

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Determining the Proper  
Carrier Classification of:

LOWPER, INC. d/b/a LOWPER  
CORPORATION, a/k/a "LOWPER  
WATER COMPANY" and "ILIAD, INC.  
d/b/a LOWPER WATER SYSTEM"

and

In the Matter of the Penalty Assessment  
Against LOWPER, INC., in the Amount of  
\$10,500

DOCKETS UW-091006  
and UW-110213 (*consolidated*)

COMMISSION STAFF BRIEF ON  
LIMITED ISSUE

1 Staff of the Washington Utilities and Transportation Commission (Staff) submits this  
brief on the limited legal issue presented by the commission in its Notice of Opportunity to  
Brief Issue entered on April 29, 2011.

**ISSUE PRESENTED**

2 Does the Commission have the legal authority to mitigate the assessed penalty  
against Lowper, Inc. (Lowper) under RCW 80.04.405 when the Company did not submit a  
written request for mitigation within fifteen days of the notice of penalty assessment?

**ANALYSIS**

**The Commission has the Legal Authority to Mitigate the Penalty Assessment**

3 This brief addresses the legal question presented. As explained below, the  
Commission has the legal authority. This is a separate question from whether, assuming the  
authority exists, the Commission *should* mitigate the penalty on the merits. The  
Commission held a hearing on the merits on April 27, 2011. There, Staff recommended  
against mitigation on the merits.

4 On February 14, 2011, the Commission issued a \$10,500 penalty assessment against

Lower for 105 violations of WAC 480-110-433(3), in Docket UW-110213. On February 23, 2011, within 15 days of the penalty assessment, Lower filed a written response requesting a hearing, on a form that accompanied the penalty assessment.<sup>1</sup> Staff responded,<sup>2</sup> and on March 8, 2011, the Commission issued a Notice of Hearing in Docket TV-110213.

5 RCW 80.04.405 provides, in part:

In addition to all other penalties provided by law every public service company subject to the provisions of this title and every officer, agent or employee of any such public service company who violates or who procures, aids or abets in the violation of any provision of this title or any order, rule, regulation or decision of the commission shall incur a penalty of one hundred dollars for every such violation. . .

\* \* \*

The penalty herein provided for shall become due and payable when the person incurring the same receives a notice in writing from the commission describing such violation with reasonable particularity and advising such person that the penalty is due. *The commission may, upon written application therefor, received within fifteen days, remit or mitigate any penalty provided for in this section or discontinue any prosecution to recover the same upon such terms as it in its discretion shall deem proper and shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as it may deem proper. [. . .]* (Emphasis added).

6 The Commission has held that it does not have the jurisdiction to mitigate a penalty assessment under RCW 80.04.405 where it received a written response after the 15 day period allowed in the statute. In such instances, the Commission has rejected the filing as untimely.<sup>3</sup> This circumstance is not presented in this case. Here, Lower responded to the penalty assessment in writing within 15 days, and it was not rejected as untimely.

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<sup>1</sup> Lower checked a paragraph on the form that says: "Request for Hearing. *I believe that the alleged violation did not occur*, based on the following information, and request a hearing for a decision by an administrative law judge." Lower added the following information: "*We have not received a list of the violations to respond*. On February 24, 2010 we informed the WUTC that Clallum County PUD would be taking over the Lower Water System, letter attached." (Emphasis added).

<sup>2</sup> Staff's response stated in part: "On February 14, 2011, the Commission issued a \$10,500 penalty for violations of WAC 480-110-433(3). On February 23, 2011, Lower filed a request for hearing. *While Staff disputes Lower's contention that the violations did not occur*, it does not oppose Lower's request for hearing." (Emphasis added).

<sup>3</sup> See, e.g., *In re Penalty Assessment against Trashbusters*, Docket TV-050421.

7           The question presented for briefing assumes that Lowerper's written response was not a "request for mitigation." If not, Lowerper's original request was essentially an application to *remit* the penalty assessed under RCW 80.04.405. As used in the statute, to "remit," also means to "cancel."<sup>4</sup> In contrast, another way to define "to mitigate" is to lessen, or "to make less severe."<sup>5</sup>

8           Lowerper's response was essentially, within the 15 days required, that it should not be penalized at all, and requested a hearing to explain why. In the language of RCW 80.04.405, Lowerper requested the entire penalty be "remitted" or cancelled.

9           This makes logical sense, as well. It does not make sense to read RCW 80.04.405 as requiring a person who is assessed a penalty for violations of Commission rules and statutes to have only the option of (1) admitting the violations and seeking a reduction of the penalty, or (2) contesting the violations and asking for a hearing, with the only possible outcome then being either no penalty or the entire penalty, with the Commission having no discretion, based on the outcome at hearing, to impose something in between. Rather, when a company requests that it should not have to pay the penalty at all, it should be deemed to have sought remission of the penalty on this basis. Thus, the requirement of RCW 80.04.405 is satisfied.

10          The Commission's Notice of Hearing in Docket UW-110213, which is based upon Lowerper's written application, is consistent with this reading of the statute. It explicitly

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<sup>4</sup> Webster's Third New International Dictionary includes the following definitions for the verb "remit":

- 1(a): To release one from the guilt or penalty of;
- (b): to refrain from exacting (as a payment);
- (c): to cancel or refrain from inflicting (a penalty).

Remit may also be defined as "to send" (as in payment of money). However, this definition does not fit with the usage in RCW 80.04.405, because in the statute the Commission is doing the remitting, not a public service company.

<sup>5</sup> Webster's Third New International Dictionary includes the following definition for the verb "mitigate":

- 1(a): To make less severe.

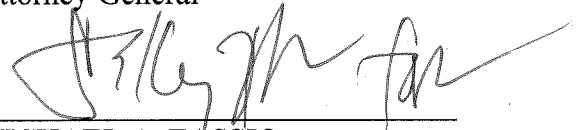
acknowledged the Commission's authority to mitigate by contemplating it as a possible outcome after hearing.<sup>6</sup> Also, at least one prior case is consistent with this reading of the statute.<sup>7</sup> In that case, a penalty assessment was followed by a timely request for hearing contained in a Commission-provided form, in which the company marked a paragraph similar to the one Lowerper checked. The Commission's Notice of Hearing in that case acknowledged that the violations were contested, but stated that the hearing would address "whether the company can show mitigating circumstances that might warrant a reduction in penalties."<sup>8</sup> After hearing, the Commission issued an order in which it, in part, (1) concluded that it had jurisdiction to consider remission or mitigation of the penalty assessment under RCW 80.04.405 based upon the Company's timely request for hearing, and (2) mitigated the penalty.<sup>9</sup>

11 In summary, the Commission has the legal authority to mitigate a penalty assessment under RCW 80.04.405, under the procedural circumstances of this case.

DATED this 6<sup>th</sup> day of May, 2011.

Respectfully submitted,

ROBERT M. MCKENNA  
Attorney General



MICHAEL A. FASSIO  
Assistant Attorney General  
Counsel for Washington Utilities and  
Transportation Commission Staff

<sup>6</sup> *In re Penalty Assessment against Lowerper, Inc.* Docket UW-110213. Notice of Hearing (March 8, 2011). ¶ 5. ("The ultimate issues include whether the penalty should be mitigated and what actions are necessary for Lowerper to maintain future compliance, pursuant to statutory provisions of RCW 80.04.")

<sup>7</sup> *In re Penalty Assessment against Meridian Transportation Resources, LLC d/b/a Meridian Western*, Docket TE-070767.

<sup>8</sup> *Id.* See *Notice of Hearing*, issued June 5, 2007.

<sup>9</sup> Docket TE-070767, *Order 01, Initial Order Mitigating Penalty to \$200*, ¶ 2 and ¶ 20.