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MAIL DATE
4/6/99

Decision 99-04-028 April 1, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the Commission's own Motion into whether the Bidwell Water Company misused its Safe Drinking Water Bond Act Surcharge revenues and has violated rules, orders, and decisions of the Commission.

ORIGINAL

Investigation 97-04-018
(Filed April 9, 1997)

ORDER MODIFYING AND GRANTING LIMITED REHEARING OF DECISION 98-10-025

On October 8, 1998, the Commission issued Decision (D.) 98-10-025. This decision resolved an investigation the Commission had undertaken into the manner in which the Bidwell Water Company (Bidwell) had used the revenues collected pursuant to a Commission-authorized surcharge established to repay a Safe Drinking Water Bond Act (SDWBA) loan. D.98-10-025 found that Bidwell had violated a prior Commission order setting forth the accounting requirements related to this surcharge by failing to credit the SDWBA balancing account with a certain portion of those revenues, thus failing to use those uncredited revenues to repay the loan. This decision required Bidwell to make the SDWBA account whole over a period of several years, modified the surcharge during this period, and fined Bidwell $1,000. Bidwell filed a timely application for rehearing.

We have considered each and every allegation raised in the application for rehearing, and are of the opinion that with one exception related to estimated net revenues, insufficient grounds for rehearing have been shown, as we discuss further below. We will, therefore, grant limited rehearing to correct this

one error. We will also modify our discussion relating to the remedy we adopt, to clarify our determination.

I. BACKGROUND

Bidwell Water Company is a small water company with 500-plus customers in the town of Greenville and vicinity, which is under the regulatory jurisdiction of the Commission. Bidwell's current shareholders, Thomas J. and Vicky K. Jernigan, bought the utility in 1977. Around this same time, the state Department of Health Services ordered Bidwell to treat its water. This necessitated installation of filtration equipment and an overhaul of the antiquated and decaying water system. In order to do this, the Jernigans requested and were granted a Safe Drinking Water Bond Act (SDWBA) loan of $557,230 from the state Department of Water Resources (DWR). The Commission approved this loan in D.90714, dated August 28, 1979. By the terms of that decision, the loan was to be paid off by a special use surcharge on all water customers' bills, revenues from which were to be placed into a separate balancing account (the SDWBA Account) and not intermingled with other utility charges. (D.90714, pp. 5, 6, 15, 16, 17.)

In late 1995, Bidwell's consultant informed staff that Bidwell was diverting surplus SDWBA funds to normal operating expenses because its rates were not providing enough revenue to cover those expenses. A staff audit in conjunction with Bidwell's 1996 general rate increase application followed. The assigned staff auditor discovered that Bidwell apparently had continuously under-funded its SDWBA Account for the years 1979 through 1995; i.e., not all collected surcharge revenues were applied to the account as proceeds to enable repayment of the loan. Staff recommended a Commission investigation into the matter, and on April 9, 1997, we issued Order Instituting Investigation (OII or I.) 97-04-013. A prehearing conference and evidentiary hearing were held in November 1997 before

the assigned Administrative Law Judge (ALJ) and assigned Commissioner. Both Bidwell and our Consumer Services Division sponsored witnesses. In D.98-10-025, we concluded the investigation.

In D.98-10-025, we found that Bidwell had violated D.90714 by failing to credit $145,004 ($116,277 plus interest), which was earmarked for payment of the SDWBA loan, to the proper account during the period 1980-1997. The decision directed Bidwell to comply with D.90714 by restoring the account to the proper balance, and allowed Bidwell to do this restoration over a period of years. The decision also set a new SDWBA surcharge to reflect a reasonable estimate of the balance that should be in the account if all surcharge revenue had been properly credited. Finally, the decision imposed a punitive fine of $1,000, which was $100,000 less than the staff had recommended (staff sought a fine of $101,000, most of which would be suspended at such time as the surcharge account was brought into balance). As noted above, Bidwell filed a timely application for rehearing.

II. DISCUSSION

Most of the arguments raised in Bidwell's lengthy and desultory application for rehearing have been raised before, either in its two motions to dismiss the proceeding, in its comments to the ALJ's proposed decision, or at the evidentiary hearing itself. We find that for the most part these arguments are not meritorious, as we explain further below. As a preliminary matter, we address Bidwell's request for oral argument.

A. REQUEST FOR ORAL ARGUMENT

Bidwell, in paragraph 2 of its Prayer at the end of its application for rehearing, requests that oral argument be granted on its application. However, Bidwell provides no justification, as required by rule 86.4 of our Rules of Practice and Procedure (Cal. Code Regs., tit. 20), for why this case satisfies any of the

criteria listed in rule 86.3, nor why oral argument would materially assist the Commission in making its determination on Bidwell's application. Bidwell merely lists the criteria and asserts that they apply. This is insufficient to sustain Bidwell's request; therefore, we will deny it.

B. JURISDICTION; DUE PROCESS

Bidwell challenges the Commission's jurisdiction to even have instituted this proceeding, on the grounds that it is an unlawful contempt proceeding and that under several statutes of limitations and the doctrine of laches, it cannot be brought because 17 years have elapsed since the decision was issued approving the loan. Bidwell also contends we have no jurisdiction to fashion the remedy we have in D.98-10-025, because under Public Utilities Code section 2107[1], only the superior court can impose fines on public utilities pursuant to an action brought by the Commission. Bidwell finally argues that we have denied it due process. Bidwell has asserted these arguments throughout this proceeding. Bidwell is incorrect on all counts.

1. Jurisdiction Generally. First, apparently Bidwell misunderstands the nature of the forum in which it finds itself. This Commission is an administrative agency which, as Bidwell concedes, has been granted broad powers by both the California Constitution and the Public Utilities Code. Included in those powers is the authority to investigate allegations by our staff that an entity under our jurisdiction has violated a Commission order. (§§ 702, 1702.) Also included in those powers is our ability to take action against an entity which has violated a Commission order, to ensure that such violation stops and that future violations do not occur. (See generally §§ 2100-2119.)

Certainly, there is no question that Bidwell is a water company under our jurisdiction. As such, it has the duty to comply with all Commission orders

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

and resolutions which in any way relate to or affect its business as a public utility. (§ 702.) This particular proceeding began after our staff presented us with information in an audit report that Bidwell had violated a prior Commission order concerning how Bidwell must treat revenues collected pursuant to a surcharge which has been earmarked to pay off a Safe Drinking Water Bond Act loan. In response to that report, we issued our Order Instituting Investigation, which specifically required Bidwell to show cause why it should not be made to repay that part of the surcharge revenue which it did not use for the intended purpose.

Bidwell has cited no persuasive authority that we have overstepped our jurisdiction in instituting this proceeding.[2] Specifically, Bidwell's claims that we have exceeded our authority under sections 701, 1702, and 451 are misplaced.

2. Statutes of Limitations; Laches Bidwell claims the Commission is precluded from proceeding with this case by various statutes of limitations and/or the doctrine of laches. Despite persistent arguments that this is a contempt case, Bidwell argues that section 735, which applies to reparations cases, should apply by analogy to this case because "the Commission is undertaking to make a monetary award that is intended to compensate ratepayers" (App. Rhg., p. 40; see also p. 25, fn 5.) The portion of Section 735 which Bidwell considers relevant to this case provides that all complaints for damages resulting from a violation of any of the provisions of Part 1 of the Public Utilities Code shall be filed within two years from the time the cause of action accrues.[3]

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[2] Bidwell argues this proceeding is not an investigation, but an adjudication. It is true that this proceeding included an adjudication, after evidence had been presented by the parties and we had evaluated it. This is how all investigations of this nature proceed before the Commission.

[3] Because the Commission cannot award general or punitive damages, the term "damages" in § 735 refers to reparations.

Bidwell then asserts that even if section 735 does not apply, it is appropriate to use various statutes of limitations from either the Penal Code (concerning misdemeanors, which Bidwell says violation of a Commission order would be) or the Code of Civil Procedure (concerning actions or special proceedings for penalties or forfeitures, or concerning situations where because no specific statute of limitations applies, a four-year limitation applies). Finally, Bidwell invokes the doctrine of laches, based on unreasonable delay in beginning the investigation against Bidwell.

These arguments are not persuasive. Section 735 applies to reparations cases where individual ratepayers, having allegedly been charged an unlawful or unreasonable rate, seek to be made whole. This is not a classical reparations case. This case involves the Commission's investigation of alleged misuse of a certain portion of a fund earmarked for one specified purpose, and a remedy which requires the company to make that fund whole.

Further, as to Bidwell's trying to "borrow" statutes of limitations from either the Penal Code or the Code of Civil Procedure, this proceeding is not a criminal proceeding, therefore, no section of the Penal Code, be it a statute of limitations or otherwise, is even arguably applicable. Moreover, California courts have held that statutes of limitations codified in the Code of Civil Procedure do not apply to administrative actions. *See Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal.App.4th 1357, 1361-1362; *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal. App..4th 325, 329; *Bernd v. Eu* (1979) 100 Cal.App.3d 511.

Finally, with regard to the doctrine of laches, Bidwell has not shown that there was unreasonable delay in initiating this proceeding, nor has Bidwell shown any prejudice to itself. Both showings are required; mere assertions do not suffice. It must be remembered that our staff did not know of any irregularities regarding the SDWBA surcharge revenues until they were told of such by a

representative of Bidwell in September of 1995. (R.T., pp. 115, 126.) In Resolution W-3963, dated January 10, 1996, Bidwell was given an interim rate increase, but it was specifically noted that our staff's preliminary investigation "revealed that BWC may have misused the SDWBA loan surcharge revenues it collected from its customers. The [staff] is currently evaluating how much of the SDWBA loan money was utilized and, at this time, does not recommend an interim increase in the SDWBA loan surcharge until the evaluation has been completed." Res. W-3963, p. 2. Moreover, this Resolution contained five ordering paragraphs relating to preliminary attempts to rectify this situation. *Id.*, p. 3. Thus our staff had begun investigating the SDWBA surcharge problem and the Commission had put preliminary measures in place to contain it within 5 months of learning about possible irregularities.

Resolution W-3999, issued September 4, 1996, authorized a general rate increase for Bidwell which included the interim increase approved in Res. W-3963. At the time this Resolution was issued, more had been discovered by our staff; they had undertaken a complete financial audit, and were continuing to investigate the situation. This Resolution also contained ordering paragraphs related to the surcharge problem; the one most relevant to the issue we address here is Ordering Paragraph 2, which ordered Bidwell to deposit at least $800 monthly into its SDWBA trust account, over and above any surcharge revenues deposited in that account. We note that Bidwell never applied for rehearing of this Resolution; moreover, staff testimony asserted that Bidwell had not been depositing the $800 monthly which the Resolution, and later the OII, had required it to do.[4] (Ex. 1, p. 8.)

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[4] Bidwell claims in its application for rehearing that Res. W-3999 observed that "Bidwell is in compliance with all relevant Commission orders relating to the SDWBA account." App.Rhg, p. 41. In fact, Res. W-3999 states: "To Branch's knowledge, BWC has complied with the orders contained in Res. W-3963." Res.W-3999, p. 3. It should be noted that these orders did not yet require Bidwell to make restitution to the surcharge fund; they only required some changes in accounting and reporting to our staff. See Res.

The order instituting the investigation at issue here was signed by the Commission on April 9, 1997. That was less than two years after the staff first became aware of the possible SDWBA surcharge irregularities. Even if Bidwell's argument that section 735 should be applicable by analogy were to have merit, this history shows that action to correct the situation began well within the two-year period described by that statute. We reject Bidwell's arguments on statutes of limitations and the doctrine of laches.

3. Due Process. As noted above, Bidwell claims that this proceeding is a contempt proceeding, because it involves alleged violations of a Commission order. Bidwell argues that section 2113 allows the Commission to punish for contempt "only to the same extent and in the same manner that contempt is punishable in the courts. . . ." Bidwell then contends the Commission denied it the due process it deserved under this statute, i.e., the right to notice and the opportunity to be heard, the right to a jury trial, and the right to have the charges against it proved beyond a reasonable doubt.

Bidwell is wrong in asserting that I.97-04-013 was a contempt proceeding. This proceeding was an investigation. No contempt order was issued against Bidwell, nor was one ever contemplated. The purpose of the investigation was to evaluate whether Bidwell was in violation of a Commission order; it could not be charged with contempt, even assuming the Commission would have considered doing so, until such a finding had been made.

Bidwell's unsupported claim that it was denied notice and opportunity to be heard is without merit. Bidwell was given every opportunity to make its case before the ALJ and Assigned Commissioner, and in turn the full Commission. As recounted above, Resolutions W-3963 and W-3999, which were served on Bidwell, gave it early notice that its practices with regard to the surcharge revenues

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W-3963, p. 3, Ordering Paragraphs 3-7.

were being examined. It was then served with a copy of the OII, which included the requirement that it show cause why it should not have to repay the portion of the surcharge revenues at issue.

A prehearing conference was held. Bidwell filed a motion to dismiss the proceeding, which was denied. A second motion to dismiss was filed, which included a motion to strike testimony, which was also denied. An evidentiary hearing was held where both Bidwell and our staff presented testimony and conducted cross examination. Both parties filed briefs and comments on the ALJ's proposed decision, and Bidwell filed an application for rehearing which we are ruling on today. Bidwell has been accorded full due process.

Its claim that it is entitled to a jury trial is also meritless. No proceeding before the Commission is or ever has been conducted through the medium of a jury trial. The Commission has been established under law to be both fact finder and decisionmaker. Bidwell was not denied due process on this score.

Finally, concerning the standard of proof, we reiterate that this is not a contempt proceeding. However, the record shows beyond a reasonable doubt, according to Bidwell's own witnesses, that beginning in the early 1980's, Bidwell regularly failed to place a portion of its SDWBA surcharge revenues in the appropriate trust account, and used those same revenues for purposes other than to repay its SDWBA loan, thus violating the terms of D.90714.

III. FINDINGS AND CONCLUSIONS

Bidwell argues that Findings 2, 3, 4, 5, 7, 8, 12, 13, 14, and 15 "are not supported by, or are contrary to, the evidence admitted at the time of the hearing . . . , and are otherwise not supported by substantial evidence and are findings made in excess of or without power or jurisdiction or because the Commission has failed to proceed in the manner required by law . . . ." App/Rhg,

p. 2. Bidwell then discusses each challenged finding in turn. It follows much the same approach in challenging Conclusions of Law 1-4, 6, and 7.

With few exceptions, we find Bidwell's arguments to be without merit. While we do not address each argument Bidwell raises, we do address major ones for purposes of clarifying our decision and correcting one legal error.

Bidwell asserts that Findings 2 and 3, which essentially state that the SDWBA surcharge authorized in D.90714 was to be utilized only to cover the costs of the loan and should not be intermingled with other utility charges, rely on a "perverse interpretation" of D.90714. Bidwell contends that even though the original surcharge was proposed to cover only the costs of repaying the loan, this does not "mean or even imply" that D.90714 ordered Bidwell to use the surcharge to do only this, or that D.90714 required Bidwell not to intermingle the surcharge revenues with other utility charges. In fact, as D.98-10-025 demonstrates by quoting many different passages from D.90714 (see D.98-10-025, pp. 2-3, 13), that earlier decision required both of these things.

Bidwell relies on one single sentence from D.90714 to support its interpretation that D.90714 entitled it to use a portion of the surcharge revenues to pay operating expenses, or that any rate, D.90714 is ambiguous on this issue. Ordering Paragraph 4 of that decision states, in part: "Applicants [Bidwell] shall 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 as utilized." (Emphasis added.) Bidwell contends the words "as utilized" apply to both the surcharge revenues and investment tax credits. Thus Bidwell argues it did not have to credit the balancing account with any surcharge revenues which were not "utilized" to repay the loan.

Testimony as to the meaning of the words "as utilized" was conflicting. The staff witness testified that at most, those words were ambiguous as to how investment tax credits should be treated; in his view, they did not apply

to the surcharge revenues themselves. Bidwell's witness testified that it was ambiguous as to whether "as utilized" applied to surcharge revenues, and that Bidwell should essentially be given the benefit of the doubt on this point. In this situation, the Commission has the discretion to weigh the evidence, which we did in favor of our staff's interpretation. This interpretation is consistent with the way the Commission has treated surcharges to pay for SDWBA loans for as long as this mechanism has been available to water companies like Bidwell; i.e., for at least as long as Bidwell has had its loan. It would have been totally inconsistent for the Commission to overturn at least 20 years of precedent in favor of the interpretation stressed by Bidwell.

As important, however, are the many other passages from D.90714 which support the staff's interpretation. As D.98-10-025 states: "The plain reading of D.90714 clearly provides that [failure to credit all funds collected pursuant to the SDWBA surcharge to the SDWBA balancing account] was prohibited." D.98-10-025, p. 13. Bidwell's reading of the earlier decision is simply not supportable.

Bidwell objects that Finding 5 recites the wrong amount of interest, even assuming that the staff made use of Bidwell's interest figures. An independent review of the calculations by staff unassociated with this case indicates that Bidwell's interest figures were indeed used for the period 1980-1995, that interest figures for 1996 and 1997 came from bank statements which Bidwell provided, that the methodology used to make the calculations followed usual Commission practice concerning calculating interest on balancing accounts, and that the figure in Finding 5 is correct. Bidwell has not sufficiently identified where any supposed error lies.

Bidwell then argues that since there was never a specific requirement that the balancing account be an interest bearing account, the Commission has no authority to require that the account be credited with interest for money which was

never placed in the account. We reject this argument. By their very nature, virtually all balancing accounts have an interest component, whether specified or not. Moreover, Bidwell's contract with DWR required Bidwell to set up a trust account or accounts with a bank, to ensure that the loan would be repaid according to the terms of the contract. The bank agreement, in turn, provides for interest in the two accounts established for this purpose. (Ex. 1, Att. 6.) D.90714, in authorizing the loan and the surcharge, memorialized this requirement. (Ex. 1, Att. 3.) Finally, as stated above, Bidwell itself provided interest figures for surcharge revenues properly credited to the SDWBA account; it cannot now be heard to argue that no interest should be applied to money which it improperly failed to credit.

Findings 7 and 8 and Conclusions of Law 3 and 4 deal with the remedy we fashioned to make the SDWBA balancing account whole. First, Bidwell is to credit the SDWBA account with approximately $22,000 per year, until the account is fully credited with the amount Bidwell appropriated for other purposes. This amount comes from the Summary of Earnings table in Resolution W-3999, Appendix A, which indicates that as of Bidwell's general rate increase approved in that Resolution on September 4, 1996, Bidwell's estimated net revenue was $22,740. In addition, Bidwell is directed to adjust its SDWBA surcharge to produce revenues of approximately $14,000 per year which, along with the $22,000, will fund the SDWBA sufficiently to cover the loan payments.

Bidwell first protests[5] that the copy of Resolution W-3999 which was introduced into the record does not contain Appendix A, thus there is no record

[5] In its comments to the ALJ's Proposed Decision, Bidwell noted only, re: the proposed remedy (which we adopted verbatim in D.98-10-025): "Space limitations preclude extensive comment on the remedy proposed other than to note that, in addition to being completely unwarranted, the proposed orders insure only that the SDWBA loan will fall into default, Bidwell will file for bankruptcy

evidence of Bidwell's projected net revenue under adopted rates. Bidwell further argues that Resolution W-4107, issued August 6, 1998, granted Bidwell its most recent general rate increase, and thus contains a more recent Summary of Earnings table. We note that Bidwell does not concede that it is appropriate to use any aspect of Bidwell's rate structure in fashioning a remedy in this case; however, Bidwell does assert that if the Commission persists in doing so, it should at least take official notice of Resolution W-4107.

Bidwell is correct that the copy of Resolution W-3999 in the record does not contain Appendix A. Presumably, this omission was an inadvertent error, as a summary of earnings table is routinely included in resolutions or decisions authorizing general rate increases. Bidwell is also correct that Resolution W-4107, the most recent general rate increase authorization for Bidwell, contains the most recent Summary of Earnings table.

Under rule 73 of our Rules of Practice and Procedure, we may take official notice of such facts as may be judicially noticed by the courts of the State of California. In applying this rule, we have often officially noticed prior Commission orders, including resolutions. Therefore, we will grant limited rehearing in order to take official notice of Resolution W-4107, including Appendix A, which is the Summary of Earnings table for that Resolution. We note that Appendix A of Resolution W-4107 states that Bidwell's expected net revenue under the new general rates approved by that Resolution is $22,662, less than $100 different from the figure referred to in D.98-10-025. In any event, this is the figure we will use for purposes of the remedy in this case, and we will modify D.98-10-025 accordingly.

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protection and ratepayers will end up paying a great deal more for water services if they can get them at all." (Comments to ALJ's PD, Sept. 23, 1998, pp. 15-16.)

Bidwell lastly argues that dropping the surcharge to a level which will produce approximately $14,000 per year and requiring that the SDWBA account be credited $22,000 per year until the difference is made up amounts to confiscation of Bidwell's property. This is because Bidwell will have to turn over all of its return - or profits - to the account, and thus will not have the opportunity to earn a fair return on its investment.

In making this argument, Bidwell fails to acknowledge the situation presented by this case. As shown by Appendix A of Resolution W-4107, Bidwell's rates have been set to give it the opportunity to earn a fair return, independently of any concerns over the SDWBA surcharge revenues. D.98-10-025 has not altered these rates. However, what Bidwell will not recognize is that for a period of 17 years, it wrongfully took revenues which were specifically designated to go into a particular account for a particular purpose and used those revenues for other things. In so doing, Bidwell violated D.90714. Bidwell now has to put those revenues where they should have gone in the first place.

In determining how Bidwell might most expeditiously accomplish this, given that it almost certainly could not replace the deficit with a lump sum, we looked at its estimated net revenues. Those revenues constitute a source of funds which, for the next six to seven years, can be used to make the SDWBA account whole. In addition, however, Bidwell must continue making the loan payments; thus the SDWBA account must contain enough funds to assure that this can be done. The record is clear that the surcharge as originally set has consistently produced more than Bidwell has needed to make payments on its loan. In order to bring the account to the necessary level, we have adjusted the amount of the surcharge so that it will produce the difference between the $22,000 and the amount needed for loan repayments (approximately $36,000), or $14,000. Another way of stating it is that the surcharge adjustment, plus an amount equivalent to the

annual estimated profits, will produce enough money to continue payments on the loan, as well as gradually repaying the account.

This does not amount to confiscation of Bidwell's property. The law on takings does not shield a utility from the financial consequences of its unlawful actions. Moreover, as we will make clear from the modifications we will make to D.98-10-025, we do not mean to irrevocably commit Bidwell to utilizing its net revenues to repay its SDWBA account if it has another alternative. However, it does have to repay that account somehow, and within the six-to-seven-year boundary we have set. We have set forth the above scenario as one which will accomplish this end, and which appears from the record in this case to be within Bidwell's means.

We are, however, concerned that we may not have allowed for Bidwell to actually take in enough revenue to meet its expenses and meet its loan payments. This is based on testimony indicating that the loan payments are currently approximately $40,000 per year. (R.T., pp. 44, 123; Ex. 8.) Clearly, $14,000 and $22,000 do not add up to $40,000. Therefore, we will modify our adjustment to the surcharge so as to require that it be adjusted to produce approximately $20,000 per year.

IV. SECTION 311

Bidwell argues we cannot sustain D.98-10-025 because it was issued in violation of section 311. Specifically, section 311 requires that an ALJ's proposed decision be issued within 90 days after submission of the case; this period was exceeded in this proceeding.

We have previously held that section 311 is directory, but does not provide that the Commission loses jurisdiction to issue a decision if this time limit is exceeded. *Babaeian Transportation Co. vs. Southern California Transit Corp.* (1992) 46 Cal.P.U.C.2d 38; *In the Matter of Used Household Goods*

Transportation by Truck (1990) 38 Cal.P.U.C.2d 559, 579. We affirmed this holding in D.98-10-025, with expanded discussion of our position. We reaffirm our holding here.

Bidwell also argues we cannot maintain this proceeding because it lasted more than the 12 months called for by section 1701.2 for adjudication cases. That statute, however, applies only to adjudication proceedings initiated after January 1, 1998, which is not the situation here.

V. PENALTY; OTHER ARGUMENTS

Bidwell argues we have no jurisdiction to impose penalties on it, and that section 2107 requires us to initiate an action in superior court in order to do so. Bidwell is incorrect. We have very recently had the occasion to address the very same issue. In D.99-03-025, we stated:

> At one time, we did not attempt to directly impose or collect penalties under Sections 2107 and 2108. Instead, if we found a violation, we ordered our General Counsel to file an action in superior court to recover penalties. (See, e.g, Suburban Water Systems (1964) 63 Cal.P.U.C. 649, 664.) More recently, we have interpreted Sections 2104 and 701 [footnote omitted] to allow us to impose penalties but to require action in superior court if the penalties are not paid voluntarily. (See, e.g., In re Application of Southern California Water Company (1991) 39 Cal.P.U.C.2d 507; TURN v. Pacific Bell (1994) 54 Cal.P.U.C.2d 122, 124; Re Facilities-Based Cellular Carriers (1994) 57 Cal.P.U.C.2d 176, 205, 215; In re Application of Pacific Gas & Electric Company [D.96-11-014] (1996) __Cal.P.U.C.2d__ [footnote omitted; this footnote expressly disapproves Dimaggio v. Pacific Bell (1992) 43 Cal.P.U.C.2d 392, where the Commission took a more limited view of its authority to impose penalties].

In re Rulemaking to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates (1999)

__Cal.P.U.C.2d__ (Dec. No. 99-03-025, pp. 8-9.) See also, In re Communications TeleSystems International (1997) __Cal.P.U.C.2d__ (Dec. No. 97-10-063, p. 10) (review den. Dec. 23, 1997 (SO65955)) which also disapproved Dimaggio.

Bidwell argues that Assembly v. Public Utilities Com. (1995) 12 Cal.4th 87, contains language which precludes us from imposing penalties pursuant to sections 2107 and 701. Bidwell is in error. The California Supreme Court in Assembly discussed uses which could be made of penalties under the numerous statutory provisions which allow the Commission to assess fines and penalties, but made no mention of any necessity for the Commission to file suit in superior court before it could assess such against utilities. Assembly, supra, 12 Cal.4th at 103, n. 10.

To the extent Bidwell presents other arguments in the course of its application for rehearing which we do not address here, those arguments are deemed to be without merit.

VI. REQUEST FOR STAY

Finally, Bidwell in paragraph 3 of its prayer requests that "the orders made in D.98-10-025 be stayed and suspended pending determination of this petition in accordance with PUC sections 1733 and 1735." Because we have found no legal error in our decision for which we must hold further hearings, we will deny this request.

THEREFORE, IT IS ORDERED that

1. Limited rehearing of Decision 98-10-025 is granted for the purpose of taking official notice of Resolution W-4107, including Appendix A thereto, the Summary of Earnings table for Bidwell Water Company (copy attached).

2. Decision 98-10-025 is modified as follows:

   a. The third and fourth full paragraphs on page 14, extending onto page 15, are deleted and the following language substituted:

"Appendix A of Resolution No. W-4107, which we take official notice of under Rule 73 of our Rules of Practice and Procedure, sets forth the results of operations for Bidwell and shows that its profit margin - the difference between all reasonable expenses and revenue - equals about $22,662 per year at the currently adopted 20% operating ratio. The remedy we formulate today makes use of this source of funds as part of the mechanism by which Bidwell can make the SDWBA account whole.

"Under this remedy, we will reset the SDWBA surcharge as if the funds had not been previously redirected. We will set the surcharge so that it produces annual revenues of about $20,000. This is the difference between the SDWBA annual loan payment of approximately $40,000 (as indicated by the testimony of Bidwell's consultant and our staff witness, and by the Department of Water Resources repayment schedule) and the credit of $22,000 that the record indicates Bidwell should be able to make from its annual profit margin. Bidwell will be able to service its SDWBA loan, and Bidwell will continue to be able to recover all reasonable operating expenses (including interest payments) under our current operating ratio method of ratesetting. When the entire credit has been accomplished, Bidwell may seek to have the surcharge adjusted.

"We realize that under this formulation of the remedy, Bidwell will have to operate for a period of about six to seven years with little or no profit margin after making the credit to the SDWBA account. We do not insist that this specific formulation be used; we have chosen it because the record before us indicates that it is within Bidwell's means, and it does not require Herculean efforts to find a rather large lump sum. However, we do insist that Bidwell make the account whole without further imposition on its ratepayers, and we also insist that it be done within the six to seven year

timeframe. Bidwell is free to propose another way to make the account whole, but until it does, and we approve the change of method requested, Bidwell shall follow the directives we have set forth."

b. Finding of Fact 4 is modified to read:

"Bidwell collected from customers $116,277 more for SDWBA surcharges than it credited to the SDWBA account over the period from 1980 to 1977."

c. Finding of Fact 12 is modified to read:

"The Bidwell profit margin equals about $22,662 per year, based on the Summary of Earnings table from its most recently authorized general rate increase (Resolution No. W-4107, dated August 6, 1998)."

d. Finding of Fact 13 is modified to read:

"The record indicates that the SDWBA annual loan payment is about $40,000 per year."

e. Finding of Fact 14 is modified to read:

"It is reasonable to set the SDWBA surcharge so that it produces revenues of about $20,000 per year until the balancing account is properly balanced."

f. Conclusion of Law 3 is modified to read:

"One reasonable way for Bidwell to properly balance the SDWBA account is for Bidwell to credit the SDWBA account with $22,000 per year over SDWBA surcharge collections until the balancing is achieved."

g. Conclusion of Law 4 is modified to read:

"The SDWBA surcharge should be adjusted to produce revenues of approximately $20,000 per year until the account is properly balanced."

h. Ordering Paragraph 4 is modified to read:

"The SDWBA surcharge should be adjusted to produce revenues of approximately $20,000 per year until the full credit is accomplished."

i. New Ordering Paragraph 5A is added to read:

"The remedy outlined in Ordering Paragraphs 1-5 above will apply unless and until Bidwell proposes and the Commission accepts another mechanism to properly balance the SDWBA account within the time limits outlined in this decision and with no negative impact on Bidwell's ratepayers."

3. Bidwell's request for oral argument on its application for rehearing is denied.

4. Bidwell's request for stay of Decision 98-10-025 is denied.

5. Bidwell's application for rehearing of Decision 98-10-025, as modified above, is denied in all other respects.

This order is effective today.

Dated April 1, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

WATER DIVISION
Water Advisory Branch

RESOLUTION NO. W-4107
August 6, 1998

RESOLUTION

(RES. W- 4107), BIDWELLWATER COMPANY (BWC). ORDER AUTHORIZING A GENERAL RATE INCREASE PRODUCING ADDITIONAL ANNUAL REVENUES OF $10,964 OR 7.93% IN 1998.

BY DRAFT ADVICE LETTER ACCEPTED ON JANUARY 21, 1998.

SUMMARY

This Resolution grants an increase in gross annual revenues of $10,964 or 7.93% for test year 1998. This increase will provide an operating ratio of 20% over expenses in 1998.

BACKGROUND

BWC requested authority under Section VI of General Order 96-A and Section 454 of the Public Utilities Code to increase rates for water service by $40,564 or 29.35% in 1998. BWC's request shows gross revenue of $138,203 at present rates increasing to $178,767 at proposed rates.

BWC estimates that it will service approximately 485 metered rate, 27 flat rate, and 38 fire protection customers in test year 1998. BWC provides service to the town of Greenville, in Plumas County. BWC's service area covers approximately two square miles of territory located along the Highway 89.

The present rates were established on May 26, 1997 by Resolution No. W-4013 which authorized Advice Letter 32 to recover fees paid to the Department of Health Services, and to offset the increase in the Consumer Price Index pursuant to Decision 92-03-093. The last general rate increase was granted on September 4, 1996 by Resolution W-3999 which authorized a general rate increase of $56,210 or 66.6% additional annual revenue.

DISCUSSION

The Water Advisory Branch (Branch) made an independent analysis of BWC's operations and issued its report in March, 1998. Appendix A shows BWC's and the Branch's estimates of the summary of earnings at present, requested, and adopted rates for the test year. Appendix A shows differences between BWC's and the Branch's estimates in operating revenues, operating expenses, and rate base.

BWC was informed of the Branch's differing views of revenues and expenses and disagreed with several Branch expense recommendations. Subsequent negotiations between Branch and BWC settled some of the disagreements, however, some differences could not be resolved. At that point, BWC chose to exercise its right to appeal pursuant to Ordering Paragraph 7 of Commission Decision 92-03-093. The adopted Summary of Earnings shown in Appendix A reflects the revenue and expenses agreed upon by BWC after appealing to the Water Division Director.

BWC's draft advice letter requested rates that it estimated would produce an operating ratio of 19.1% in the test year. The Summary of Earnings in Appendix A shows an operating ratio of 20.0% at Branch's recommended rates. Although this exceeds the rate estimated by BWC, it does not result in an overall increase greater than requested.

Under guidelines established in Decision 92-03-093, the Commission staff must calculate net revenues by both the rate base/return method and the operating ratio method, selecting the method that produces the most revenue. Branch used the 20% operating ratio method for determining the revenue requirement in this study due to BWC's relatively low rate base. Branch will continue to work with BWC to establish rate base to which the utility can build on and eventually earn a return on.

BWC estimated employee labor to be $18,636 in its original increase request. The Branch agreed with this estimate as being reasonable for a utility of BWC's size and operating characteristics. Subsequent to the original request, BWC informed the Branch that its original estimate of $18,636 was low and that based on employee labor expenses incurred so far in 1988, employee labor in test year 1998 should be $23,000. Branch did not increase its estimate, however, it recommends that BWC be authorized to establish and maintain an employee labor balancing account into which it will record the difference between actual employee labor expenses and the currently adopted employee labor expenses. At the end of each calendar year, BWC should then be authorized to request a surcharge or provide a surcredit to customers to compensate for the under or over collection balance in the employee labor balancing account.

BWC estimated professional services expenses to be $33,553 in the test year. Included in this expense category was approximately $16,292 in legal and other professional services expenses associated with a currently pending matter before the Commission involving BWC. The matter is a Commission Order Instituting Investigation (I.97-04-013) into whether BWC misused its Safe Drinking Water Bond Act (SDWBA) surcharge revenues and has violated rules, orders and decisions of the Commission. The Water Division's Auditing and Compliance Branch (Auditors) participated in this proceeding conducting an independent investigation and providing testimony at hearings in the matter. The Auditor's testimony concluded that BWC did misuse the SDWBA surcharge revenues thus violating a previous Commission order and decision. The final decision in I.97-04-013 is pending. In order to be consistent with the Auditor's conclusion in the matter, Branch disallowed the professional services expenses incurred by BWC in I.97-04-013. Ratepayers should not be held responsible for costs associated with the violation of

Commission orders and decisions. If the I.97-04-013 decision rules that BWC did not misuse SDWBA surcharge revenues and was not in violation of any Commission rules, orders and decisions, the Branch will consider amortizing those expenses in BWC's next general rate case filing.

BWC's filed tariffs currently contain three rate schedules: 1, General Metered Service; 2-R, Residential Flat Rate Service; and F-1, Private Fire Hydrant Service. In its request, BWC requested that all rates be increased by the system average increase. The Branch concurs.

At the Branch's recommended rates shown in Appendix A, the monthly bill for a 5/8 x 3/4-inch metered customer using 10.0 Ccf (one Ccf equals 100 cubic feet) will increase from $18.15 to $19.90 or 9.64%. The monthly bill for a residential flat rate customer will increase from $18.60 to $20.10 or 8.06%. Bill comparisons are shown in Appendix C. The adopted quantities and tax calculations are shown in Appendix D.

NOTICE AND PROTESTS

On Monday, March 2, 1998 at 6:30pm, a public meeting was held in the utility's service area. The Branch representative explained Commission rate setting procedures and BWC's representative explained the reasons for the proposed increase. Approximately 33 customers attended the meeting. About 10 customers made statements, asked questions, registered complaints, or made miscellaneous comments related to utility operations. One customer representing the retired people in the system, presented to the Branch Representative a petition with 131 signatures protesting the increase. All of the customers, who spoke at the meeting, protested the magnitude of the increase.

Many comments and complaints at the meeting concerned the utility's Safe Drinking Water Bond Act Trust account and attorney fees associated with I.97-04-013. Branch representatives explained that customer's concerns with the trust account have been considered in I.97-04-013 with a Decision being rendered very soon. Branch representatives assured customers that the Commission would take into account all of the customers concerns when authorizing the final rates in the matter.

FINDINGS AND CONCLUSIONS

1. The summary of earnings (Appendix A) developed by the Branch is reasonable and should be adopted.

2. The rates proposed by the Branch (Appendix B) are reasonable and should be adopted.

3. BWC should be authorized to establish and maintain an employee labor balancing account to record the difference between recorded employee labor expenses and currently adopted

employee labor expenses. At the end of each calendar year, BWC should be authorized to request by advice letter to assess a surcharge or provide a surcredit to each customer to compensate for the under or over collection balance in the employee labor balancing account.

4. The quantities (Appendix D) used in preparation of this report are reasonable and should be adopted.

5. The rate increase proposed by the Branch is justified and the resulting rates are just and reasonable.

IT IS ORDERED that:

1. Authority is granted under Public Utilities Code Section 454 for Bidwell Water Company to file an advice letter incorporating the summary of earnings and the revised schedules attached to this resolution as Appendices A and B, respectively, and concurrently to cancel its presently effective rate schedules - 1, General Metered Service; 2-R, Residential Flat Rate Service; and F-1, Private Fire Hydrant Service. The effective date of the revised schedules shall be five days after the date of its filing.

2. Bidwell Water Company is authorized to establish and maintain an employee labor balancing account to record the difference between recorded employee labor expenses and currently adopted employee labor expenses. At the end of each calendar year, Bidwell Water Company is authorized to request by advice letter to assess a surcharge or provide a surcredit to each customer to compensate for the under or over collection balance in the employee labor balancing account.

3. This resolution is effective today.

I certify that this resolution was adopted by the Public Utilities Commission at its regular meeting on August 6, 1998. The following Commissioners approved it:

Wesley Franklin

WESLEY M. FRANKLIN
Executive Director

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

APPENDIX A

BIDWELL WATER COMPANY

SUMMARY OF EARNINGS

Test Year 1998

Item	Utility Estimated		Branch Estimated		
	Present Rates	Requested Rates	Present Rates	Requested Rates	Adopted Rates
Operating Revenue					
Metered Rates	$130,810	$167,179	$130,810	$169,257	$141,713
Flat Rates	5,820	9,553	5,820	7,458	6,270
Fire Protection	1,573	2,035	1,573	2,035	1,710
Total Revenue	138,203	178,767	138,203	178,750	149,167
Operating Expenses					
Power	980	980	980	980	980
Other Volume Related	7,560	7,560	7,560	7,560	7,560
Materials	7,360	7,360	6,943	6,943	6,943
Employee Labor	18,636	18,636	18,636	18,636	18,636
Contract Work	2,352	2,352	2,352	2,352	2,352
Transportation Exp.	4,660	4,660	4,660	4,660	4,660
Other Plant Maintenance	100	100	765	765	765
Office Salaries	15,503	15,503	15,503	15,503	15,503
Management Salaries	21,000	21,000	21,000	21,000	21,000
Employee Benefits	4,470	4,470	4,575	4,575	4,575
Uncollectibles	1,410	1,410	1,000	1,000	1,000
Office Services & Rental	1,320	1,320	1,320	1,320	1,320
Office Suppl. & Exp.	4,470	4,470	4,470	4,470	4,470
Professional Services	33,553	33,553	12,113	12,113	12,113
Insurance	3,410	3,410	3,410	3,410	3,410
Regulatory Comm. Exp.	2,500	2,500	-	0	0
General Expenses	900	900	900	900	900
Subtotal	$130,184	$130,184	$106,187	$106,187	$106,187
Depreciation Expense	$7,137	$7,138	$7,125	$7,125	$7,125
Property Taxes	1,515	1,515	1,130	$1,130	$1,130
Payroll Taxes	5,825	5,825	5,478	$5,478	$5,478
State Income Tax	800	3,081	1,616	5,201	2,585
Federal Income Tax	0	4,765	2,500	8,044	3,999
Total Deductions	$145,461	$152,508	$124,036	$133,165	$126,505
Net Revenue	-$7,258	$26,259	$14,167	$45,585	$22,662
Rate Base					
Average Plant	294,000	294,000	200,450	200,450	200,450
Avr. Accum. Deprec.	170,186	170,186	174,980	174,980	174,980
Net Plant	123,814	123,814	25,470	25,470	25,470
Plus: Working Cash	10,849	10,849	0	0	0
Materials & Supplies	12,283	12,283	12,283	12,283	12,283
Less: Acc Defered Income Taxes	13,608	13,608	0	0	0
Rate Base	$133,338	$133,338	$37,753	$37,753	$37,753
Return On Margin	loss	19.1%	12.5%	40.2%	20.0%

[Appendices B-D not included]