

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SARAH HAND,

Complainant,

v.

RAINIER VIEW WATER COMPANY,
INC.

Respondent.

DOCKET UW-170924

COMMISSION STAFF'S BRIEF
CONCERNING JURISDICTION
AND REMEDIES

I. INTRODUCTION

1 This matter arises from a dispute about water quality between a jurisdictional water company and one of its customers. The Commission has asked for briefing on two questions: whether it has jurisdiction over the dispute and whether it can provide any remedy to the complainant. The answer to both questions is yes. The legislature has provided the Commission with jurisdiction over water quality disputes and also given the Commission the ability to provide certain remedies to persons complaining about the quality of water sold by a jurisdictional water company. However, the Commission shares jurisdiction over water quality issues with the Department of Health (DOH), a division of authority with implications for this case as discussed below.

II. BACKGROUND

2 Rainier View Water Company (RVWC) is a Commission-regulated water company.¹ RVWC serves, among other areas, a gated community in Spanaway, Washington.²

¹ See *Hand v. Rainier View Water Co., Inc.*, Docket UW-170924, Notice Converting Informal Complaint to Formal Complaint; Calling for Answer; and Initiating Adjudicative Proceeding, at 1 ¶ 1 (Aug. 31, 2017) (hereinafter “*Notice*”).

² *Notice* at 1 ¶ 1.

3 One of RVWC’s customers in that community, Sarah Hand, alleges that RVWC sold
her tainted water.³ Ms. Hand alleges that this tainted water caused \$654 in damage to the
piping in her house.⁴

4 Ms. Hand complained informally about the allegedly tainted water to the
Commission.⁵ The Commission has, on its own motion, converted Ms. Hand’s informal
complaint into a formal adjudication.⁶ The Commission has also requested briefing on two
subjects: its jurisdiction and its ability to provide Ms. Hand a remedy.⁷

III. ISSUES PRESENTED

- A. Does the Commission have jurisdiction to adjudicate complaints alleging that a public service companies has provided contaminated water? [short answer: yes.]
- B. Can the Commission provide a remedy to a complainant alleging that a public service company has sold him or her contaminated water? [short answer: yes.]

IV. DISCUSSION

- A. The Commission has jurisdiction over water quality complaints, but primary jurisdiction for such complaints lies with the Department of Health.**

5 Ms. Hand’s complaint first raises the question of whether the Commission has
jurisdiction over water quality issues. It does, although as it has itself repeatedly recognized,
“primary jurisdiction” over those issues lies with the DOH.⁸

³ *Id.*

⁴ *Id.*

⁵ *See id.* at ¶ 2.

⁶ *Id.*

⁷ *See generally Hand v. Rainier View Water Co., Inc.*, Docket UW-170924, Notice of Request for Briefing (Oct. 26, 2017).

⁸ *E.g., In re Petition of Camano Hills Water Co., Inc., for Approval of a Surcharge to Service a Drinking Water State Revolving Loan Fund*, Docket UW-101817, Order 01, at 3 ¶ 13 (Dec. 30, 2010); *In re Petition of Aquarius Utils., LLC, for a Surcharge Tariff to Service Four Drinking Water State Revolving Fund Loans*, Docket UW-081416, Order 01, at 4 ¶ 17 (Aug. 28, 2008).

6 The legislature delegated to the Commission the power to regulate public service companies.⁹ Water companies, subject to certain exceptions not relevant here, are public service companies.¹⁰

7 The powers delegated to the Commission included quasi-judicial powers. Accordingly, any person may complain to the Commission about violations of the public service laws,¹¹ and the Commission has jurisdiction to adjudicate those complaints.¹² Any person may complain about the commodity sold by a water company (water) under RCW 80.28.030(1):

Whenever the commission finds, after such a hearing, that the . . . purity, quality, volume, and pressure of water . . . supplied by any . . . water company . . . is insufficient, impure, inadequate, or inefficient, it shall order such improvement . . . in the storage, distribution, or supply of water, or in the methods employed by such . . . water company . . . as will in its judgment be efficient, adequate, just, and reasonable.¹³

8 Some version of what is now RCW 80.28.030 has authorized the Commission or its predecessors to regulate the purity of water sold by jurisdictional companies since 1911.¹⁴ However, the legislature has, in the years since 1911, largely shifted the regulation of drinking water potability to the DOH.¹⁵

9 This split in authority is evidenced in the public service laws and, accordingly, in the Commission's own regulations. For example, the legislature has directed the Commission to look to the DOH's water quality standards in adjudications by providing that a violation of

⁹ RCW 80.01.040; *People's Org. for Wash. Energy Resources v. Utils. & Transp. Comm'n*, 104 Wn.2d 798, 807-08, 711 P.2d 319 (1985).

¹⁰ RCW 80.04.010(23); RCW 80.04.030(b) (exempting small, low-revenue water systems from Commission oversight).

¹¹ *E.g.*, RCW 80.04.110.

¹² *E.g., id.*

¹³ RCW 80.28.030(1).

¹⁴ LAWS OF 1911, ch. 117, § 54.

¹⁵ *E.g.*, RCW 70.116.010-.140; RCW 70.119.010-.900; RCW 70.119A.020-.900.

those standards “is prima facie evidence that the water supplied is . . . impure” within the meaning of RCW 80.28.030.¹⁶ Further, given the DOH’s engineering expertise, the Commission must consult with the DOH before ordering any improvement in the commodity or service sold by a jurisdictional water company.¹⁷ Reflecting the legislature’s choice, the Commission’s service responsibility rule does not set out independent water quality standards; it instead requires jurisdictional water companies to comply with the DOH’s water quality standards.¹⁸

10 The Commission’s orders also follow the division of labor envisioned by the legislature. For example, Alderton-McMillan Water Systems, Inc. filed tariff revisions to increase its revenues in 1991.¹⁹ Although the matter was presented to the Commission as a rate case, the Commission complaint and order suspending the tariff revisions included allegations of violations under RCW 80.28.030 and a related provision governing service quality, RCW 80.28.040.²⁰ A Commission ALJ determined that the company had provided “poor water quality and poor service to its customers,”²¹ something the Commission affirmed after finding that “[t]he evidence supports the initial order’s findings that the company has provided poor water quality, inadequate service, neglected its obligations to its ratepayers, and been unresponsive to its customers. ‘Deplorable’ is a more apt description of the quality of water and service provided.”²²

¹⁶ RCW 80.28.030(1).

¹⁷ RCW 80.28.030(2), .040(2).

¹⁸ WAC 480-110-365(4).

¹⁹ *Wash. Utils. & Transp. Comm’n v. Alderton-McMillan Water System, Inc.*, Docket No. UW-911041, Third Supplemental Order, at 1 (Aug. 31, 1992).

²⁰ *Id.* at 25.

²¹ *Id.* at 1.

²² *Id.* at 19.

11 Based on those problems, the Commission significantly reduced Alderton-McMillan's return on equity and tied any subsequent increases thereto to "rigid performance standards."²³ Those performance standards required the company to coordinate with the DOH to sample its water at least three times during the six months following the Commission's order, obtain analysis of the samples, and provide the results to the DOH and the Commission.²⁴ The Commission also required the company to perform certain maintenance and take certain steps to remedy water and service quality issues.²⁵ Citing RCW 80.28.030 and RCW 80.28.040, the Commission directed Staff to "[c]onsult and [c]oordinate" with DOH in "carrying out and enforcing the provisions of this order relating to water quality and service improvements."²⁶ The Commission retained jurisdiction so that, if the company failed to remedy its water and service quality issues, the Commission could petition DOH to commence receivership proceedings against the company pursuant to RCW 80.28.030 and RCW 80.28.040.²⁷

12 The Commission and the DOH formalized the division of labor that the legislature envisioned by negotiating two separate memoranda of understanding, one in 1995 and another in 2008.²⁸ Each of those memoranda sets out the roles and responsibilities of each

²³ *Id.* at 17.

²⁴ *Id.* at 20.

²⁵ *Id.* at 20-24. The operations maintenance section of the Commission's order required the company to develop a 12-month maintenance plan for each of its systems that complied with DOH and Commission regulations, maintain documents for public review, establish a record-keeping system acceptable to Staff, and hold regular meetings with customer groups. *Id.* at 21-22. The service quality section of the order required the company to alert customers to ways to alleviate pressure problems, monitor water pressure in its lines and take certain actions if the pressure dropped, devise a water conservation plan, provide customers with advance notice of service interruptions, develop a policy for prioritizing customer requests, maintain an office and a telephone number to allow customers to contact the company, and maintain voice mail so that customers could leave the company messages. *Id.* at 23-24.

²⁶ *Id.* at 26, 27.

²⁷ *Id.* at 25-26.

²⁸ Memorandum of Understanding between the Wash. Dep't of Health and the Wash. Utils. & Transp. Comm'n, Coordination of the Dep't of Health's Drinking Water Program and the Utils. & Transp. Comm'n's

agency, and both make the DOH responsible for handling water quality issues and the Commission responsible for economic issues.²⁹

13 The 1995 Memorandum of Understanding (MOU) is quite explicit in its division of roles and responsibilities, something meant, in the context of customer complaints, to ensure that customers are “assured of follow up.”³⁰ The MOU designates the DOH as responsible for “[c]ustomer complaints” and “direct follow up” where the complaint “regard[s] quality, quantity, and health issues.”³¹ The MOU designates the Commission as responsible for customer complaints concerning “rates, services, and management.”³² Under the MOU, an agency receiving a complaint falling within the other agency’s responsibility pledged to forward that complaint on for resolution.³³

14 The 2008 MOU preserves the division of responsibility found in the 1995 MOU. Its substantive discussion begins with a summary of the regulatory authority each agency possesses, describing the DOH as having regulatory authority over water quality for any public water system and the Commission as possessing economic regulatory powers over jurisdictional water companies.³⁴ The summary of authorities specifically notes that “the [Commission] lacks staff expertise” in certain areas including “water quality” and therefore “defers to [the DOH] if technical questions arise.”³⁵ When setting forth agency

Water Program for the State of Wash. (Nov. 22, 1995) (hereinafter the 1995 MOU); Memorandum of Understanding between the Wash. Dep’t of Health and the Wash. Utils. & Transp. Comm’n, Coordination of the Dep’t of Health’s Office of Drinking Water Program and the Utils. & Transp. Comm’n’s Water Regulation Program for the State of Wash. (Feb. 2008) (hereinafter the 2008 MOU).

²⁹ 1995 MOU at 2; 2008 MOU at 1.

³⁰ 1995 MOU at 4.

³¹ *Id.* at 2.

³² *Id.* at 2.

³³ *Id.* at 4.

³⁴ 2008 MOU at 2-4.

³⁵ *Id.* at 4.

responsibilities, the MOU provides that the DOH is responsible for ensuring “compliance with applicable regulations.” Its summary of authorities suggests that, as relevant here, those regulations are the ones enacted to allow the DOH to act in the stead of the United States Environmental Protection Agency under the federal Safe Drinking Water Act.³⁶ Under the MOU, the Commission is responsible for economic regulation of water companies.³⁷ With regard to customer complaints, Commission Staff’s water section is responsible for “assist[ing] customers of UTC regulated companies to resolve complaints regarding billing disputes, service and management issues.”³⁸ Given the deference to the DOH mentioned above, where water quality is at issue, the Commission’s water section must work “[i]n cooperation with” the DOH to ensure compliance with the DOH’s “rules in connection with rate and system acquisition filings and hearings.”³⁹ As the 1995 MOU did, the 2008 MOU requires the two agencies to create processes and procedures for “[r]egistering and forwarding customer complaints on rates, service, water quality, water quantity or health issues.”⁴⁰

15 Commission Staff’s handling of Ms. Hand’s informal complaint shows both its jurisdiction over water quality complaints and the deference owed to the DOH. When Ms. Hand complained informally to the Commission, Staff informed her that the DOH handled water quality issues, but opened an investigation.⁴¹ In the course of that investigation, Staff learned that RVWC sold water exceeding the DOH’s Maximum Contamination Level

³⁶ *Id.* at 2.

³⁷ *Id.* at 5.

³⁸ *Id.* at 5.

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 6.

⁴¹ *Hand v. Rainier View Water Co., Inc.*, Docket UW-170924, Washington UTC Complaint, at 1 (Nov. 8, 2016)

(MCL) for manganese, but also that RVWC had obtained DOH approval to install filtration systems that would reduce the contamination to levels well below the MCL.⁴² The DOH apparently did not require any action,⁴³ which is not unusual.⁴⁴ Staff closed the complaint based on that information.

B. The Commission can remedy water quality problems by order and award reparations; it cannot order compensatory damages.

16 Ms. Hand's complaint also raises the question of whether the Commission can provide any remedy to Ms. Hand. The Commission may order improvements to the purity of water RVWC sells and, upon a certain showing by Ms. Hand, order a refund to her.

17 The Commission plainly has the authority to order RVWC to remedy contamination in the water it sells. As noted above, RCW 80.28.030 allows the Commission to order improvements to the purity of water sold by a jurisdictional water company, and it could exercise that power here. However, RVWC has consulted with the DOH and has already begun installing a filtration system that will drastically reduce the amount of manganese in the water sold to Ms. Hand.⁴⁵ It is unclear what further relief the Commission could grant Ms. Hand in this respect.

18 The Commission's ability to award monetary relief to a complainant depends on the type of relief sought.

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *Wash. Utils. & Transp. Comm'n v. Kayak Estates Water, LLC*, Docket UW-051444, Order 04, at 3 ¶ 12 (Apr. 19, 2006) ("The DOH has jurisdiction over water quality and does not provide for removal of secondary contaminants such as . . . manganese.").

⁴⁵ The Commission, at its December 22, 2016, open meeting, approved a treatment surcharge extension tariff intended to allow RVWC to fund the installation of this filtration system. *Wash. Utils. & Transp. Comm'n v. Rainier View Water Co.*, Docket UW-161232, Order, at 1-4 (Dec. 22, 2016). The tariff became effective on December 31, 2016.

19

The Commission cannot award compensatory damages. The legislature subjected public service companies that violate the public service laws to potential liability for damages.⁴⁶ The legislature did not, however, provide the Commission with the jurisdiction to order payment for such damages – it left that jurisdiction vested in the superior courts.⁴⁷ The Commission has recognized its inability to award compensatory damages to aggrieved parties,⁴⁸ although it sometimes considers actual damages when determining whether to assess a penalty for violations of the public service laws.⁴⁹

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While withholding jurisdiction to order damages, the legislature did provide the Commission with jurisdiction to order refunds or reparations. RCW 80.04.220 provides:

When complaint has been made to the commission concerning the reasonableness of any rate, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged.

RCW 80.04.230 provides:

When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found.

⁴⁶ RCW 80.04.440.

⁴⁷ *Id.*

⁴⁸ *Walla Walla County Club v. Pac. Power & Light Co.*, Docket UE-143932, Order 03, at 6 ¶ 27 (Jan. 15, 2016).

⁴⁹ *E.g., Monroe v. Puget Sound Power & Light Co.*, Cause No. U-85-70, ALJ Memorandum Opinion, (Mar. 06, 1986). These penalties are paid to the state treasury, not to aggrieved individuals, and are therefore not damages. *Taut v. All My Sons Moving & Storage*, Docket No. TV-021248, Final Order Affirming Initial Order on Adjudicative Proceeding, at 5 ¶ 22 (Jan. 15, 2003).

21 Pursuant to its power to order reparations, the Commission has provided for refunds
when a water company provides “poor . . . quality” water.⁵⁰ Such refunds are available
through an order from the Commission after a formal adjudication,⁵¹ and obtaining that
order requires the complainant to show: (1) a violation of the water quality standards
enacted by the DOH in WAC 246-290-310,⁵² and (2) that the water company failed to take
the follow-up steps found in WAC 246-290-320.⁵³

22 The DOH’s water quality regulations set MCLs for a variety of bacteria and
inorganic compounds.⁵⁴ DOH regulates manganese under its secondary standards.⁵⁵ Those
standards set a MCL of 50 parts per billion (ppb) for manganese.⁵⁶

23 The DOH regulation governing follow-up steps for an MCL exceedance requires
different actions for violations of primary or secondary standards. Any water company
exceeding the MCL for a secondary contaminant must “notify the [DOH] and take action as
directed by the [DOH].”⁵⁷ The regulation also requires follow-up monitoring and testing; as
relevant here it requires water companies exceeding a secondary standard to take action as
required by the DOH. That action “shall be commensurate with the degree of consumer
acceptance of the water quality and their willingness to bear the costs of meeting the
secondary standard.”⁵⁸

⁵⁰ WAC 480-110-395(1).

⁵¹ WAC 480-110-395(1)(a).

⁵² WAC 480-110-395(1)(b).

⁵³ WAC 480-110-395(1)(c).

⁵⁴ WAC 246-290-310.

⁵⁵ WAC 246-290-310(3)(a).

⁵⁶ *Id.*

⁵⁷ WAC 246-290-320(1)(c).

⁵⁸ WAC 246-290-320(3)(d).

24 The Commission does not appear to have the power to award damages or a refund to Ms. Hand. Her plea for \$654 to remedy the damages to her pipes is a plea for compensatory damages, which the Commission cannot award.⁵⁹ Nor can the Commission order RVWC to pay Ms. Hand a refund for selling contaminated water. The Commission's record of Ms. Hand's informal complaint indicates that although RVWC sold water exceeding the MCL for manganese, the DOH did not order RVWC to take any action to remedy the exceedance. Ms. Hand can therefore apparently make the first showing necessary for a refund order, but not the second.

V. CONCLUSION

25 The Commission has jurisdiction to adjudicate complaints about the purity of water sold by jurisdictional water companies like the one lodged by Ms. Hand. The Commission may, under some circumstances, order refunds to customers to whom a jurisdictional water company has sold impure water. However, a refund appears unwarranted here given that Ms. Hand cannot make the showing WAC 480-100-395 requires for a refund.

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Respectfully submitted,

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⁵⁹ See BLACK'S LAW DICTIONARY at 393-94 (7th ed. 1999) (definitions of actual damages and compensatory damages).