

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

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

COUGAR RIDGE WATER SYSTEM,

Respondent.

DOCKET NO. UW-040367

COMMISSION STAFF
MOTION FOR SUMMARY
DETERMINATION

I. RELIEF REQUESTED

1 Commission Staff moves for summary determination on the claim that the respondent, Cougar Ridge Water System, Inc., (Cougar Ridge or Company) is a water company, as defined by RCW 80.04.010, and is therefore subject to the Commission's regulatory jurisdiction under chapter 81.28 RCW and chapter 480-110 WAC.

2 This motion is made on the ground that no genuine issue of material fact
exists that Cougar Ridge is a water company subject to regulation by the
Commission and as such, the Commission should enter an order, pursuant to RCW
80.04.015, declaring the activities of Cougar Ridge to be subject to the provisions of
Title 80 RCW and requiring the company to comply, by a date certain,¹ with RCW
80.28.050 (requiring water companies to file tariff schedules with the commission),
WAC 480-110-295(3) (prescribing requirements for an initial tariff filing), and related
provisions.

II. STATEMENT OF FACTS

3 Cougar Ridge is a water supply system that provides water service to
residences in the Cougar Ridge development, located in unincorporated Thurston
County, Washington. (Thompson Decl., response to staff DR 3.)

4 Cougar Ridge is solely owned by Paul A. Bitar whose business address is 444
8th Avenue, Hoquiam, Washington. (*Id.*, response to staff DR 1.)

5 The Company provides water service to at least 43, but fewer than 100
customers in the Cougar Ridge development and holds itself out to supply domestic
water service to all who purchase or build houses within that development. (*Id.*,
response to staff DR 5.)

¹Staff recommends that the Commission allow the company 30 days from the entry of the Commission order.

Cougar Ridge admits that the water system is owned, controlled and managed for the owner’s gain (that is, to recover his investment and a return on that investment through revenues received from customers) and that the Company is not operated as a not-for-profit organization or as a cooperative. (*Id.* response to staff DR 7.) Cougar Ridge makes that admission, however, subject to the following exception or proviso:

The ownership and purposes of the water system have been inextricably tied to the ownership and purposes of the overall development. Unfortunately, the development has been mired in litigation for many years, which prevented the owner from bringing the development or the water system to full and proper fruition.

(*Id.*, response to staff DR 8.) The Company bills its customers on a monthly basis, at a flat (non-metered) rate. (*Id.*, response to staff DRs 9, 17.) The Company’s per-customer monthly service charges from January of 2002 until April of 2004 were as follows:

Month	Rate
Jan-02	\$32.50
Feb-02	\$32.50
Mar-02	\$32.50
Apr-02	\$32.50
May-02	\$32.50
Jun-02	\$32.50
Jul-02	\$37.50
Aug-02	\$37.50
Sep-02	\$37.50
Oct-02	\$37.50
Nov-02	\$37.50

Dec-02	\$37.50
Jan-03	\$37.50
Feb-03	\$37.50
Mar-03	\$37.50
Apr-03	\$37.50
May-03	\$37.50
Jun-03	\$37.50
Jul-03	\$37.50
Aug-03	\$43.00
Sep-03	\$43.00
Oct-03	\$43.00
Nov-03	\$0.00
Dec-03	\$0.00
Jan-04	\$35.00
Feb-04	\$35.00
Mar-04	\$35.00
Apr-04	\$35.00

(*Id.*, response to staff DR 17.) The Commission’s rules at WAC 480-110-255 explain how to determine average annual revenue per customer. The information that is required to make the calculation is (1) the amount that the company charged each customer for service each month during twelve consecutive months and (2) the number of customers who were charged for service each month (i.e., the number of monthly service periods). (Eckhardt Decl. ¶ 4.) From February 2002 through June 2002 , Cougar Ridge had 35 customers. From July 2002 through December 2002 it had 36. From January through June of 2003 it had 41, and from July through September of 2003, it had 43. Based on these figures, over the twelve consecutive months ending with February of 2003, the Company’s average annual per customer

revenue was \$430.82. (Exhibit to Eckhardt Decl. column D.) In September of 2003, the rolling twelve month average annual revenue per customer had increased to \$461.75. (*Id.* column M, row 41.)

7 The Company waived monthly service charges for November and December of 2003 as “a method of keeping the system under the jurisdictional threshold.” (Thompson Decl., response to staff DR 19.) Starting with January of 2004, Cougar Ridge resumed charging a monthly per customer service charge, but at a new rate of \$35. If the company maintains this rate, the twelve-month rolling total service charge amount will eventually level out at \$420. (Eckhardt Decl. ¶ 7)

8 Cougar Ridge is not certain of the exact date that it made the decision to do so, but it admits that, by July 1, 2003 it had increased the charge for a new connection to the system from \$600 to \$3,000. (Thompson Decl., response to staff DR 20.)

III. STATEMENT OF THE ISSUE

9 The issue presented for resolution by the Commission is whether Cougar Ridge meets the RCW 80.04.010 definition of a water company under the test pertaining to average annual revenue per customer set out in WAC 480-110-255(5), and if so, whether the Commission should order Cougar Ridge to file a tariff and supporting documents by a date certain.

IV. EVIDENCE RELIED UPON

10 This motion is based on the Declaration of Eugene K. Eckhardt, Assistant Director of Transportation and Water; the Declaration of James A. Ward, Regulatory Analyst; the Declaration of Jonathan Thompson, Assistant Attorney General, Counsel for Commission Staff; and the Respondent's answers to WUTC Staff Data Requests 1-21, attached as an exhibit to the Declaration of Jonathan Thompson.

V. LEGAL AUTHORITY

11 This motion is made pursuant to WAC 480-07-380(2)(a), which provides that:

A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (e.g., affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion made under this subsection, the commission will consider the standards applicable to a motion made under CR 56 of the Washington superior court's civil rules.

Although the parties may disagree about the conclusions to be drawn from the facts, such as whether the Commission has discretion, and if so whether it should, in its discretion, decline to order Cougar Ridge to file a tariff, there is no genuine issue of material fact.

12 RCW 80.01.040 directs the utilities and transportation commission to "[e]xercise all the powers and perform all the duties prescribed therefor by this title and by Title 81 RCW, or by any other law" and to "[r]egulate in the public interest,

as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to . . . water companies.”

13 RCW 80.28.050 provides that “[e]very . . . water company shall file with the commission and shall print and keep open to public inspection schedules in such form as the commission may prescribe, showing all rates and charges made, established or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations relating to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed by such . . . water company.” RCW 80.28.080 states that “[n]o . . . water company shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such service as specified in its schedule filed and in effect at the time, . . .”

14 Under RCW 80.28.020 the commission is authorized to determine, after a complaint or a hearing on its own motion, “the just, reasonable, or sufficient rates, charges, regulations, practices or contracts” to be observed and in force for public service companies, including water companies.

RCW 80.04.010 defines “water company” to include:

every corporation, company, association, joint stock association, partnership and person . . . owning, controlling, operating, or managing any water system for hire within this state: PROVIDED, That for purposes of commission jurisdiction it shall not include any water system serving less than one hundred customers where the average annual gross revenue per customer does not exceed three hundred dollars per year, which revenue figure may be increased annually by the commission by rule adopted pursuant to chapter 34.05 RCW to reflect the rate of inflation as determined by the implicit price deflator of the United States department of commerce . . . A water company cannot be removed from regulation except with the approval of the commission. Water companies subject to regulation may petition the commission for removal from regulation if the number of customers falls below one hundred or the average annual revenue per customer falls below three hundred dollars. The commission is authorized to maintain continued regulation if it finds that the public interest so requires.

Under WAC 480-110-255(1)(b) the Commission has increased the \$300 threshold for entering Commission jurisdiction to \$429. Thus, a water company is exempt from Commission jurisdiction if it has fewer than 100 customers and has not received average annual per-customer revenue of \$429 or greater. A company that is below the jurisdictional threshold could come within the Commission's jurisdiction either upon connecting its 100th customer or upon receiving, over a twelve-month period, average per-customer revenue of \$429 or greater.

15 WAC 480-110-255 details how to determine when the facts giving rise to regulation are met. It states:

WAC 480-110-255 Jurisdiction. (1) The commission only regulates investor-owned water companies that:

(a) Own, operate, control, or manage one or more water systems; except that control or management does not include management by a satellite management agency as defined in chapter 70.116 RCW if the satellite management agency is not an owner of the water company.

(b) Meet jurisdictional thresholds of one hundred or more customers, or receive average revenue of four hundred twenty-nine dollars per customer per year.

If a water company serves customers	and receives average annual revenue per customer	commission regulation
99 or less	less than \$429	No
99 or less	\$429 or more	Yes
100 or more	less than \$429	Yes
100 or more	\$429 or more	Yes

Subsection (4) of the same rule provides that:

To calculate the average annual revenue per customer, the commission considers only the charges that water-receiving customers pay on a monthly basis, other than contributions in aid of construction. For example, this includes money paid for flat-rate service or the metered base-charge and all usage charges.

Subsection (4)(b) states:

The commission does not consider contributions in aid of construction in determining jurisdiction. These contributions can be money, services or property. Payments can be made in a lump sum or financed over time. Examples of contributions in aid of construction include payments for:

- (i) Connection to system
- (ii) Meter installation.
- (iii) System buy-in.
- (iv) Facilities charges.
- (v) Assessments for capital plant and equipment.

Subsection (5) of the rule provides a very detailed explanation, including an illustrative example, of how to calculate average annual revenue per customer. Based on information Cougar Ridge supplied to Staff about the number of customers the company billed for service, the amount of its monthly service charges, and its resulting revenues, the company's average annual revenue per customer exceeded the threshold for Commission jurisdiction beginning in February 2003. (Eckhardt Decl. ¶ 5.) For the twelve months ending with September 2003, the company's average annual revenue per customer was \$461.75. (Exhibit to Eckhardt Decl. column M, row 41.)

16 Subsection (5) does not restrict the calculation of the average annual revenue per customer to a calendar year (i.e., January to December). Instead, the rule instructs the reader to “[s]elect the most recent twelve consecutive months,” and provides an example that uses a twelve-month period that begins with February and ends with January.

17 Because Cougar Ridge met the revenue test for Commission jurisdiction beginning in February 2003 and continuing through at least September of the same year, the Company should have filed an initial tariff, in accordance with the Commission's rules, to become effective on the date on which its revenues met the threshold for jurisdiction, but it did not do so. The Company waived service charges for November and December of 2003 in an effort to remain below the

revenue threshold for Commission jurisdiction. (Thompson Decl., response to staff DR 19.) Going forward, the Company's rates will produce average annual revenue per customer below \$429, but significantly above \$300 (\$420). (Eckhardt Decl. ¶ 7.)

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Having exceeded the \$429 revenue threshold, the Company is subject to regulation and should be ordered to file a tariff. RCW 80.04.015 ("In the event the activities are found to be subject to the provisions of this title, the commission shall issue such orders as may be necessary to require all parties involved in the activities to comply with this title"). A company cannot remove itself from the Commission's jurisdiction merely by reducing its rates. If a company meets the definition of water company, Commission regulation applies regardless of whether the company has filed a tariff in recognition of that fact or whether the Commission has declared it to be so.² Water companies that are subject to Commission regulation cannot be removed from regulation unless the Commission approves. RCW 80.04.010 ("A

²In *WUTC v. G&W Aqua, Inc.*, Commission Decision and Order Affirming Proposed Order Granting Motion to Suspend, WUTC Docket No. U-87-1089 (Sept. 16, 1988), the Commission found that a company had been subject to Commission jurisdiction for a period of a year and seven months because of its rate levels, even though it never filed an initial tariff with the Commission during the period when its rates exceeded the statutory threshold and the Commission had apparently never taken action to declare the company subject to regulation. The Commission made this finding in applying RCW 80.04.130(3), which states that the commission may suspend the initial tariff filing of any water company removed from and later subject to commission jurisdiction, and that the temporary rates during the suspension shall not exceed the rates charged when the company was last regulated. G&W Aqua had been "removed" from the Commission's jurisdiction as a result of the legislature raising the revenue threshold from \$120 to \$300 in 1985. At that time, the company's rates yielded revenues of \$177.91. Importantly, when this occurred, RCW 80.04.010 did not provide that water companies cannot be removed from regulation except with the approval of the Commission. That language was added in 1991. Laws of 1991, ch. 100, § 1.

water company cannot be removed from regulation except with the approval of the commission.”)

19 In its definition of “water company,” the legislature set out two different revenue “thresholds.” The first revenue threshold that is set out in the statute is the one at which a water system is deemed to have entered Commission jurisdiction.³ The legislature authorized the Commission to adjust this threshold (\$300 in the statute) for inflation using a specific price index. The second revenue threshold is that below which a company’s revenues must drop before the company may petition to be removed from regulation.⁴ The legislature did not authorize the Commission to adjust the latter threshold (also \$300 in the statute) for inflation.⁵

20 Having exceeded the \$429 threshold, Cougar Ridge became subject to Commission jurisdiction. Unless its revenues now fall below \$300 per customer per year, it may not petition to be removed from regulation and the “public interest”

³ PROVIDED, That for purposes of commission jurisdiction it shall not include any water system serving less than one hundred customers where the average annual gross revenue per customer does not exceed three hundred dollars per year, which revenue figure may be increased annually by the commission by rule adopted pursuant to chapter 34.05 RCW to reflect the rate of inflation as determined by the implicit price deflator of the United States department of commerce: [emphasis added]

⁴ Water companies subject to regulation may petition the commission for removal from regulation if the number of customers falls below one hundred or the average annual revenue per customer falls below three hundred dollars. [emphasis added]

⁵ Although one might argue that the thresholds really are one and the same and are both adjustable for inflation, there are at least two rules of statutory construction that preclude such an interpretation: (1) when the legislature uses certain statutory language in one instance, and different language in another, courts will presume a difference in legislative intent. *State v. Jackson*, 137 Wn.2d 712, 724 (1999), and (2) a court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.” *In re Custody of Smith*, 137 Wn.2d 1, 12 (1998).

standard for continued regulation does not apply. RCW 80.04.010 (“Water companies may petition the commission for removal from regulation if the number of customers falls below one hundred or the average annual revenue per customer falls below three hundred dollars. The commission is authorized to maintain continued regulation if it finds that the public interest so requires.”)

21 If the Commission finds, however, that it may consider whether the public interest requires regulation of Cougar Ridge, Staff submits that the public interest does so require. This is because, in approximately July of 2003, the Company increased its connection charge by \$2,400 (400%) to \$3,000. Although Staff has not studied Cougar Ridge’s costs, Staff believes that Cougar Ridge’s \$3,000 connection charge is likely to produce revenues well in excess of the actual cost of connecting each new customer’s service line to the company’s distribution main (Ward Decl. ¶ 7.). The charge is also, Staff would argue, unjustly discriminatory toward new customers.⁶ The purpose of a connection charge under Commission rules for regulated water companies⁷ and under published national industry and regulatory

⁶RCW 80.28.100 (prohibiting a water company from collecting a charge from any person for water, or for any service rendered in connection therewith, that is of greater compensation than it collects from any other person for doing a like service under the same or substantially similar circumstances or conditions.)

⁷WAC 480-110-445(3) states that “A water company may assess a service connection charge, if named in its tariff, to recover the cost of the service connection.” WAC 480-110-245 defines a service connection as “the pipes, valves, and fittings between the water company’s distribution system and the customer’s service line.”

standards for water systems⁸ is to recover the cost of labor and materials to tap into the water main that runs along the street, to install a service line to the customer's property line, and, if a meter is used, to install a meter setter, a meter box and a stub out. (Ward Decl. ¶ 5.) The average amount, including applicable taxes, for water system connection charges that have been reviewed by Staff is \$417, and the highest such charge that has been reviewed by Staff is \$913. (*Id.* ¶ 6.) Although under WAC 480-110-255(4)(b) the Commission does not consider contributions in aid of construction, such as legitimate connection charges, toward annual per customer revenue for determining jurisdiction, the Commission does *regulate* all charges for service, including connection charges. RCW 80.28.020 (authorizing Commission to determine the just, reasonable or sufficient rates or charges demanded by a water company for water or in connection therewith); RCW 80.28.050 (requiring every water company to file a tariff showing all rates and charges made).

⁸ The American Water Work Association's (AWWA) manual *Principles of Water Rates, Fees, and Charges*, defines "connection charge" as "[a] charge made by the utility to recover the cost of connecting the customer's service line to the utility's facilities. This charge often is considered as contribution of capital by the customer or other agency applying for the service." The National Association of Regulatory Commissioners (NARUC) Uniform System of Accounts for water utilities, #333 Services, states under section (A) that "[t]his account shall include the cost installed of service pipes and accessories leading to the customers premises." Under section (B) it notes, "A complete service begins with the connection on the main and extends to but does not include the connection with the customer's meter. A stub service extends from the main to the property line or the curb stop (curb stop cock)."

22 If the Commission were to decline to assert jurisdiction over Cougar Ridge, it
would have no assurance that the Company would not continue to charge its
inequitable and very likely excessive connection charge.

VI. CONCLUSION

23 The undisputed facts show that Cougar Ridge Water System exceeded the
revenue threshold above which water systems become subject to regulation under
Title 80 RCW. Even though it has reduced its rates from the level that caused it to
exceed this threshold, its revenues have not gone below the level at which a
regulated water company may petition the Commission to be removed from
regulation. A company becomes subject to regulation by operation of law—it is not
a discretionary act on the part of the Commission. But even if the Commission finds
that it has the discretion not to order the Company to comply with the provisions of
Title 80, the fact that the Company raised its connection charges so significantly, and

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so much above the usual level of cost-based connection charges that have been review by staff, argues against any such exercise of discretion.

DATED this 11th day of June, 2004.

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