L/nas

MAIL DATE
10/15/97

Decision 97-10-032 October 9, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Strawberry Property Owners Association
Complainant,
vs.
Conlin-Strawberry Water Company, Inc.
Defendent.

Case 95-01-038
(Filed January 20, 1995)

ORIGINAL

ORDER MODIFYING AND DENYING REHEARING OF DECISION 96-09-043

I. SUMMARY

Interim Decision (D) 96-09-043 ("Decision") found that the Conlin-Strawberry Water Company is seriously mismanaged and has not complied with numerous past Commission and Department of Health Services (DHS) orders. The water system suffers from pump failures, water supply deficiency, lack of system alarms, inaccurate monthly water quality reporting, questionable daily monitoring, and non-use of an automated control system. The Decision finds that Conlin-Strawberry's compliance failures provide sufficient grounds to immediately replace Danny Conlin as system manager and orders him to show cause why he should not be held in contempt for noncompliance with past Commission orders, and he and the company fined pursuant to Public Utilities Code sections 2111 and 2113.[1] In addition, the Decision orders an investigation into Conlin-Strawberry's operation, including an audit.

[1] All statutory references are to the Public Utilities Code unless otherwise indicated.

Conlin-Strawberry applied for rehearing of the Decision on the grounds that: 1) the Commission is prohibited by allegedly applicable statutes of limitations from fining Danny Conlin or Conlin-Strawberry for any violation of the Public Utilities Act which was cured more than one, or possibly two, years prior to the effective date of the Decision; 2) section 2111, on its face, cannot be applied to either Danny Conlin or Conlin-Strawberry; 3) the Commission exceeded its authority by ordering Conlin-Strawberry to hire a new operator or manager; 4) the Decision erroneously found that, pursuant to D.66037, Conlin-Strawberry was required to use a 2.2% composite depreciation rate; 5) the Commission does not have the authority to issue an order against Danny Conlin in this case because Danny Conlin was neither named as a defendant in SPOA's complaint nor named as a respondent in a Commission investigation; and 6) the Commission does not have the authority to issue an order against Conlin-Strawberry which exceeds the relief requested in the complaint absent adherence to certain procedural safeguards.

Conlin-Strawberry filed a timely response to Ordering Paragraph 3 of the Decision, which required Danny Conlin to show why he should not be held personally in contempt for noncompliance with past Commission decisions and fined pursuant to section 2113, and why the company should not be fined pursuant to section 2111 for violating orders in two Commission decisions and four DHS citations. The response repeats a number of the legal arguments made in Conlin-Strawberry's application for rehearing. The response further argues that Danny Conlin did not act with the requisite intent for the Commission to find him in contempt, and asserts that Conlin-Strawberry has in fact complied with most of the orders allegedly violated.

On February 21, 1997, the Strawberry Property Owners' Association (SPOA) petitioned for modification of the Decision on the ground that it lacks the specificity necessary for effective implementation. SPOA requests that the

Commission supplement the ordering paragraphs to ensure that the new system operator mandated by the decision operates under the close supervision of the Commission.

This order finds that Conlin-Strawberry properly points out a minor legal error in the penalty provisions of the Public Utilities Code referenced in the Decision, and a procedural question regarding the possible imposition of fines on Danny Conlin, personally. This order, therefore, corrects the citation errors and deletes references in the Decision to Danny Conlin. This order also deletes references to contempt proceedings, noting that other provisions of the Public Utilities Code provide adequate means for penalizing any failure to comply with our orders. This order finds no merit to the remainder of the application for rehearing. This order finds that SPOA's petition for modification seeks changes which are unnecessary, vague, or inappropriate, and for this reason denies the petition. Finally, this order clarifies that the Commission will determine what, if any, fines will be imposed on Conlin-Strawberry in a future order in this proceeding. This future order will also address the remaining issues raised in the ordering paragraphs of the Decision. Any issues raised by the parties but not discussed in this order are deemed denied.

II. DISCUSSION

Conlin-Strawberry Response to Ordering Paragraph 3

On October 21, 1996 Conlin-Strawberry filed a response to Ordering Paragraph 3 of the Decision, which requires that Danny Conlin show why he should not be held personally in contempt for noncompliance with past Commission decisions and DHS orders and fined $500 for each violation. Conlin-Strawberry first alleges that Danny Conlin did not act with the willful intent necessary to find him in contempt for noncompliance with past Commission and DHS orders because he constantly consulted with DHS over compliance questions

and maintained a working relationship with that agency which resulted in a greatly improved water system. In a September 1, 1996 letter, DHS acknowledged that Conlin-Strawberry had greatly improved over previous years, and stated that continuance of the improvement process would decrease DHS enforcement action. Citing *Re Facilities-based Cellular Carriers and Their Practices, Operations and Conduct in Connection with Their Siting of Towers* [D.94-11-018] (1994) 57 Cal.P.U.C.2d 176, 190, Conlin-Strawberry points out that the Commission has recognized that contempt proceedings are quasi-criminal in nature, and that for the Commission to find someone in contempt, "the person's conduct must have been willful in the sense that the conduct was inexcusable, or that the person accused of the contempt had an indifferent disregard of the duty to comply." (*Id.* at 205.)

As Conlin-Strawberry notes, contempt proceedings require a more rigorous procedure and higher standard of proof than other Commission proceedings. In a case such as this, contempt proceedings would add little to our ability to punish Conlin-Strawberry for its service failures. Penalties for failing to comply with Commission orders can already be imposed on the utility pursuant to sections 2107-2110. The acts and omissions of Danny Conlin, as an officer of Conlin-Strawberry, are imputed to the utility by section 2109, and thus it is not necessary to proceed against him as an individual in order to penalize the utility for any of his misdeeds. Furthermore, the DHS testimony referenced above suggests there may be some doubt as to the willfulness of the conduct at issue here. For these reasons, we will delete from the Decision references to contempt proceedings against either Danny Conlin or Conlin-Strawberry.

Conlin Strawberry also argues that the one year statute of limitations for the imposition of statutory penalties or fines, Code of Civil Procedure section 340, bars any sanctions for acts or omissions which occurred before September 4, 1995. The utility contends that SPOA's complaint did not mention fines, and that by requiring Danny Conlin to show cause why he should not be found in contempt

and fined, the Commission goes beyond the scope of the complaint to create a new proceeding which commenced on the day the Decision became effective. The utility argues that the Decision's effective date establishes the benchmark from which the statute of limitations must be measured, and that any violations of the orders referenced in Ordering Paragraph 3 which were cured before September 4, 1995 cannot form the basis of any statutory penalty. This statute of limitations argument repeats the contentions in Conlin-Strawberry's application for rehearing, and will be discussed below. The same is true of the utility's argument regarding the inapplicability of section 2111.

Finally, Conlin-Strawberry discusses in detail its compliance with the various specific orders noted in Ordering Paragraph 3. We will not review here the specific compliance portion of Conlin-Strawberry's response to Ordering Paragraph 3, leaving this issue, the issue of the utility's compliance with the other ordering paragraphs of the Decision, and the actual imposition of possible penalties or fines to a future order in this proceeding.

Application for Rehearing

Statute of Limitations

Conlin-Strawberry argues that: 1) the Commission is prohibited by section 735 from basing a damage claim on any violations of the orders referenced in Ordering Paragraph 3 which were cured before September 4, 1994, two years before Ordering Paragraph 3 became effective; and 2) the Commission is prohibited by CCP section 340 from seeking statutory penalties or forfeitures for acts which occurred more than one year before the date Ordering Paragraph 3 of the Decision became effective. The dates used in the utility's statutes of limitations argument are based on its contention, discussed below, that Ordering Paragraph 3, which discusses possible fines, is beyond the scope of the original SPOA complaint, and essentially creates a new proceeding on the stated effective

date of the Decision (September 4, 1997). It is from this date that Conlin-Strawberry measures the limitation period.

Section 735 states in pertinent part that "[a]ll complaints for damages resulting from a violation of any of the provisions of this part ... shall ... be filed ... within two years after the cause of action accrues ...." Since this proceeding involves no complaint for damages, the relevance of Conlin-Strawberry's section 735 argument is unclear.

Conlin-Strawberry's CCP section 340 argument has no merit. Each of the violations noted in Ordering Paragraph 3 as possible grounds for imposing a fine or penalty remained uncured as of the date the complaint was filed in this proceeding. Under section 2108:

> Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in the case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

Thus, each day any violation remains uncured constitutes a separate and distinct offense for the purposes of the penalty provisions of the Public Utilities Code from which any relevant statute of limitations may be measured. Since none of the named violations were entirely cured as of the date the complaint was filed, none of the potential fines for the violations would be barred by any conceivably applicable statute of limitations. The only way in which a statute of limitations might affect our ability to impose fines here would be if we decide to impose fines for each day of each separate offense. In such a case, our ability to impose daily fines would be limited to the days not barred by the relevant statute of limitations.

Public Utilities Code Section 2111

Conlin-Strawberry correctly points out that section 2111 cannot be applied to either Danny Conlin or Conlin-Strawberry. Section 2111 states in

pertinent part that: Every corporation or person, other than a public utility and its officers, agents, or employees, which or who knowingly violates or fails to comply with ... is subject to a penalty ...." (Emphasis added.) Since Danny Conlin is an officer of Conlin Strawberry, and since Conlin-Strawberry is a utility, section 2111 is obviously inapplicable.

The Decision should have referred to sections 2107, 2108, 2109 and 2110. Section 2107 states in part that: "any public utility which ...fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not been otherwise provided, is subject to a penalty of not less than five hundred dollars..." Section 2108 states that: "Every violation ... of any order ... of the commission by any corporation or person is a separate and distinct offense, and in the case of a continuing violation each days continuance thereof shall be a separate and distinct offense." Section 2109 states that "the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility." And section 2110 states that: "[e]very public utility and every officer, agent or employee of any public utility, who violates or fails to comply with any part of any order ... of the commission, or who procures, aids , or abets any public utility in such violation or noncompliance ... is guilty of a misdemeanor ...."

The Decision will be corrected by the substitution of references to sections 2107-2110 for the current references to section 2111.

Authority to Require New Manager or Operator.

Conlin-Strawberry argues that the Decision's requirement that Conlin-Strawberry hire a qualified system operator within 60 days of the effective date of the decision exceeds the Commission's authority. The utility cites Pacific Telephone & Telegraph Co. v. Public Utilities Commission (1950) 34 Cal.2d 822,

828 ("PT&T") for the proposition that the Commission lacks the authority to undertake the management of all utilities subject to its jurisdiction "even in instances where it believes the owner of the public utility has been derelict in his duties." (Application for Rehearing at 8.) Conlin-Strawberry contends that

> although the Commission may, after hearing, set standards and regulations for water utilities (see Section 770); prescribe rules for the performance of any service or the furnishing of any commodity by a public utility (see Section 761); and order the addition, repair or change of in physical property by a public utility under certain circumstances, (see Section 762), the Commission does not have the authority to order a public utility to change its system operator if the current operator is qualified to operate the system. (Id.)

Conlin-Strawberry's "invasion of management's prerogatives" argument is long outdated. In General Telephone Company v. Public Utilities Commission (1983) 34 Cal.3d 817, the California Supreme Court noted:

> Later cases ... have cast serious doubts on the continuing validity of much of the reasoning in *Pac. Tel.* The *Pac Tel.* Court's primary justification for refusing to imply the commission's power to regulate the arrangement between Pacific and American was the 'invasion of management' rationale. ... Nevertheless, only a few years later, we severely limited the 'invasion of management' argument in *Southern Pac. Co. v. Public Utilities Com.* (1953) 41 Cal.2d 354. In that case, we affirmed a commission order requiring Southern Pacific to furnish a particular type of passenger service, even specifying the particular equipment to be use despite Southern Pacific's Company claim that the order was an invasion of management. The majority opinion ... responded to the 'invasion' argument without a single mention of *Pac. Tel.*: 'In exercising the powers ... granted [by the Legislature] it may not be disputed that the commission to some extent invades the function of

> management But they are not necessarily unlawfully invaded....[2]...As the 'invasion of management' rationale has waned, we have been more willing to permit regulatory bodies to exercise powers not expressly stated in their mandate.. (34 Cal.3d at 824-825; *see also, Gay Law Students Assn. v. Pacific Tel. and Tel. Co.* (1979) 24 Cal.3d 458, cited at 34 Cal.3d 825.)

We have ordered other water companies to hire qualified new personnel. For example, in *Re the Application of Yucca Water Company, Limited* [D.87-04-064] (1987 Cal.P.U.C. LEXIS 345), we authorized Yucca to borrow $4,610,268 from the Safe Drinking Water Fund (SDF) administered by the Department of Water Resources in order to build improvements needed to bring the Yucca water system up to minimum water works standards. As a condition for authorizing the loan, we ordered Yucca to promptly hire a qualified field supervisor and a qualified office manager, and to advise our Evaluation and Compliance Division [renamed the Commission Advisory and Compliance Division] of the hiring and qualifications of the new personnel. Following an investigation, Yucca was found not to be in compliance with D.87-04-064, and given a deadline by which to complete this task or be faced with our institution of receivership proceedings against it. (*Re Yucca Water Company, Limited* [D.89-09-050] (1989) 32 Cal.P.U.C.2d 459.)

The above authorities make clear that we have the power to order a utility to hire qualified personnel, and to order the replacement of nominally qualified personnel who are not performing adequately, even where such actions essentially substitute for the judgment of utility management. We did not err in

---

[2] Footnote 10 of this decision reads in part: "*Atchison* and *Southern Pacific* can, of course, be distinguished from *Pac. Tel.* in that they deal directly with the commission's power over service. The point here is simply that the 'invasion of management' rationale now appears to be disfavored. We have been unable to locate a single case since *Pac. Tel.* in which this court has annulled a commission order based on this rationale." (34 Cal.3d at 824-825.)

ordering Conlin-Strawberry to replace a manager we lack confidence in with a qualified manager or operator.

Depreciation Rate

Conlin-Strawberry correctly notes that D.66037 ordered it to use a 3% depreciation rate, rather than the 2.2% rate referenced in the Decision. Conlin-Strawberry neglects to mention, however, that the depreciation rate was changed from 3% to 2.2% in Resolution W-3445 in 1989. Since then, the depreciation rate has remained 2.2%. The Decision will be modified to more accurately represent the facts.

Scope of the Complaint

Conlin-Strawberry complains that Ordering Paragraph 3 improperly requires Danny Conlin to file a written response indicating why he, personally, should not be held in contempt for noncompliance with past Commission decisions and fined pursuant to section 2113, and why Conlin-Strawberry should not be fined $500 pursuant to section 2111. Conlin-Strawberry notes that Danny Conlin was not named in SPOA's complaint, which requested only an audit of Conlin-Strawberry's records and the appointment of a new system operator. The utility also points out that we did not serve Danny Conlin or Conlin-Strawberry with an order instituting investigation pursuant to Rule 14 of our Rules of Practice and Procedure. The utility argues that it is, therefore, inappropriate to issue an order in the present complaint docket requiring Danny Conlin to show cause why he should not be held in contempt and fined, or to investigate Conlin-Strawberry without first serving the company with an order instituting investigation.

As an initial matter, it is important to note that we are not limited by the recommendations in SPOA's complaint. In *City of Visalia* [D.75325](1969) 69 Cal.P.U.C. 310, 319, we cite *Market Street Railroad Company v. Railroad Commission of California* (1945) 324 U.S. 548, 560-561 in support of our rejection of "the contention that the Commission is limited in the exercise of its

expertise and statutory authority by the solutions proposed by litigants." (*See also, Re Limitation of Liability of Telephone Corporations* [D.77406] (1970) 71 Cal.P.U.C. 229,235.) Therefore, the fact that the decision under review contemplates imposing penalties on Conlin-Strawberry, even though such penalties were not requested in the original complaint, is not legal error.

Conlin-Strawberry properly notes, however, that Danny Conlin himself was not named as a defendant in SPOA's complaint, and that we have not instituted an investigation of Danny Conlin or served him with an order instituting investigation pursuant to Rule 14.[3] Conlin-Strawberry asserts that Ordering Paragraph 3 of the Decision inappropriately requires Danny Conlin to show cause why he should not be held in contempt and fined, and to show why Conlin-Strawberry should not be fined pursuant to section 2111.

In the interest of simplifying the legal issues in this proceeding, we will modify Ordering Paragraph 3 to remove the personal references to Danny Conlin. As noted earlier, as an officer, agent, or employee of a utility, Danny Conlin's acts and omissions within the scope of his official duties or employment will be considered the acts, omissions, or failures of the public utility. (Section 2109.).

We may, of course, issue a new order instituting investigation concerning Conlin-Strawberry and/or Danny Conlin at any time.

Petition for Modification

SPOA proposes modifications to the Decision which it believes will provide necessary guidance to Conlin-Strawberry and the Commission staff. SPOA believes that the intent of the Decision will not be achieved without these modifications. Accordingly, SPOA proposes language requiring that Tuolumne

[3] Rule 14 states in most pertinent part: "The Commission may at any time institute investigations on its own motion. Orders instituting investigation shall indicate the nature of the matters being investigated, and will be served upon the person or entity being investigated...."

Utilities District and the Pinecrest Permittees Association be considered for the position of system operator. Under SPOA's proposal, Commission staff would approve the selection of the operator, the budget, terms, conditions and length of the operator's contract, and the qualifications of the new operator's employees. However, as Conlin-Strawberry points out, a new operator has already been hired. Therefore, the issues raised in the proposed new language are moot.

SPOA proposes to add ordering paragraphs which summarize the prior Commission and DHS orders found to be violated and order the new operator to comply with them and operate the system under "best standard practices." Conlin-Strawberry points out that such an order is unnecessary. All public utilities are required to comply with all of our rules and regulations. The proposed language is superfluous and recommends a standard which is vague. The Commission and DHS have already promulgated the exact standards under which water utilities must be operated.

SPOA proposes to make the Commission staff the arbitrator of disputes between Conlin-Strawberry and the new operator. This proposal is troublesome. While staff may offer advice on regulatory issues, it does not normally continuously make management decisions, and is not authorized to operate a water utility. Therefore, this proposed modification is inappropriate.

SPOA proposed adding to the ordering paragraphs language requiring that the new system operator propose cost reduction measures for system operations. However, this issue was not addressed in this proceeding, and we will not make such an order now.

III. CONCLUSION

Conlin-Strawberry correctly notes a minor legal error in the Decision's references to the penalty provisions of the Public Utilities Code. Conlin-Strawberry also notes that the Decision orders Danny Conlin personally to

show why he and Conlin-Strawberry should not be found in contempt and fined, even though Danny Conlin was never named as a defendant in the complaint or served with an order instituting investigation in accord with Rule 14 of the our Rules of Practice and Procedure. The Decision will be modified to correct the penalty citations, and to delete language referencing Danny Conlin personally. References to contempt proceedings will also be deleted.

SPOA proposes a number of modifications to the Decision which, while well intentioned, are either unnecessary, vague, or inappropriate. SPOA's petition for modification will be denied.

Therefore, **IT IS ORDERED** that D.96-09-043 is modified as set forth below:

1. On page 2, the third sentence of the second full paragraph is replaced by the following:

> Indeed, this noncompliance contributed to a serious system outage in 1994, and we find that defendant's failures of compliance provide sufficient grounds to immediately replace Danny Conlin as the system manager and order Conlin-Strawberry to show cause why it should not be fined, pursuant to sections 2107-2110, for noncompliance with past Commission orders.

2. On page 5, in the second line of the third full paragraph, the number "2.20%" is replaced with the number "3%."

3. On page 5, in the second sentence of the third full paragraph, the word "again" is deleted.

4. On page 26, the second sentence of the last paragraph is replaced with the following:

> "After further investigation, staff will recommend whether Conlin-Strawberry should be fined for noncompliance with Commission orders, including General Order 103, pursuant to sections 2107-2110."

5. On page 28, the reference in finding of Fact 9 to "D.66037" is replaced with a reference to "Resolution W-3445."

6. On page 32, Conclusion of law 5 is replaced with the following

> "Within 30 days after the effective date of this order, Conlin-Strawberry should be ordered to show cause why it should not be found to have violated past Commission decisions and fined pursuant to sections 2107-2110.

7. On page 33, the first sentence of Ordering Paragraph 3, prior to the colon, is replaced with the following

> "Within 30 days after he effective date of this order, Conlin-Strawberry shall file a written response indicating why it should not be found to have failed to comply with past Commission decisions and fined pursuant to sections 2107-2110."

IT IS FURTHER ORDERED that:

1. Rehearing of D.96-09-043, as modified herein, is denied.

2. The petition of Strawberry Property owners' Association for modification of D.96-09-043 is denied

This order is effective today.

Dated October 9, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners