

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Penalty Assessment)	DOCKET UW-140598
Against)	
)	ORDER 01
WASHINGTON WATER SUPPLY,)	
INC.)	INITIAL ORDER RESCINDING
)	PENALTY ASSESSMENT
In the Amount of \$11,600)	
.....)	

BACKGROUND

- 1 On April 17, 2014, the Washington Utilities and Transportation Commission (Commission) issued a penalty assessment against Washington Water Supply, Inc. (WWS or Company) in the amount of \$11,600, alleging that the Company acquired and has been operating two water systems, Silent Sky and Bainbridge 1, neither of which were listed in the Company’s tariff. The Commission assessed penalties against WWS for failing to file either an application for a transfer of property, or revisions to its tariff as required by WAC 480-110-433.
- 2 On May 2, 2014, WWS filed a request for hearing, disputing the violation on the grounds that the Company has never owned the Silent Sky or Bainbridge 1 water systems and thus was not obligated to apply for a transfer of property or revise the Company’s tariff to include those systems.
- 3 On May 20, 2014, Commission Staff (Staff) filed a response to the Company’s request, disagreeing with the substance of WWS’s contentions but stating that Staff supports the Company’s request for a hearing.
- 4 The Commission conducted a brief adjudicative proceeding on August 18, 2014. Staff presented exhibits and the testimony of Darren Tinnerstet and Jim Ward in support of its position that from September 6, 2013, through December 31, 2013, WWS (a) operated and claimed that it owned the Silent Sky and Bainbridge 1 water systems, (b) violated Commission rules by failing to include those systems in the Company’s tariff, and (c) should be penalized \$100 for each of the 116 days WWS was not in compliance with those rules. WWS presented exhibits and the testimony of John Poppe, President of WWS, in support of the Company’s position that it did

not own the systems, did not violate any Commission rule, and should not be assessed any penalty.

- 5 Jennifer Cameron-Rulkowski, Assistant Attorney General, Olympia, represents Staff. Scott M. Ellerby, Mills Meyers Swartling P.S., Seattle, represents WWS.

DISCUSSION AND DECISION

- 6 Washington statutes require every water company to file tariffs with the Commission setting forth all rates, charges, rules, and regulations applicable to the service the company provides.¹ The statute defines a “water company” to be any person or legal entity “owning, controlling, operating, or managing any water system for hire within this state.”² WWS concedes that it operated the Silent Sky and Bainbridge 1 water systems from September 6, 2013 through December 31, 2013. WWS, therefore, is a “water company” with respect to those systems, and to the extent the Commission has jurisdiction over them,³ the statute requires the Company to file a tariff with the rates, terms, and conditions for the service WWS provides to the customers of those systems, even if the Company does not own them.

- 7 Both Mr. Ward and Mr. Poppe, however, testified that companies have been allowed to operate or manage regulated water systems under an agreement with the system owner that is not filed with, or disclosed to, the Commission, and the rates, terms, and conditions of the service are established in a tariff the water system owner files.⁴ The Commission’s rules governing water companies do not address, much less authorize, such a practice,⁵ which at the very least appears to be inconsistent with the language of the statute. We are also troubled that there are circumstances in which the Commission is unaware of the entity that is actually operating a water system subject

¹ RCW 80.28.050.

² RCW 80.04.015(30)(a).

³ See RCW 80.04.015(30)(b) (establishing jurisdictional threshold for Commission regulation of water systems).

⁴ TR at 70:9 through 72:19 (Ward); TR at 84:10 through 85:19 (Poppe). Neither Silent Sky nor Bainbridge 1 has a tariff on file with the Commission because they do not meet the jurisdictional threshold for Commission regulation. TR at 72:16-19 (Ward).

⁵ See WAC 480-110.

to Commission jurisdiction. Indeed, WWS operated the Silent Sky and Bainbridge 1 systems for over 15 and 10 years, respectively, without the Commission's knowledge.⁶

8 This proceeding, however, is not the appropriate forum to address the issue of whether a company that operates but does not own a water system should be required to file a tariff establishing the rates, terms, and conditions for the service that company is providing. Rather, our focus here is on whether the Commission correctly "assessed penalties against [WWS] in the amount of \$11,600 for failing to file either an application for transfer of property, or revisions to its tariff as required by WAC 480-110-433 for at least 116 days after the Company began operating the two additional water systems."⁷ We conclude that WWS should not have been assessed penalties under the facts of this case.

9 The Commission rule at issue provides, "A water company must file revisions to its filed tariff within thirty days of its *acquisition* of new service area."⁸ The ordinary meaning of "acquire" is "to come into possession, control, or power of disposal of often by some uncertain or unspecified means."⁹ We conclude that "acquisition" as used in the rule is equivalent to ownership or a comparable right to sell or otherwise dispose of the water system that serves the service territory.

10 The record evidence demonstrates that WWS never owned or otherwise had the right to sell or dispose of the Silent Sky or Bainbridge 1 water systems. The Company initially represented to Staff and the Washington Department of Health (DOH) that WWS owned those systems,¹⁰ but after further investigation and consultation with counsel, Mr. Poppe clarified to Staff in January 2014 that WWS does not own them.¹¹ WWS did not acquire the two systems or the area they served and accordingly had no obligation under WAC 480-110-433 to file a transfer application or revise the

⁶ TR at 91:19-25 (Poppe).

⁷ Notice of Penalties Incurred and Due for Violations of Laws and Rules at 1 (April 17, 2004).

⁸ WAC 480-110-433 (emphasis added).

⁹ Webster's Third New International Dictionary (1968).

¹⁰ *E.g.*, Exh. DPT-1 Attachments C and G.

¹¹ *E.g.*, Exhs. JP-1 & JW-5.

Company's tariff to include those systems. WWS thus did not violate that rule and should not have been assessed a penalty for such a violation.

- 11 None of Staff's arguments to the contrary support the penalty assessment. Staff contends that "acquisition" as used in WAC 480-110-433 is not limited to a legal sale and that WWS "acquired" Silent Sky and Bainbridge 1 because the Company "came into possession of these two water systems by undocumented means and has continued to exercise control over them ever since."¹² As discussed above, however, the term "acquisition" is not reasonably susceptible to such a broad interpretation. The record evidence, moreover, demonstrates that WWS "possessed" and "exercised control" over the two systems only to the extent of operating them as a satellite system manager at the request of the prior operator and the customers who own the systems,¹³ and Staff's own witness testified that this arrangement was not a violation of Commission rules.¹⁴
- 12 Staff nevertheless asserts that WWS is a "de facto" owner of the systems consistent with the evidence of its representation to Commission Staff and to the Washington Department of Health (DOH) that the Company owns the Silent Sky and Bainbridge 1 water systems, and the DOH Water Facilities Inventory Forms continuing to identify WWS as the owner of those systems. Staff cites no authority to support or explain its theory of "de facto" ownership of a water system, and we are aware of none. The evidence of the Company's representations, without more, is insufficient to prove that the Company owns the systems, particularly when WWS has maintained since January 2014 that it does not own them. The Company offers a less than satisfactory explanation for its prior misrepresentation of ownership,¹⁵ but making false statements on state government forms is not a violation of WAC 480-110-433.

¹² Staff's Answer to WWS Motion for Summary Judgment ¶ 12.

¹³ TR at 84:21 through 85-7 & 97:3 through 98:9 (Poppe).

¹⁴ TR at 103:21 through 104:14 (Ward).

¹⁵ WWS states that its "representation that it owned the systems was mistaken and based on its aspiration to eventually own the systems once all concerns regarding title and their suitability and fit within WWS' assets were resolved." WWS Motion for Summary Judgment at 2. At best, it strains credulity for the Company to claim that it equated "owning" with "intent to own," as well as for WWS to assert that it needed over 10 years of operating those systems to resolve title issues and determine whether the systems were a good fit with the rest of the Company.

- 13 Staff witnesses also testified that they considered only the facts Staff knew during the period of September 6 through December 31, 2013, when WWS maintained that it owned Silent Sky and Bainbridge 1. Mr. Poppe did not inform Staff until January 2014 that WWS does not, in fact, own the systems and never has owned them. Because Staff learned that information after December 31, 2013, Staff did not consider it when concluding that the Company violated WAC 480-110-433, and Staff did not include the Company's denial of any ownership interest in the systems in the investigation report in support of the penalty assessment.¹⁶ This was erroneous.
- 14 The Commission must consider all relevant facts of which it becomes aware during the course of an investigation, particularly when those facts are dispositive of that investigation. Once Staff knew that WWS was claiming it did not own the Silent Sky and Bainbridge 1 water systems, Staff should have obtained evidence of ownership other than the Company's prior representations or closed the investigation.¹⁷ We will not uphold the penalty against WWS when the record evidence shows that the basis on which that penalty was assessed is incorrect. The Commission cannot turn a blind eye to exculpatory information simply because that information becomes available after the time period in which the Company's actions are being examined.
- 15 Finally, Staff contends that its investigation report discloses that WWS also violated WAC 480-110-433 by failing to revise the Company's tariff to reflect the sale of the Whidbey West Water System on September 1, 2012, and that violation alone justifies the assessed penalty. The penalty assessment notice, however, states that the Commission assessed a penalty only because WWS did not revise its tariff to include the Silent Sky and Bainbridge 1 systems. The notice makes no reference to the Whidbey West Water System. The Commission cannot penalize the Company, consistent with due process, for a different violation than the violation on which the original penalty assessment was based.

¹⁶ E.g., TR at 40:2-17 (Tinnerstet); TR at 56:5 through 58:4 (Ward).

¹⁷ Staff investigation reports, moreover, should include all relevant facts known as of the date of the report. Staff knew in January 2014 that WWS was asserting that it has never owned the Silent Sky and Bainbridge 1 water systems, but the investigation report Staff prepared three months later did not disclose this information. The Commission relied on that report to issue the penalty assessment in this case and would not have taken that action had the Commission been aware of this additional information.

16 WWS did not own the Silent Sky and Bainbridge 1 water systems and thus had no
obligation under WAC 480-110-433 to revise the Company's tariff to include those
systems. Because WWS did not violate WAC 480-110-433, the penalty assessed
against the Company for violation of that rule must be rescinded.

FINDINGS AND CONCLUSIONS

17 (1) The Washington Utilities and Transportation Commission is an agency of the
State of Washington, vested by statute with authority to regulate rates, rules,
regulations, and practices of public service companies, including water
companies, and has jurisdiction over the parties and subject matter of this
proceeding.

18 (2) WWS is a water company subject to Commission regulation.

19 (3) WWS did not own the Silent Sky and Bainbridge 1 water systems during the
time period of September 6, 2013, through December 31, 2013.

20 (4) WWS did not acquire the Silent Sky and Bainbridge 1 water systems within
the meaning of WAC 480-110-433 and thus had no obligation under that rule
to revise the Company's tariff to include those systems.

21 (5) The penalty assessed against WWS for violation of WAC 480-110-433 should
be rescinded.

ORDER

THE COMMISSION ORDERS That

22 (1) The penalty assessed against Washington Water Supply, Inc., for violation of
WAC 480-110-433 is rescinded.

23 (2) This docket is closed.

DATED at Olympia, Washington, and effective August 28, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

GREGORY J. KOPTA
Administrative Law Judge

NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and **five (5)** copies of any Petition or Answer must be filed by mail delivery to:

Attn: Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
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