

Decision 93470

AUG 18 1981

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Commission Investigation into the services and practices of Winton Water Company, Inc. and Riverdale Water Company, Inc.

OII 93
(Filed July 7, 1981)

Irvin Heppner, for Winton Water Co., Inc. and Riverdale Water Co., Inc., respondents.
Sheldon Rosenthal, Attorney at Law, for the Commission staff.

INTERIM OPINION

Order Instituting Investigation

The Commission staff investigation of Winton Water Company, Inc. (Winton) and Riverdale Water Company, Inc. (Riverdale), both of which are wholly owned by Irvin Heppner, prompted the Commission to begin this investigatory proceeding to determine:

- "1. Whether or not Winton and/or Riverdale is maintaining books and records in accordance with the Commission's Uniform System of Accounts.
- "2. Whether Winton and/or Riverdale is providing the proper level of service to its customers.
- "3. Whether the proceeds of the loan from the Department of Water Resources, as authorized by D.88945, 89713, and 94521 have been used for the purposes contemplated in those decisions.
- "4. Whether the rate surcharges authorized by D. 88945, 89713, and 94521 have been retained to repay the loans authorized by those decisions.
- "5. Whether advances paid to Riverdale have been used for purposes other than those intended by the person making the advance.

- "6. Whether Winton and/or Riverdale is unwilling or unable to adequately serve its ratepayers.
- "7. Whether Winton and/or Riverdale has been actually or effectively abandoned by its owners.
- "8. Whether management has conducted the affairs of Winton and/or Riverdale in such a manner as to render Winton and/or Riverdale incapable of being responsive to the rules or orders of the Commission.
- "9. Whether there is reasonable cause to petition the Superior Court of the County of Merced or the County of Stanislaus for appointment of a receiver or receivers pursuant to Section 855 of the Public Utilities Code.
- "10. Whether the Commission should order such other relief as may be appropriate under the circumstances."

As an adjunct to its investigation, the Commission also ordered that:

"No funds shall be withdrawn from the utilities and no utility property shall be sold or pledged without further order of the Executive Director of the Commission or his designee."

Prior Commission Decisions

By Interim Decision (D.) 88945 dated June 6, 1978, in Application (A.) 57771 the Commission authorized Winton to borrow \$587,100 from the California Department of Water Resources (DWR) under the provisions of the Safe Drinking Water Bond Act of 1976 (SDWBA). The Commission explicitly ordered that "the funds (were) to be used only for the purposes specified in this decision (D.88945) or for refunding short-term loans already incurred for such purposes." (D.88945, p. 9). Winton was also authorized to increase its rates to service the debt and was ordered to establish a balancing account to reflect the difference between the rates then in effect and the rates as revised under D.88945 and to reflect income tax credits attributable to the investments funded by the DWR loan.

On December 13, 1978 the Commission issued D.89713 in A.57771. In that decision the Commission converted the interim increase authorized in D.88945 to a surcharge basis, \$2.70 per month per flat rate customer and \$0.17 per 100 cubic feet for metered customers. The surcharge was designed to produce approximately \$40,500 per year. Winton was again ordered to "establish and maintain a separate balancing account which shall include all billed surcharge revenue and the value of investment tax credits on the plant financed by the loan, and which shall be reduced by payments of principal and interest to the Department of Water Resources." (D.89713, p. 4). One of the purposes of the balancing account was to make Winton "responsible for refunding or applying, on behalf of consumers, any surplus accrued in the balancing account if subsequently ordered by the Commission." (D.89713, p. 3).

On August 12, 1980 Winton filed A.59875 seeking authority to borrow an additional \$200,600 to:

1. Complete water system improvements originally authorized (\$57,400);
2. Construct a new well and to improve an existing well contaminated by DBCP^{1/} (\$137,300); and
3. Fund DWR administrative fees (\$5,900).

By D.92415 dated November 18, 1980, the Commission granted the application. In doing so it ordered Winton to establish and maintain the balancing account previously discussed, it made Winton responsible for refunding any surplus in the balancing account, and it slightly

^{1/} Dibromochloropropane (DBPC) is a pesticide with carcinogenic properties.

revised the surcharge.^{2/} The revised surcharge was designed to produce about \$4,381 per month, enough to satisfy DWR's annual requirements.

Hearings

The hearing ordered by OII 93 was held July 13, 1981 before Administrative Law Judge (ALJ) Robert T. Baer and the matter was submitted after testimony by two staff witnesses, by a representative of the Department of Health Services, and by Irvin Heppner, followed by brief oral argument.

Staff Evidence

A staff engineer from the Hydraulic Branch testified that the pressure in both the Winton and Riverdale systems was lower than General Order 103 allows and that both system pressure and water quality would be improved in Winton if the partially constructed Well 13 were completed and connected to the system. The well is in and is a good producer, but the pumps, valves, pressure tanks, control devices, electricity, and connecting mains are not installed. He estimated that the work remaining on Well 13 could be completed in approximately one week.

The witness for the Department of Health Services testified that the concentration of DBCP in Well 11 is above the danger level and that, when Well 13 comes on line, Well 11 could be reduced to standby, fire protection service only.

A staff auditor from the Revenue Requirements Division testified that she inspected the books and records of Winton and Riverdale. The books of neither corporation were maintained according to the Commission's Uniform System of Accounts. Only check registers and bank deposits were available. Checks were not classified by account and monthly income and expense statements were not prepared. Tax returns were not available. No separate balancing account had

^{2/} For 1,550 flat rate customers the surcharge remained the same (\$2.70). The new surcharge required increases for nine residential customers with one-inch meters and a school with a 6-inch meter.

been prepared or maintained for surcharge revenues as required by the Commission. All records for a 3-month period in 1980 (February, March, and April) were missing.

The staff auditor placed in evidence an agreement between Winton and State Savings and Loan Association (S&L), Merced, which requires Winton to make monthly deposits with the S&L to enable it to transmit the semiannual payments of loan principal and interest to DWR. A copy of Winton's passbook with S&L shows regular monthly deposits averaging \$3,809 between March 1979 to and including January 1980. Thereafter deposits cease until June 1981 when a deposit of \$4,522.50 was made. As of June 9, 1981 the account contained \$50,218.79. If regular monthly deposits had been made after January 1980 as required by the agreement, the account would have been augmented by at least \$60,944 (16 months x \$3,809) plus interest compounded on those monthly deposits.

The staff witness also produced documentary evidence showing that DWR loan funds of over \$36,000, which had been advanced to Winton to pay specific bills, were not used for those purposes. These advances by DWR included amounts to equip a new well (13) intended to replace an existing well (11) now in service but contaminated by DBCP.

The staff witness prepared excerpts from Winton's and Riverdale's check registers showing that the funds of the utilities have been commingled with personal funds of the owner, Irvin Heppner, and with other enterprises in which Heppner has an interest. For instance, loans were made to Irvin Heppner's son, Glen, as follows:

<u>Date</u>	<u>Amount</u>
2/7/79	\$ 350.00
2/7/79	3,000.00
2/8/79	200.00
2/8/79	500.00
2/26/79	375.00
4/2/79	700.00
4/11/79	100.00
4/12/79	400.00
4/12/79	425.00
6/13/79	3,000.00*
7/16/79	100.00*
7/23/79	500.00*
10/10/79	2,000.00*
10/19/79	350.00*
11/1/79	500.00*
	<hr/>
Total	\$12,500.00

* These items are identified as "draw" to Glen or for his benefit.

In 1979 large loan payments of \$5,995.03 and \$10,250.83 were made by Winton to the Bank of America, but such payments were not accounted for as operating expenses or plant purchases, giving rise to the suspicion that nonutility purposes were involved. In addition, regular monthly checks were issued during 1979 to the Bank of America, apparently for car payments. The checks were not classified as to utility account. The total of payments to Bank of America during 1979 was \$21,555.54.

Other checks were issued during 1979 to Riverdale, totaling \$17,000, to Transamerica Title Co. for \$7,225, and to Winton; totaling \$5,000.

The foregoing Winton transactions illustrate the commingling of utility with nonutility, family, and personal businesses. A similar picture was sketched by Exhibit 7, an analysis of selected vouchers of Riverdale, a system with only 100 connections. A mere listing of items identified as loans should suffice to illustrate the presence of commingling here as well:

<u>1981 Date</u>	<u>Debtor</u>	<u>Amount</u>
1/12	Irvin Heppner	\$ 1,000
1/19	Glen Heppner	10,000
1/21	The Stove Company*	3,000
1/26	Riverdale Ranch*	1,500
2/6	The Stove Company*	2,000
2/6	Winton Water Company	5,000
2/17	Winton Water Company	4,000
3/2	Glen Heppner	450
3/4	The Stove Company*	1,000
3/6	Glen Heppner	200
3/9	Glen Heppner	800
3/9	The Stove Company*	1,000
3/13	Winton Water	1,500
3/19	The Stove Company*	<u>1,500</u>
	Total	\$32,950

*Nonutility businesses owned
by Irvin Heppner.

In addition to intercompany and intrafamily loans, the record contains additional evidence of commingling of funds between commonly owned utility and nonutility businesses. Exhibit 7 shows that checks were frequently drawn on Riverdale's account payable to Riverdale, the functional equivalent of checks made to "cash". Three such checks issued in December 1980 totaled \$15,000. Five such checks issued in 1981 totaled \$11,600. Another series of checks issued in 1981 to Riverdale Ranch and Riverdale Investments, both nonutility businesses owned by Irvin Heppner, totaled \$13,850. One check for \$8,000 was issued January 8, 1981, to Zions First National Bank in Utah.

Discussion

Irvin Heppner admitted that he ran his nonutility business through the books of his water corporations. He attributed the dissipation of his monthly surcharge revenue and the absence of over \$36,000 of DWR loan funds to losses incurred in the utility business due to inadequate rates. This rationalization is unacceptable. Since the commingling is admitted and the evidence of dissipation of earmarked utility and loan funds is clear, we will not prolong this opinion with additional discussion.

Staff Recommendations

At the conclusion of the hearing staff counsel urged that the Commission order that:

1. Heppner provide Winton with funds from sources outside the water corporations to complete Well 13.
2. Winton and Riverdale be permitted to pay current and past due utility operating expenses. However, no salaries should be paid, nor transfers made to or for the benefit of Irvin Heppner or his relatives.
3. No assets of Winton or Riverdale were to be pledged, sold, or otherwise encumbered.
4. No existing escrows be closed.

Executive Director's Letter

In OII 93 the Commission ordered that "[n]o funds shall be withdrawn from the utilities and no utility property shall be sold or pledged without further order of the Executive Director of the Commission or his designee." Based upon the sworn testimony taken at the hearing on July 13, 1981, the Executive Director wrote the following letter:

"Dear Mr. Heppner:

"In Order Instituting Investigation No. 93 the Commission prohibited Winton Water Co., Inc., and Riverdale Water Co., Inc., from withdrawing utility funds or disposing of utility [property] without the Commission's prior approval. By this means, the assets of the utilities were frozen pending the hearing on July 13, 1981.

"At that hearing you promised, under oath, to replace the money loaned to you by the Department of Water Resources for equipment for Well #13. You also promised to pay any other bills outstanding for which you have received DWR money, so as to make Well #13 operable.

"On the basis of these promises, and because of our anxiety for customers of Winton, I am, on behalf of the Commission, lifting the restrictions to the following extent:

- "1. You may pay past and present obligations of the water corporations, in so far as they were incurred for utility service costs, and are not owing to you or to your relatives.
- "2. You shall not pay any salary to yourself or any of your relatives out of funds of the water corporations.
- "3. You shall not pay any loan or debt to you or any of your relatives out of funds of water corporations.
- "4. You shall not sell, pledge, or borrow against any property now in the name of either water corporation, whether or not it is utility operating property.
- "5. You shall not allow closing of any escrow regarding property now in the name of either water corporation and shall so notify the escrow holders in writing. A copy of these notifications shall be sent to ALJ Baer as a late-filed exhibit.

"The Commission expects strict compliance with the letter and spirit of these directions."

We have not received a copy of any notice to escrow holders, nor have we been informed that the missing DWR loan funds have been restored. This apparent lack of cooperation by Heppner gives us every reason to believe that he will continue to commingle personal and utility assets and to act in his own, rather than his customers', interests.

Findings of Fact

1. Winton has failed to use DWR loan funds of over \$36,000 for the purposes specified in D.88945 and D.92415 or for the purposes for which DWR advanced such funds.

2. Winton has failed to establish and maintain a separate balancing account to record all billed surcharge revenue, as required by the Commission in D.88945, 89713, and 92415.

3. For 16 months in 1980 and 1981 Winton failed to make any deposits of surcharge revenues with the S&L as required by its agreements with the S&L and with DWR.

4. Winton and Riverdale have failed to maintain their books, records, and accounts in accordance with the requirements of the Uniform System of Accounts for Water Utilities prescribed by the Commission under Public Utilities (PU) Code Section 792.

5. Well 11 is contaminated by DBCP.

6. When Well 13 is connected with the Winton system, Well 11 can be reduced to standby, fire protection status.

7. Well 13 can be completed and connected to the system within one month after the effective date of this order.

8. The completion of Well 13 has been impeded by Winton and Heppner's dissipation of and misapplication of DWR loan funds advanced for the purpose, among others, of equipping and connecting that well.

9. Until Well 13 is on line, Winton's customers will be drinking water contaminated by DBCP.

10. Irvin Heppner has commingled the books, records, accounts, property, and funds of Winton and Riverdale with the books, records, accounts, property, and funds of himself, his family members, and his nonutility businesses, among which are The Stove Company, Riverdale Investment Company, and Riverdale Ranch.

11. Irvin Heppner has used Riverdale as a conduit for the purchase and sale of real property.

12. Irvin Heppner, Winton, and Riverdale are unresponsive to the rules and orders of the Commission.

Conclusions of Law

1. Heppner and Winton should be ordered to apply all DWR loan funds received in the future to the purpose for which DWR disburses such funds and to establish a separate checking account for the receipt and disbursement of such funds.

2. Heppner and Winton should be ordered to report to the Commission monthly the amount of surcharge revenue billed, the number of customers billed, the amount of surcharge revenue collected, and the amount deposited with the fiscal agent.

3. Heppner and Winton should be ordered to deposit surcharge revenues monthly with the fiscal agent approved by DWR.

4. Heppner and Winton should be ordered to recalculate from Winton's records the surcharge revenues, by month from March 1, 1979 to date, and to report this information to the Commission. The calculation should show the number of customers billed each month at each surcharge rate, and the amount of interest that would have been earned on such amounts if they had been deposited monthly with the fiscal agent.

5. Heppner, Winton, and Riverdale (to the extent funds have been transferred from Winton to Riverdale) should be ordered to deposit immediately with the fiscal agent all collected but undeposited surcharge revenues, plus interest thereon.

6. Heppner and Winton should be directed to instruct the fiscal agent to move the surcharge deposit into the highest interest rate account consistent with availability of funds to meet payments due to DWR.

7. Heppner, Winton, and Riverdale (to the extent funds have been transferred from Winton to Riverdale) should be ordered to pay all creditors who have extended credit to Winton in connection with SDWBA financed projects and in particular those creditors upon the payment of whom depends the completion and connection of Well 13.

8. Heppner, Winton, and Riverdale (to the extent funds have been transferred from Winton to Riverdale) should be ordered to

complete, connect, and place in service Well 13 within 30 days from today, using, if necessary, funds supplied by Heppner, Winton, or Riverdale.

9. Winton and Riverdale have not, and are not now, maintaining their books and records in accordance with the Uniform System of Accounts and should be ordered to do so.

10. The Legal Division should be directed to file an action in the appropriate superior court against Heppner, Winton, and/or Riverdale for injunctive relief and civil penalties and to petition the court under Code of Civil Procedure § 564(7) and Public Utilities (PU) Code § 855 for the appointment of a receiver.

11. Heppner, Winton, and Riverdale should be placed on notice that they are now, and have been, in violation of the rules, regulations, and orders of the Commission and that the Commission will keep this proceeding open to assure their future compliance with the requirements of the Commission and the statutes. Any further violation may result in the issuance of orders to show cause to impose statutory sanctions for contempt of the Commission's orders (PU Code § 2113) or further actions to impose civil or criminal penalties (PU Code § 2100 et seq.).

12. Heppner, Winton, and Riverdale should be ordered to call in or collect all loans outstanding on the books of Winton or Riverdale and officers of Winton and Riverdale should be ordered to repay to Winton or Riverdale loans extended to them.

13. The restrictions contained in the Executive Director's letter of July 16, 1981 should continue in effect until he or the Commission modifies them.

14. This proceeding should remain open to provide a vehicle for future investigative or enforcement actions.

15. Heppner, Winton, and Riverdale have commingled their funds and business affairs to the extent that they may lawfully be considered the alter egos of each other.

16. This order should be effective today so that immediate remedial steps may be taken.

INTERIM ORDER

IT IS ORDERED that:

1. The Legal Division is directed to file an action in the appropriate Superior Court against Irvin Heppner (Heppner) and Winton Water Company, Inc. (Winton) and/or the Riverdale Water Company, Inc. (Riverdale) for injunctive relief, civil penalties, and to petition the court for the appointment of a receiver for Winton and Riverdale. Also, it shall proceed to initiate a criminal action through the appropriate District Attorney.
2. Heppner and Winton shall apply all Department of Water Resources (DWR) loan funds received after today to the purposes for which DWR advances such funds, shall establish a separate checking account for the receipt and disbursement of such funds, and shall not commingle such funds with utility, personal, family, or nonutility funds.
3. Heppner and Winton shall deposit surcharge revenues monthly in Winton's savings account at State Savings and Loan Association.
4. Heppner and Winton shall recalculate from Winton's records the surcharge revenues, by month from March 1, 1979 to date, and report this information to the Commission. The calculation shall show the number of customers billed each month at each surcharge rate, and the amount of interest that would have been earned on such amounts if they had been deposited monthly with the fiscal agent.
5. Heppner and Winton shall report to the Commission each month the amount of surcharge revenues received during the previous month's billing period.
6. Heppner, Winton, and Riverdale (to the extent funds have been transferred from Winton to Riverdale) shall immediately deposit with the fiscal agent all collected but undeposited surcharge revenues plus interest thereon.
7. Heppner and Winton shall instruct the fiscal agent to move the surcharge deposit into the highest interest rate account consistent with availability of funds to meet payments due to DWR.
8. Heppner, Winton, and Riverdale (to the extent funds have been transferred from Winton to Riverdale) shall pay all creditors who have

extended credit to Winton in connection with Safe Drinking Water Bond Act financed projects and in particular those creditors upon the payment of whom depends the completion, connection, and operation of Well 13.

9. ~~8.~~ Heppner, Winton, and Riverdale (to the extent funds have been transferred from Winton to Riverdale) shall complete, connect, and place in service Well 13 within 30 days from today, using, if necessary, funds supplied by them.

10. ~~9.~~ Winton and Riverdale shall maintain their books and records in accordance with the Uniform System of Accounts.

11. ~~10.~~ Heppner, Winton, and Riverdale shall call in and collect all loans outstanding on the books of the corporations and the officers of the corporations shall pay to such corporations any loans extended to them.

12. ~~11.~~ The restrictions contained in the Executive Director's letter of July 16, 1981 shall continue in effect until he or the Commission modifies them.

13. ~~12.~~ This proceeding shall remain open for further investigative or enforcement action, if necessary.

~~13. The Legal Division is directed to file an action in the appropriate superior court against Heppner, Winton, and/or Riverdale for injunctive relief and civil penalties and to petition to court for the appointment of a receiver for the properties of Winton and Riverdale.~~

This order is effective today.

Dated AUG 18 1981, at San Francisco, California.

John S. Bryan

President
Richard A. Powell

James H. Smith

Arthur E. ...

Prudence E. ...

Commissioners