

Decision 87 10 059 OCT 28 1987

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LATTANZIO ENTERPRISES, a )  
 partnership, )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 P.P.D. CORPORATION, dba NORTH- )  
 EAST GARDENS WATER COMPANY, )  
 )  
 Defendant. )

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Case 10166  
(Filed August 31, 1976)

O P I N I O N

Background

This proceeding began in August 1976 when Lattanzio Enterprises (complainant) requested that the Commission issue an order confirming that the \$53,634.75 advanced to P.P.D. Corporation (defendant), dba Northeast Gardens Water Company, is subject to refund and that defendant refund to complainant those amounts payable for the years 1973, 1974, and 1975.

Finding that defendant had violated its tariff Rule No. 15, Main Extensions, Decision (D.) 89056 dated July 11, 1978 ordered the parties to execute a main extension contract and ordered defendant to refund \$5,193.50 plus interest for the years 1974-1977 inclusive. No main extension contract was executed and no refund was made.

On May 10, 1979 complainant requested an order that defendant and its president Francis H. Ferraro appear and show cause why they should not be adjudged in contempt for failure to make the refunds ordered by D.89056. Defendant opposed the request for an order to show cause and requested that the proceeding be reopened for the purpose of modifying D.89056 to reflect complainant's inability to convey to defendant the easements and

title to the pump station site necessary to enter into a main extension contract. By D.90476 dated June 19, 1979 we denied defendant's request to reopen and ordered defendant to appear and show cause why it should not be adjudged in contempt for failure to comply with D.89056. After hearing, D.91916 dated June 17, 1980 ordered that within 90 days after the effective date of the order the parties execute a main extension contract and that within 30 days defendant deposit in an escrow account the monies ordered refunded by D.89056. The monies in the escrow account were to be released upon further order of the Commission.

On October 25, 1983, defendant filed a document titled Application for Clarification of D.91916. By D.84-02-048 dated February 6, 1984 defendant was ordered (1) to initiate the condemnation action(s) within 30 days after the order's effective date in order to obtain the easements or rights-of-way, thus enabling the execution of a main extension contract and (2) to file with the Commission staff an accounting of the costs incurred in obtaining the easements.

By letter dated December 17, 1986, counsel retained by defendant to bring the action(s) to obtain the necessary easements advised defendant that all of the easements had been obtained. By letter dated December 22, 1986, complainant's counsel advised defendant's counsel that he understood that the easements necessary to execute the main extension contract had been obtained and requested counsel to forward within 15 days the following:

- "1. A summary showing the gross revenues of the Northeast Gardens Water Company for the years 1977 through 1986.
- "2. The gross revenues received for water service provided to the 191 dwelling units developed by applicant.
- "3. Your calculation of the 22 percent of Item 2 due applicant.

- "4. The reasonable attorney fees generated in procurement of the subject easements."

Complainant's counsel also requested that the monies ordered refunded by D.89056 be remitted forthwith.

Receiving no response to his December 22, 1986 letter, complainant's counsel on January 20, 1987 requested the Commission to issue an Order to Show Cause in Re Contempt in an attempt to force defendants to comply with the order to execute a main extension contract and to refund the monies previously ordered refunded.

By D.87-03-055 dated March 25, 1987 we declared:

"Further excuses from defendant for noncompliance with our orders can no longer be accepted. We will order defendant to:

"1. Execute the main extension contract ordered by D.89056.

"2. Refund to complainants' \$1,654.67, \$1,772.27, and \$1,766.56 plus interest at 7% annually for the years 1974, 1975, and 1976 respectively.

"3. File with Evaluation and Compliance Division a summary of the revenues from complainants' development from 1977 to the present.

"4. File with Evaluation and Compliance Division the details of the costs incurred in obtaining the easements ordered by D.84-02-048.

"Defendant is put on notice that further dilatory tactics will not be tolerated. We caution defendant that we will entertain no further delays in complying with our orders."

The Evaluation and Compliance Division (E&C) was directed to monitor the defendant's compliance and report its findings to the Commission. When informed by E&C that defendant had not complied with D.87-03-055, on June 15, 1987 we issued D.87-06-020 which ordered P.P.D. Corporation, dba Northeast Gardens Water

Company to appear on July 21, 1987 and show cause why Francis H. Ferraro, its president and officer, should not be adjudged in contempt of this Commission for violation of the order.

Hearing was held on July 21, 1987 in San Francisco at which time the matter was submitted subject to the filing of briefs 10 days after the receipt of the transcript. The transcript was received August 20, 1987.

Defendant filed a brief on July 31, 1987. Defendant alleges that: (1) the Commission lacks jurisdiction over P.P.D. Corporation and its officer, Francis H. Ferraro, since it has ceased performing any public utility service, (2) the affidavit of the staff witness in the contempt hearing held July 21, 1987 is based on matters that took place in the past and is therefore irrelevant, (3) D.87-03-055 is not valid since P.P.D. Corporation is no longer a public utility and has no utility property under its control, (4) any reference to failure to obtain easements has no merit and is contrary to the evidence that defendant did make efforts to obtain the easements up to the time the City of Fresno was authorized to take possession of P.P.D. Corporation's water system pursuant to an order of the Superior Court of Fresno County, (5) obtaining the easements ordered by the Commission is a condition precedent to the execution of a main extension contract and since all of the necessary easements were not obtained by the time when the city of Fresno took possession, a main extension contract could not be executed, (6) any refunds relative to the revenues collected are dependent on the existence of a main extension contract and since there is no contract, any accounting of revenues is irrelevant, and (7) the City of Fresno has had control of the water system since November 19, 1986 and as such removed P.P.D. Corporation and Francis H. Ferraro from the Commission's jurisdiction and therefore there is no violation of any Commission order or orders.

The Commission staff filed its brief on August 28, 1987. The staff states that the Commission has the power to punish for contempt in the same manner as courts of record as granted by Article XII Section 6 of the California Constitution. Further, it states that Section 312 of the Public Utilities Code (PU) Code empowers the Commission to issue, among other things, warrants of attachment and warrants of commitment in proceedings for contempt in like manner and to the same extent as courts of record. It states that Section 2113 of the PU Code provides that utilities, corporations, or persons failing to comply with Commission orders are punishable for contempt. Further, the staff states that acts of contempt are punishable by fines of not more than \$500 or imprisonment not exceeding 5 days or both (Section 1218 of the Code of Civil Procedure), but that the contempt must be proved beyond a reasonable doubt.

With respect to defendant's position that it is unable to comply with the Commission's orders because P.P.D. Corporation is no longer a public utility and because the easements necessary to enter into a main extension contract had not been obtained prior to the City of Fresno taking possession and thereby eliminating its ability to make the ordered refunds, the staff states that the Superior Court order only authorized possession of the assets and not the transfer of ownership. It states that even though the city of Fresno is operating the system, the transfer of assets does not relieve the utility of its public utility status and obligations and that only the Commission can relieve the utility of such an obligation. The staff states that because defendant has not been relieved of its public utility status, it still has the ability to execute the main extension contract and commence making refunds. Further, only defendant has a record of the revenues attributable to complainant's development.

The staff states that defendant has the ability to execute the main extension contract since: (1) the necessary

easements were obtained sometime in late 1986 and the fact that the City of Fresno took possession of the system on November 19, 1986 matters not, and (2) defendant was aware, prior to the takeover by the City of Fresno, that the easements had been obtained, and (3) the defendant has been put on notice on numerous occasions of its responsibility to obtain the easements.

Further, the staff states that defendant also has the ability to make the ordered refunds since the escrow account was opened and that the monies in the escrow account have not yet been turned over to complainant.

Finally, the staff states that defendant's reliance on Van Hoosear v Railroad Commission (1922) 189 Cal 228 for the proposition that an order of contempt for failure to perform an act directed by the Commission is not valid unless it appears therefrom that it is within the power of the party adjudged in contempt to perform the act, is misplaced. The staff states that in Van Hoosear the Commission ordered reestablishment of public utility water service which had been discontinued but that the person adjudged in contempt did not have title and ownership of the system and thus could not obey the order. In the instant case defendant still owns the water system, has obtained the easements, has opened an escrow account, has the necessary records of revenues generated, and therefore has the ability to execute the main extension contract and make the ordered refunds.

The staff concludes that defendant is indeed in contempt of the Commission and notwithstanding the City of Fresno's possession of the water system, defendant has not been relieved of its public utility status and obligations. It requests that pursuant to Section 312 defendant be fined \$500 for failure to execute a main extension contract and an additional \$500 for failure to make refunds as ordered.

Discussion

It is clear that the Commission has the authority to prosecute for contempt. (Sections 312, 1792, 1793, and 2113 of the PU Code and Article XII Section 6 of the California Constitution.) Essential to the charge of contempt is intent and that the conduct of the offender is wilful. Further, where the contempt is indirect, as here, the offender must be presumed to have intended the ordinary consequences of his act. Finally, because of the nature of the offense, to protect the offender, it is necessary to file an affidavit and have a hearing prior to a finding of contempt.

The facts in this case have been outlined and restated in the many decisions issued since the filing of the complaint and need not be repeated other than to state that defendant has been repeatedly warned that engaging in further dilatory tactics would not be tolerated. Defendant has presented no evidence to convince us that it should have taken until December 1986 to obtain the easements necessary to execute a main extension contract.

Defendant has been aware that refunds on the advances for construction must be made since July 1978 when D.89056 was issued. Since that date defendant has made little or no effort to enter into a main extension contract or make a refund of the advances. In D.87-03-055 we explicitly ordered defendant to (1) execute a main extension contract, (2) make the refunds ordered in D.89056, (3) submit a summary of costs incurred in obtaining the easements, and (4) file with the Commission's Evaluation and Compliance Division an accounting of the revenues collected under the terms of the main extension contract. To date there has been no compliance. Indeed, at the hearing held July 21, 1987 defendant challenged the jurisdiction of the Commission to order any refunds stating that because Fresno has control of the system a main extension contract cannot be executed.

Defendant appears to be raising the defense of inability to perform. All of defendant's contentions are without merit. The easements have been acquired, the books of record are in defendant's possession, there is supposed to be an escrow account with past refunds deposited therein, and defendant has not been relieved of its public utility responsibility. Thus, defendant has the ability to enter a main extension contract and account for the revenues collected from complainant's development.

With respect to the just compensation proceedings, it would appear that defendant, aware that such proceedings (Application 82-05-065 et al.) would be instituted and prosecuted, felt that by ignoring Commission orders such proceedings would resolve this case and would thereby eliminate any liability or responsibility for refunding the monies advanced.

Just compensation proceedings do not relieve a party or corporation of its debts or other obligations. Further, as we noted in D.86-08-034, modifying D.86-02-040, Fresno made it clear that it was willing to accept the burden of refunding the outstanding advances as of the date of the transfer. In that decision we found that the obligation to make refunds on advance contracts belongs to the person, corporation, or government agency that received, receives, or will receive the revenue associated with those advances. Thus, the monies in the escrow account established pursuant to D.89056 and that collected up to and including November 19, 1986 are and continue to be the liability of defendant.

Since the issue of contempt is such a serious charge, we believe it is necessary to respond to each of defendant's charges as to why it is not and should not be found in contempt. Following are defendant's charges and the responses thereto:

1. The Commission has no jurisdiction over defendant or its president. As pointed out above, Fresno's possession of the water system does not relieve defendant of its public utility



responsibility nor of its debts. Until such time that defendant no longer has any public utility obligations, the Commission has jurisdiction.

2. The staff affidavit is based on past events and is therefore irrelevant. It appears that the defendant misunderstands the concept of contempt. The affidavit can only be based on past events since only past Commission orders are at issue and thus are pertinent to the charge.

3. D.87-03-055 is not valid since P.P.D. is no longer a public utility and has no property under its control. As noted above, defendant has not been relieved of its public utility responsibility and physical possession of the water system is not at issue.

4. Defendant made good faith efforts up to the time Fresno took possession to obtain the easements. Defendant's efforts to obtain the easements have at best been trifling. It has been aware of the need for easements since 1978 and only after repeated requests from complainant and orders from the Commission did defendant act, and then without the diligence necessary to terminate the proceeding.

5. The easements are a condition precedent to the execution of a main extension contract and because of Fresno's possession prior to obtaining the easements, a contract could not be executed. Defendant is correct in stating that easements are a condition precedent to the execution of a main extension contract. Defendant was ordered to execute a main extension contract in 1978 and was aware at that time that easements were required, but made only feeble attempts to obtain them. Though Fresno is in possession of the system, it has willingly agreed to assume the burden of refunding the advances from the effective date of eminent domain action. The easements obtained have presumably been granted to defendant and thus the main extension contract can be executed.

6. Without a main extension contract any accounting of revenues is irrelevant. As stated above, Fresno's possession of the system does not cancel defendant's liabilities. The revenues collected up to the final determination in the eminent domain action are the responsibility of defendant. Defendant has the books of record and is the only one with the ability to determine the amount due complainant. Defendant also has possession and control of the escrow account.

7. Possession of the water system by Fresno removes defendant from the Commission's jurisdiction. Again as stated above, possession of the premises in itself does not relieve defendant of its public utility responsibilities or liabilities. Thus, until the final order in any eminent domain action commenced after conclusion of our just compensation proceedings, defendant remains subject to the Commission's jurisdiction.

We conclude that defendant P.P.D. Corporation and its president Francis H. Ferraro are in contempt of the Commission for failure to obey the orders issued in this proceeding and should be fined for such behavior as authorized by the PU Code and the California Constitution.

Findings of Fact

1. Defendant is a public utility providing water service in the City of Fresno in Fresno County.
2. Complainant advanced to defendant funds whereby defendant was to provide water service to complainant's real estate development.
3. D.89056 ordered defendant and complainant to execute a main extension contract within 30 days and for defendant to make refunds of the advances for the years 1974, 1975, and 1976 within 90 days.
4. D.91916 ordered defendant and complainant within 90 days to execute the main extension contract as ordered in D.89056 and to deposit in an escrow account those monies ordered refunded by that

decision with said funds to be released upon further order of the Commission.

5. Defendant refused to make the ordered refunds without the benefit of a main extension contract.

6. Defendant refused to enter into a main extension contract without easement to the property.

7. D.84-02-048 ordered defendant to commence proceedings necessary to obtain the easements to enable the execution of a main extension contract within 30 days and provide the Commission staff with an accounting of the costs to obtain the easements.

8. Counsel retained by defendant advised defendant sometime in December 1986 that all easements had been obtained.

9. Defendant refuses to execute a main extension contract alleging that the City of Fresno, through a condemnation action, took control of the water system on November 19, 1986 and that such a contract can no longer be executed.

10. D.87-03-055 dated March 25, 1987 specified that further excuses from defendant would not be tolerated and ordered that defendant (1) execute the main extension contract ordered by D.89056, (2) refund to complainants' monies for the years 1974, 1975, and 1976, (3) file with the E&C division a summary of revenues collected from complainants' development from 1977 to the present, and (4) file the details of the costs incurred in obtaining the easements ordered in D.84-02-048.

11. Defendant did not comply with any portion of D.87-03-055. On June 15, 1987, by D.87-06-020 defendant was ordered to appear and show cause why its president and officer Francis H. Ferraro, should not be adjudged in contempt for violation of the orders contained in D.87-03-055.

12. Defendant argues that (1) the Commission lacks jurisdiction over defendant since it no longer performs or is able to perform public utility service, (2) D.87-03-055 is invalid since defendant is no longer a public utility and controls no utility

property, (3) all of the easements were not obtained prior to the condemnation takeover by the City of Fresno and a main extension contract could not be executed before said easements were obtained, (4) refunds relative to revenues collected are dependent on the existence of a main extension contract and since there is no contract, any accounting is irrelevant, and (5) because of the condemnation takeover there can be no violation of any Commission order.

13. The easements necessary to execute a main extension contract have been obtained.

14. To date the main extension contract has not been executed.

15. To date there has been no refund of advances to complainant.

16. To date there has been no accounting of revenues collected from complainant's development.

Conclusions of Law

1. Defendant has not been relieved of its public utility responsibilities.

2. Defendant has the necessary records of the revenues generated by complainant's development.

3. By refusing to execute a main extension contract and make the refunds ordered, defendant is in contempt of the Commission as defined in Section 2113 of the PU Code.

4. Defendant is in contempt of the Commission and should be punished by a fine of \$1,000 for failure to execute the main extension contract and make the refunds as ordered.

ORDER

IT IS ORDERED that:

1. Within 30 days after the effective date of this order, defendant P.P.D. Corporation shall pay the sum of \$1,000 to the Commission pursuant to Section 2111 of the PU Code.

2. Within 10 days after the effective date of this order, defendant P.P.D. Corporation and its officer, Francis H. Ferraro, and complainant Lattanzio Enterprises shall execute a main extension contract as ordered by D.89056.

3. Within 30 days after the effective date of this order, defendant shall report to the Commission's Evaluation and Compliance Division an accounting of the revenues collected and subject to refund from complainant's development for the years 1974, through, to, and including November 19, 1986.

4. Defendant P.P.D. Corporation and Francis H. Ferraro are put on notice that failure to comply with this order will be considered a continuing violation subjecting defendant to a further fine of \$50 per day commencing 30 days after the effective date of this order.

5. If defendant P.P.D. Corporation and Francis H. Ferraro fully comply within 10 days with this order, other than the payment of the fine, the order to pay the fine shall be suspended until further order of the Commission.

This order is effective today.

Dated October 28, 1987, at San Francisco, California.

STANLEY W. HULETT  
President  
DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OHANIAN  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

*Victor Weisser*  
Victor Weisser, Executive Director  
AB

ORDER

IT IS ORDERED that:

1. Within 30 days after the effective date of this order, defendant P.P.D. Corporation shall pay the sum of \$1,000 to the Commission pursuant to Section 2111 of the PU Code.

2. Within 10 days after the effective date of this order, defendant P.P.D. Corporation and its officer, Francis H. Ferraro, and complainant Lattanzio Enterprises shall execute a main extension contract as ordered by D.89056.

3. Within 30 days after the effective date of this order, defendant shall report to the Commission's Evaluation and Compliance Division an accounting of the revenues collected and subject to refund from complainant's development for the years 1974, through, to, and including November 19, 1986.

4. Defendant P.P.D. Corporation and Francis H. Ferraro are put on notice that failure to comply with this order will be considered a continuing violation subjecting defendant to further fines.

This order is effective today.

Dated OCT 28 1987, at San Francisco, California.

STANLEY W. HULETT  
President  
DONALD VIAL  
FREDERICK R. DUDA  
C. MITCHELL WILK  
JOHN B. OHANIAN  
Commissioners