

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SARAH HAND,

Complainant,

v.

RAINIER VIEW WATER COMPANY,  
INC.

Respondent.

DOCKET UW-170924

STAFF'S ANSWER TO RAINIER  
VIEW WATER COMPANY'S  
PETITION FOR ADMINISTRATIVE  
REVIEW

**I. INTRODUCTION**

1 This administrative appeal concerns a dispute between Sarah Hand and her water company, Rainier View Water Company (RVWC). After a hearing on a complaint by Ms. Hand, an administrative law judge (ALJ) determined that RVWC supplied her with impure water. The ALJ ordered RVWC to improve the purity of the water it sells to Ms. Hand and also ordered RVWC to prospectively refund her bill until it does so.

2 The Commission should deny RVWC's petition for review of the ALJ's order. A significant amount of evidence supports the ALJ's finding that RVWC provided Ms. Hand with impure water, and the ALJ ordered remedies authorized by statute and rule.

**II. BACKGROUND**

3 In 2015, Ms. Hand bought a home in Spanaway, Washington, with water supplied by RVWC.<sup>1</sup> The home sits in a cul-de-sac at the end of one of RVWC's distribution lines.<sup>2</sup>

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<sup>1</sup> Hand, Exh. SH-1T at 2:5-15.

<sup>2</sup> Hand, Exh. SH-15 at 14; *see* Blackman, TR. at 117:4-6.

4 Ms. Hand noticed that the water from her taps ran brown when she first inspected her  
house.<sup>3</sup> The inspector and her realtor told her the problem likely resulted from the house  
sitting unoccupied, and Ms. Hand accepted their explanation.<sup>4</sup>

5 Unfortunately, Ms. Hand's water quality did not improve after she moved in and  
began using the water regularly.<sup>5</sup> Instead, she and her family experienced the brown water  
problems consistently and persistently.<sup>6</sup> Photographic evidence provides some confirmation  
of her account,<sup>7</sup> as do social media post by her neighbors, many of which lament the brown  
water provided by RVWC.<sup>8</sup>

6 Ms. Hand attempted to deal with these problems by draining her hot water heater and  
running her faucets, measures that provided her some temporary relief.<sup>9</sup> But the brown water  
always returned.<sup>10</sup>

7 Eventually, Ms. Hand learned at a homeowners' association meeting that  
manganese-contaminated water was the likely source of her brown water issues.<sup>11</sup> At some  
point after that, she contacted RVWC and demanded that it pay to replace a valve that had  
failed in her home.<sup>12</sup> RVWC declined to do so, but it did send technicians to flush her  
pipes.<sup>13</sup> This process, a complaint about brown water by Ms. Hand followed by flushing by  
RVWC's technicians, would play out a number of times between 2016 and 2018.<sup>14</sup>

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<sup>3</sup> Hand, Exh. SH-1T at 2:25-3:2.

<sup>4</sup> Hand, TR. at 180:19-22, 182:9-10.

<sup>5</sup> Hand, Exh. SH-1T at 3:4-12.

<sup>6</sup> *Id.* at 3:4-12; Hand, TR. at 182:17-19.

<sup>7</sup> Hand, Exh. SH-2; Hand, Exh. SH-3; Hand, Exh SH-4; Hand, Exh. SH-6; Hand, Exh. SH-7.

<sup>8</sup> Hand, Exh. SH-8; Hand, Exh. SH-9.

<sup>9</sup> Hand, TR. at 182:20-24. 217:16-218:15.

<sup>10</sup> *E.g., id.* at 217:16-218:15.

<sup>11</sup> Hand, TR. at 183:7-11.

<sup>12</sup> *See id.* at 182:17-183:23.

<sup>13</sup> Hand, Exh. SH-1T at 4:24-27; Hand, TR. at 183:17-23.

<sup>14</sup> Hand, Exh. SH-1T at 6:15-7:12.

8 Ms. Hand turned to the Commission, complaining informally about the quality of her water and RVWC's refusal to pay for the valve.<sup>15</sup> Commission staff (Staff) investigated and spoke with representatives from RVWC and the Department of Health (DOH).<sup>16</sup> RVWC acknowledged that one of the wells supplying water to Ms. Hand's house had shown an increase in manganese contamination at some point around 2013, but stated that it had already taken Commission-approved measures to remedy the problem.<sup>17</sup> The DOH informed Staff that it considered manganese contamination an aesthetic problem and would not take action unless a majority of RVWC's customers approved of remedial measures.<sup>18</sup> Staff closed the informal complaint,<sup>19</sup> which returned to the Commission as a formal complaint after a detour through the Pierce County Superior Court.<sup>20</sup>

9 During discovery, RVWC moved to compel production of certain documents from Ms. Hand.<sup>21</sup> Among these were any test results related to her water quality.<sup>22</sup> The presiding ALJ compelled the production of those tests,<sup>23</sup> and Ms. Hand later entered them into the record as an exhibit to her reply testimony.<sup>24</sup>

10 At hearing, RVWC objected to the admission of the exhibit containing Ms. Hand's test results, stating that "it [wa]s an expert opinion offered without qualifications to do so . . . and that it lack[ed] any foundation . . . [because] [t]he testing and sampling methods, there's no explanation as to how they were done, how the methods were derived, and there[] [was]

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<sup>15</sup> See generally Stark, Exh. RS-1T.

<sup>16</sup> Stark, Exh. RS-1T at 4:1-8:3.

<sup>17</sup> *Id.* at 4:19-5:4.

<sup>18</sup> *Id.* at 7:5-8:3.

<sup>19</sup> *Id.* at 8:5-18.

<sup>20</sup> Hand, Exh. SH-1T at 11:20-12:2.

<sup>21</sup> Tr. at 27:7-13.

<sup>22</sup> *Id.* at 34:7-11.

<sup>23</sup> *Id.* at 35:4-20.

<sup>24</sup> See generally Hand, Exh. SH-29.

no foundational support for those methods used.”<sup>25</sup> The administrative law judge (ALJ) acknowledged RVWC’s concerns about the exhibit, but admitted it after providing that he would give it the appropriate weight.<sup>26</sup>

11           Also at hearing, RVWC’s witness testified that the manganese that entered the distribution system from its contaminated well might take several years to work its way out.<sup>27</sup> The witness also testified that the brown water problems Ms. Hand complained about were the type caused by manganese contamination.<sup>28</sup>

12           After hearing, the ALJ found that Ms. Hand testified credibly about her brown water problems, that the test results she offered were sufficiently reliable for use by the Commission, and that RVWC supplied Ms. Hand with impure water.<sup>29</sup> Because the ALJ determined that RVWC supplied Ms. Hand with impure water, he ordered the company to remedy the impurity by supplying her with water that consistently met the DOH’s water quality standards.<sup>30</sup> He also prospectively waived certain requirements in WAC 480-110-395 and ordered RVWC to refund Ms. Hand’s bill from the date of the order until it met the initial order’s terms.<sup>31</sup>

### III. DISCUSSION

13           RVWC seeks administrative review of the ALJ’s findings that: (1) Ms. Hand testified credibly about her water quality, (2) Ms. Hand’s water quality tests were sufficiently reliable to determine whether RVWC supplied Ms. Hand with pure water under

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<sup>25</sup> Tr. at 61:9-15.

<sup>26</sup> *Id.* at 68:17-25.

<sup>27</sup> Blackman, TR. at 134:4-135:3.

<sup>28</sup> *Id.* at 97:20-98:5, 100:11-102:18, 141:10-12, 144:11-19.

<sup>29</sup> *Hand v. Rainier View Water Co., Inc.*, Docket UW-170924, Initial Order, at 8 ¶ 23, 9 ¶¶ 23-24, 14 ¶ 7, 14-15 ¶ 48, (October 2, 2018) (hereinafter “Initial Order”).

<sup>30</sup> *Id.* at 10 ¶ 29, 11-12 ¶ 34, 15 ¶¶ 51-54, 56, 16 ¶¶ 63-66, 17 ¶ 68.

<sup>31</sup> *Id.* at 11-12 ¶ 31, 15 ¶¶ 56-57.

RCW 80.28.030, and (3) RVWC supplied Ms. Hand with impure water.<sup>32</sup> RVWC also asks the Commission to determine that the ALJ improperly ordered: (4) water quality improvements, and in doing so improperly apportioned costs to RVWC; and (5) a prospective water quality refund until RVWC satisfies the order to supply Ms. Hand with pure water.<sup>33</sup>

14           The Commission should deny the petition. The ALJ’s findings are supported by the record evidence and the remedies he ordered are authorized by statute and rule.

**A.     The ALJ Correctly Determined that RVWC Provided Ms. Hand with Impure Water**

15           RVWC first seeks review of the ALJ’s determination that the company supplied Ms. Hand with impure water, contending that the ALJ “relie[d] on sparse and unreliable evidence and misconstrue[d] facts to reach unsupportable conclusions.”<sup>34</sup> In seeking review of that ultimate finding, RVWC challenges the ALJ’s determination that Ms. Hand provided credible testimony about the quality of water she received, and also the ALJ’s use of the test results offered by Ms. Hand to show that she received impure water. The Commission should affirm the ALJ’s credibility finding based on the corroborating evidence in the record, affirm the ALJ’s use of Ms. Hand’s test results as consistent with RCW 80.28.030, and affirm the ALJ’s finding that RVWC supplied Ms. Hand with impure water based on those affirmed findings.

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<sup>32</sup> *Hand v. Rainier View Water Co., Inc.*, Docket UW-170924, Rainier View Water Co., Inc.’s Petition for Administrative Review (Oct. 22, 2018) (hereinafter “Pet. for Review”).

<sup>33</sup> *Id.* at 6-11 ¶¶ 14-29, 14-17 ¶¶ 44-55.

<sup>34</sup> *Id.* at 1 ¶ 1.

**1. Ms. Hand testified credibly.**

16 RVWC first contends that the ALJ erred by finding that Ms. Hand testified credibly. RVWC argues that she did not because (1) she delayed in seeking a remedy from RVWC,<sup>35</sup> and (2) her testimony was “exaggerated and unreliable.”<sup>36</sup>

17 Before turning to RVWC’s specific challenges, Staff notes that although the finding is not unreviewable, the Commission gives “substantial weight”<sup>37</sup> to the ALJ’s credibility findings. This results from the fact that the ALJ saw and heard Ms. Hand testify, allowing him to measure her credibility using cues that do not appear in the cold record.<sup>38</sup>

18 Further, as the ALJ noted, a significant amount of evidence in the cold record confirms Ms. Hand’s testimony, supporting a finding that she testified credibly. Photographic evidence shows brown water provided to her house.<sup>39</sup> Social media posts from other RVWC customers, including a number of posts by those in her neighborhood, describe similar brown water problems.<sup>40</sup> RVWC admits that, prior to the installation of treatment, one of the wells providing water to Ms. Hand was “a “high-manganese wellhead.”<sup>41</sup> RVWC also admits that manganese contamination could have caused the issues about which Ms. Hand complained.<sup>42</sup> All of that corroborating evidence indicates that Ms. Hand testified credibly.

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<sup>35</sup> *Id.* at 2 ¶ 3.

<sup>36</sup> *Id.* at 2 ¶ 2, 2-3 ¶ 4.

<sup>37</sup> *Wash. Utils. & Transp. Comm’n v. Best Moving & Delivery, LLC*, Docket TV-132030, Order 03, at 3 ¶ 11 (May 8, 2015).

<sup>38</sup> *State v. Maxwell*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994).

<sup>39</sup> Hand, Exh. SH-2 (photograph showing brown water); Hand, Exh. SH-3 (same); Hand, Exh. SH-4 (same); Hand, Exh. SH-5 (same); Hand, Exh. SH-6 (same).

<sup>40</sup> *E.g.*, Hand, Exh. SH-7 (social media posts about RVWC mentioning brown water); Hand, Exh. SH-8 (social media posts by residents of Ms. Hand’s subdivision complaining about frequent brown water).

<sup>41</sup> Blackman, Exh. BB-1T at 7:11-12.

<sup>42</sup> Blackman, TR. at 97:12-98:5; *see* Hand, Exh. SH-33X at 5 (RVWC’s treatment program engineering study).

19           Given the weight accorded an ALJ’s findings, and the record evidence corroborating  
Ms. Hand’s testimony, the Commission should simply affirm the ALJ’s finding.

20           RVWC, however, contends that Ms. Hand’s failure to promptly notify RVWC  
undermines her claims. Ms. Hand testified that she did not initially understand the origin of  
her problem and, accordingly, took steps to address it as best she could.<sup>43</sup> She notified  
RVWC after she became aware that her problems stemmed from the manganese-  
contaminated water it sold.<sup>44</sup> Nothing about that detracts from Ms. Hand’s credibility or  
indicates undue delay.<sup>45</sup>

21           RVWC also maintains that Ms. Hand is exaggerating the severity of the manganese  
problem because “[n]o rational or scientific explanation exists why Ms. Hand’s home – and  
only her home – experienced brown water as severe and often as she claims.”<sup>46</sup> The record  
indicates that Ms. Hand’s home sits in a cul-de-sac at the end of one of RVWC’s lines,  
something that may provide the explanation RVWC seeks.<sup>47</sup> Regardless, RVWC misstates  
the record evidence. Other households did experience the same type of severe and persistent  
manganese problems that Ms. Hand did: the record contains social media posts by members  
of these households, who complain bitterly about the brown water provided by RVWC.<sup>48</sup>

22           RVWC finally contends that Ms. Hand’s water testing “further discredit[s]” her  
testimony because the tests show that her “water . . . is not brown and murky.”<sup>49</sup> As an

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<sup>43</sup> Hand, TR. at 182:20-24.

<sup>44</sup> *See id.* at 182:17-183:23.

<sup>45</sup> *Cf. U.S. Oil & Refining Co. v. Dep’t of Ecology*, 96 Wn.2d 85, 92, 633 P.2d 1329 (1981) (discovery rule that measures delay from the point at which a person becomes aware of all of the facts giving rise to a claim).

<sup>46</sup> Pet. for Review at 2 ¶ 4.

<sup>47</sup> *See, e.g.*, Hand, Exh. SH-8 at 2 (posts by Arlene Winters discussing the severity of her problem and noting that her house was located on the end of the line); Hand, Exh. SH-14 at 15 (Ms. Hand explaining that her home is located on the end of a line).

<sup>48</sup> *E.g.*, Hand, Exh. SH-8; Hand, Exh. SH-9.

<sup>49</sup> Pet. for Review at 3 ¶ 5.

initial matter, RVWC incorrectly states what those samples show. Water samples from Ms. Hand's water heater and bathtub show turbidity and color results that exceed the DOH's maximum contaminant levels.<sup>50</sup> Turbidity measures the sedimentation (and therefore coloration) of water;<sup>51</sup> and the purpose of color testing is evident from its name.<sup>52</sup> Two of the samples show significant concentrations of manganese, with one of the samples showing manganese contamination in excess of the secondary maximum contaminant level,<sup>53</sup> and manganese in excess of that level causes discoloration.<sup>54</sup> All this evidence supports, rather than undermines, Ms. Hand's claim that RVWC provided her with brown water.

**2. Ms. Hand's sample results are probative.**

23 RVWC next assails the water quality tests offered by Ms. Hand and the ALJ's use of the data produced by those tests. RVWC contends that (1) the tests employed flawed sampling methodology, (2) RVWC did not have an opportunity to cross-examine the industrial hygienist that performed the tests, (3) the ALJ ignored DOH rules governing the averaging of tests, (4) the law only requires RVWC to comply with DOH requirements, and (5) the ALJ's order creates strict liability. None of RVWC's arguments is persuasive.

24 RVWC first complains that Ms. Hand failed to provide testimony about the sampling protocols used.<sup>55</sup> Ms. Hand testified that the samples came from inside her house and testified to the best of her memory about the protocols used.<sup>56</sup> Given that testimony, the ALJ

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<sup>50</sup> Hand, Exh. SH-29 at 8, 18.

<sup>51</sup> Hand, Exh. SH-26T at 5:5-16.

<sup>52</sup> *Id.* at 4:14-5:3.

<sup>53</sup> Hand, Exh. SH-29 at 7, 17.

<sup>54</sup> Blackman, TR. at 97:20-98:5.

<sup>55</sup> Pet. for Review at 3-5 ¶¶ 6-9.

<sup>56</sup> Hand, Exh. SH-26T at 2:28-3:28.



properly determined that the tests were relevant and that RVWC's arguments simply went to the weight to afford those tests.<sup>57</sup> That was within the ALJ's discretion.<sup>58</sup>

25 RVWC next claims that it could not cross-examine the industrial hygienist performing the tests, making them unreliable.<sup>59</sup> RVWC did not object to the admission of the test results on that basis; it instead asked the Commission to exclude them based on Ms. Hand's inability to provide what it deemed an appropriate foundation.<sup>60</sup> RVWC did not utilize the Commission's discovery rules to probe the hygienist's methodology. Nor did RVWC demand that Ms. Hand produce the hygienist, or attempt to call the hygienist to the stand. The Commission should hold that RVWC waived its claim as to confronting the hygienist based on those facts.<sup>61</sup>

26 Regardless, RVWC does not explain how its inability to cross-examine the hygienist prejudiced it. The company offered testimony impeaching the testing methodologies.<sup>62</sup> By failing to produce the hygienist, Ms. Hand could not rebut that testimony.<sup>63</sup> Again, the ALJ weighed the test results accordingly, but determined that they were probative enough given the lack of any other quantitative water quality evidence.<sup>64</sup>

27 RVWC next alleges that Ms. Hand's samples likely showed artificially high manganese results because the hot water heater sat unused for 24 hours.<sup>65</sup> The company

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<sup>57</sup> RCW 80.28.030.

<sup>58</sup> See *Millies v. Landamerica Transnation*, 185 Wn.2d 302, 319, 372 P.3d 111 (2016)

<sup>59</sup> Pet. for Review at 3 ¶ 6.

<sup>60</sup> TR. at 61:9-15; *State v. Walker*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993) (per curiam) (a party only preserves a claim of error in the admission of evidence based on the specific objection to the admission of the evidence).

<sup>61</sup> Cf. *State v. Schroeder*, 164 Wn. App. 164, 168-69, 262 P.3d 1237 (2011).

<sup>62</sup> Blackman, Exh. BB-2T at 2:17-4:7.

<sup>63</sup> Pet. for Review at 4:19-20 ("Ms. Hand produced no evidence or testimony to refute Mr. Blackman's testimony.").

<sup>64</sup> TR. at 62:17-25.

<sup>65</sup> Pet. for Review at 4 ¶¶ 7-8.

notes that particulates settle in the heater, requiring yearly flushing.<sup>66</sup> This argument might have merit if not for Ms. Hand’s testimony that she drains her hot water heater twice a month.<sup>67</sup> If RVWC supplies water that fails the DOH’s water quality standards after sitting for 24 hours in a water heater cleaned at most two weeks before the testing, the Commission should treat that fact as conclusive on the question of the water’s purity.

28           RVWC also contends that the ALJ erred by refusing to average Ms. Hand’s samples, contending that the ALJ “decline[d] to follow DOH’s methodology.”<sup>68</sup> But RVWC cites no authority for the proposition that the averaging methodology applies before the Commission, and nothing in the text of RCW 80.28.030(1) indicates that the legislature intended it to. DOH’s regulations require a “yearly average” of test results, and specifically require at least a year’s data before a system can be considered in violation.<sup>69</sup> If the averaging provisions apply, then the Commission must presume that the legislature intended that consumers suffer impure water for up to a year before the Commission takes action, an absurd result which should be avoided<sup>70</sup> in light of the Commission’s duties.<sup>71</sup>

29           RVWC further maintains that “the law holds RVWC to the technical standard imposed by the DOH,” and that it met that standard.<sup>72</sup> True, RVWC must comply with DOH’s water quality regulations. But it must also provide water that the Commission deems sufficiently pure,<sup>73</sup> a component of its duty to provide just and reasonable service.<sup>74</sup> Compliance with DOH’s standards is evidence that RVWC has discharged its duties under

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<sup>66</sup> Blackman, Exh. BB-2T at 3:8-16.

<sup>67</sup> Hand, TR. at 218:1-3.

<sup>68</sup> Pet. for Review at 5 ¶ 10.

<sup>69</sup> WAC 246-290-310(3)(b).

<sup>70</sup> *State v. Ervin*, 169 Wn.2d 815, 823-24, 239 P.3d 354 (2010).

<sup>71</sup> RCW 80.01.040(3); RCW 80.28.020.

<sup>72</sup> Pet. for Review at 6 ¶ 13.

<sup>73</sup> RCW 80.20.030.

<sup>74</sup> RCW 80.20.020.

the public service laws; conversely, violations of those standards are evidence that RVWC has failed to live up to its responsibilities under the public service laws.<sup>75</sup> Here, RVWC failed to discharge its duty to supply water meeting the Commission's standards for purity.

30           RVWC finally contends that the ALJ's order creates strict liability for water providers.<sup>76</sup> As the ALJ noted, RCW 80.28.030(1) provides that a violation of DOH's water quality standards is prima facie evidence of impurity. The key words there are "prima facie." RVWC introduced no evidence to rebut Ms. Hand's claims that the water in her house is brown and malodorous. While RVWC did introduce evidence showing that it had remedied the problem at the wellhead, its own witness acknowledged that the company had no idea how much manganese remained in its pipes and how long it would take that manganese to work its way out of the system.<sup>77</sup> And the ALJ ordered service quality improvements because RVWC supplied impure water for a period of years.<sup>78</sup> Nothing about that indicates that the ALJ's order is unduly harsh.

**3.       The ALJ properly determined that RVWC supplied Ms. Hand with impure water given the findings related to her testimony and the test results.**

31           Finally, RVWC asks the Commission to reverse the ALJ's finding that it provided her with impure water based on its claims about her credibility and her test results.<sup>79</sup> Ms. Hand offered credible testimony about the quality of the water RVWC supplied her with, and test results indicate the water failed the DOH's water quality standards. RVWC supplied Ms. Hand with impure water.

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<sup>75</sup> RCW 80.28.030.

<sup>76</sup> Pet. for Review at 5 ¶ 11.

<sup>77</sup> Blackman, TR. at 134:21-135:3, 144:11-14.

<sup>78</sup> Initial Order at 14 ¶ 47.

<sup>79</sup> Pet. for Review at 7 ¶ 18, 11 ¶¶ 30-32, 13-14 ¶¶ 41-43.

**B. The ALJ Ordered Remedies Authorized by Law**

32 RVWC also takes issue with the remedies ordered by the ALJ. RVWC claims that the ALJ (1) set an impossible standard for compliance, (2) ignored the limitation on liability in RVWC's tariff, (3) ignored the apportionment of maintenance costs between RVWC and its customers, (4) ignored Ms. Hand's failure to mitigate her damages, and (5) improperly provided for prospective refunds of Ms. Hand's bill until RVWC complies with the order's provisions concerning water quality. The Commission should reject each of those arguments.

33 RVWC contends that the ALJ erred by ordering that RVWC "remove all manganese from the distribution system," which RVWC claims is an order that it supply water containing "zero manganese," something RVWC deems impossible.<sup>80</sup> RVWC overstates what the ALJ ordered. The words "remove all" and "zero manganese" are not found in the order.<sup>81</sup> The ALJ simply ordered RVWC to supply water "consistently meet[ing] or exceed[ing]" DOH water quality standards within 60 days of the effective date of a final order.<sup>82</sup> Any RVWC statement that it cannot do that is a statement that it cannot comply with DOH regulations, which should be of some concern to both the Commission and the DOH.

34 RVWC next contends that the ALJ ignored the fact that its tariff limits its customers' ability to seek monetary damages to certain specified conditions when making it responsible for the costs of service quality improvements.<sup>83</sup> RVWC's tariff's liability limiting provision has no relevance to the ALJ's order to improve service quality. The provision limits

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<sup>80</sup> Pet. for Review at 7 ¶ 16.

<sup>81</sup> See generally Initial Order.

<sup>82</sup> Initial Order at 15 ¶ 51, 16 ¶ 63.

<sup>83</sup> Pet. for Review at 8-9 ¶¶ 20-22.

RVWC's liability for damages, which are a legal remedy paid to make a person whole for an injury.<sup>84</sup> The ALJ did not order RVWC to pay Ms. Hand damages or in any way order the company to make her whole, but instead required RVWC to improve the quality of the water that it provides.

35 Nor does the liability-limiting provision affect the ALJ's order that RVWC prospectively refund Ms. Hand's bill until it provides her with pure water. Even assuming that the tariff limits the Commission's ability to order a refund,<sup>85</sup> the refund is a "proportionate part of the monthly recurring charge for service for the period during which the service was affected,"<sup>86</sup> which the tariff expressly permits.

36 RVWC next contends that the ALJ's order ignores provisions in its tariff requiring its customers to provide and maintain all pipes and fixtures on the customer side of the meter.<sup>87</sup> That provision is also irrelevant. It says nothing about how to allocate service quality improvements ordered by the Commission.

37 RVWC further maintains that the initial order does not account for Ms. Hand's failure to mitigate damages.<sup>88</sup> That argument fails for three reasons. First, failure to mitigate damages is an affirmative defense and, accordingly, RVWC bore the burden of proof.<sup>89</sup> RVWC does not appear to have introduced evidence that Ms. Hand could have mitigated the problem but did not.<sup>90</sup> Ms. Hand, conversely, testified that she had performed, and continued

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<sup>84</sup> BLACK'S LAW DICTIONARY at 393 (defining damages as "money claimed by, or ordered to be paid to, a person as compensation for loss or injury.").

<sup>85</sup> See RCW 80.04.220, .230 (statutory authorization for refunds); WAC 480-110-395 (rule-based authorization for a refund); WAC 480-80-020 (tariffs must comply with the laws of Washington).

<sup>86</sup> Blackman, Exh. BB-5 at Sheet No. 14 (Rule 20).

<sup>87</sup> Pet. for Review at 9 ¶ 23.

<sup>88</sup> *Id.* at 9 ¶¶ 23-24.

<sup>89</sup> *E.g., Fed. Signal Corp v. Safety Factors, Inc.*, 125 Wn.2d 413, 86 P.2d 172 (1994); *Bernse v. Big Bend Elec. Co-op., Inc.*, 68 Wn. App. 427, 432-33, 842 P.2d 1047 (1993).

<sup>90</sup> *But see* Hand, TR. at 187:19-22 (testimony about the possible lack of preventative maintenance by Ms. Hand's predecessor in interest).

to perform, preventative maintenance to address her water problems.<sup>91</sup> Second, a party owes no duty to mitigate ongoing problems,<sup>92</sup> and RVWC's own witness testified that manganese may continue to slough off the company's pipes and flow into Ms. Hand's home for up to several years. Third, as discussed above, the ALJ did not order RVWC to pay damages, but instead ordered service quality improvements.

38           Finally, RVWC claims that the ALJ erred by prospectively providing for a refund to Ms. Hand, because: (1) RVWC has met DOH requirements; (2) even if the Commission determines that RVWC failed to comply with DOH requirements in the past, no evidence supports a finding that RVWC currently supplies impure water; and (3) the prospective refund raises due process concerns.

39           RVWC implores the Commission not to provide for a refund where "DOH has already approved of the water" it provides.<sup>93</sup> Staff has addressed this argument above: RVWC supplied Ms. Hand with impure water, whether or not the Commission bases that determination solely on Ms. Hand's testimony and exhibits other than the test results, on the test results, or both.

40           RVWC also contends that no evidence shows that the water it provides is currently impure given its installation of a filter system at its wellheads.<sup>94</sup> While RVWC correctly notes that the water entering into the distribution system meets DOH standards,<sup>95</sup> its own witness recognized that RVWC cannot say how much manganese sediment is in its pipes.<sup>96</sup> He also acknowledged that manganese sediment may work its way out of those pipes and

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<sup>91</sup> Hand, TR. at 182:20-24. 217:16-218:3.

<sup>92</sup> *E.g., Desimone v. Mut. Materials Co.*, 23 Wn.2d 876, 884, 162 P.2d 808 (1945).

<sup>93</sup> Pet. for Review at 10 ¶ 27.

<sup>94</sup> *Id.* at 14 ¶ 44.

<sup>95</sup> Blackman, TR. at 140:1-25.

<sup>96</sup> *Id.* at 141:10-12.

into customers' homes for years.<sup>97</sup> And Ms. Hand testified that her water quality has not significantly improved.<sup>98</sup> That evidence readily allows a finding that RVWC continues to supply impure water.

41 Finally, RVWC argues that the prospective refund here violates its right to due process.<sup>99</sup> That claim is meritless. Ms. Hand's complaint requested a water quality refund, which both statute<sup>100</sup> and Commission rule permit.<sup>101</sup> The Commission's rules also provide that, in the context of an adjudication, the Commission may waive any provision in its rules if doing so is consistent with the public interest, the purposes underlying the regulation, and applicable statutes.<sup>102</sup> The ALJ necessarily determined that the waiver was in the public interest, and it is certainly consistent with both the regulations and statutes authorizing refunds and also with their purposes. RVWC had the opportunity to contest the request for a refund at hearing, and the ALJ did not order a retroactive refund. Given all of that, RVWC had more than adequate notice and a meaningful opportunity to be heard. The ALJ's order complied with due process.<sup>103</sup>

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<sup>97</sup> *Id.* at 134:21:-135:3.

<sup>98</sup> Hand, TR. at 217:16-219:7.

<sup>99</sup> Pet. for Review at 16 ¶ 54.

<sup>100</sup> RCW 80.04.220, .230.

<sup>101</sup> WAC 480-110-395.

<sup>102</sup> WAC 480-07-110; WAC 480-07-215.

<sup>103</sup> *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006).

#### IV. CONCLUSION

42 The record supports the ALJ's findings that RVWC supplied Ms. Hand with impure water. The remedies ordered by the ALJ flow directly from that finding.<sup>104</sup> The Commission should deny RVWC's petition for review.

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Respectfully submitted,

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<sup>104</sup> RCW 80.28.030(1) (the Commission "shall" order improvements when water sold is impure).