 11, 2024, the Commission held its regularly scheduled Open Meeting and issued Order 01, setting forth its complaint and suspending the Company’s proposed revised tariff.
- 34 (8) Washington Water filed an Answer to Complaint and a Motion for Reconsideration on January 30, 2024, after the ten-day window set forth in WAC 480-07-810(3)(a).
- 35 (9) Pursuant to WAC 480-07-810(3)(b) Commission Staff filed its Response to Washington Water’s Motion for Reconsideration February 10, 2024.
- 36 (10) In its Motion, the Company alleges that its right to procedural due process was violated because it was unable to appear during the open meeting.
- 37 (12) After reviewing Washington Water’s June 30, 2023, Motion, and giving due consideration to its argument the Commission finds that Order 01 suspends the effectiveness of the surcharge for further proceedings to determine the fairness, justness, reasonableness, and sufficiency of the surcharge, but does not deprive the Company of due process.

ORDER

THE COMMISSION ORDERS:

- 38 (1) Washington Water Supply Inc.’s Motion for Reconsideration is DENIED.

- 39 (2) The Commission retains jurisdiction over the subject matter and Washington Water Supply Inc. to effectuate the provisions of this Order.

DATED at Lacey, Washington, and effective February 23, 2024.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/Connor Thompson
CONNOR THOMPSON
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.