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May 6, 2011

VIA E-MAIL AND HAND DELIVERY

Mr. David Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7250

Re: Docket Nos. UW-091006 and UW-110213 - Lowper, Incorporated -
Briefing on RCW 80.04.405

Dear Mr. Danner:

The question has been asked whether under RCW 80.04.405, the Commission may assess a lower penalty than originally assessed if a party requests a hearing rather than mitigation within fifteen days of the date of the assessment of the penalties.

In this matter, Lowper, Incorporated requested a hearing within fifteen days of the assessment of the penalties. The question is then whether those penalties can be mitigated.

RCW 80.04.405 does not present the Hobson's choice of requesting a hearing on an all or nothing basis or mitigating the penalty on a paper record. Under the tentative interpretation that is raised by the question asked in this matter, a party who requests mitigation can present a paper record and hope that the fine be remitted. However, a party that requests a hearing, apparently faces a win or lose situation. If the party wins, no penalty is assessed. If the party loses, the entire penalty is assessed. That does not appear to be consistent with the commands of justice nor with the statute.

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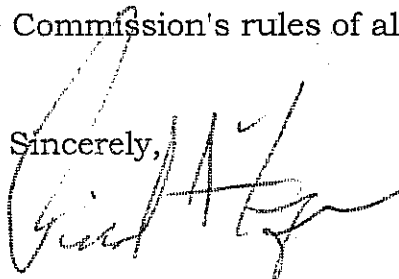
Under a literal interpretation of the provisions of RCW 80.04.405, if a party did not check the box requesting mitigation on a paper record, there would be no hearing. Instead, the matter would be referred to the Attorney General's office to bring an action in Superior Court in Thurston County or such other county in which the "violator" may do business to recover the penalty. However, that is not the case.

As pointed out in the Notice of Opportunity to Brief Issue, RCW 80.04.405 states:

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.¹

It is entirely consistent with the language of RCW 80.04.405 that if a hearing is requested within the fifteen days, the Commission may determine that the full amount of the initial penalty assessment is not appropriate under the facts and may lessen that penalty. This is the only reasonable construction of the statute and one that is consistent with the Commission's rules of allowing for a hearing on a penalty assessment.

Sincerely,



RICHARD A. FINNIGAN

RAF/km

cc: Michael Fassio (via e-mail and U.S. mail)
Client (via e-mail)

¹ Notice at footnote 2.