L/ngs*

MAIL DATE
9/17/99

Decision 99-09-073 September 16, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into whether existing standards and policies of the Commission regarding drinking water quality adequately protect the public health and safety with respect to contaminants such as Volatile Organic Compounds, Perchlorate, MTBEs, and whether those standards and policies are being uniformly complied with by Commission regulated utilities.	Investigation 98-03-013 (Filed March 12, 1998)

ORDER MODIFYING DECISION 99-06-054 FOR PURPOSES OF CLARIFICATION AND DENYING REHEARING

I. INTRODUCTION

On March 12, 1998, we instituted Investigation (I.) 98-03-013, an inquiry into the safety of drinking water service provided by Commission-regulated water utilities.[1] This investigation followed the filing of complaints in the superior courts of California by numerous plaintiffs alleging that water utilities under the Commission's jurisdiction and other defendants have delivered and continue to deliver contaminated water detrimental to the health of utility customers. These lawsuits, now pending in the state courts, allege negligence, wrongful death, strict liability, trespass, public nuisance, and private nuisance, and seek injunctive relief against defendant water companies and

[1] *Investigation on the Commission's own motion into whether existing standards and policies of the Commission regarding drinking water quality adequately protect the public health and safety with respect to contaminants etc.* (OII or Drinking Water Investigation (1998) __ Cal. P.U.C.2d __ (I.98-03-013)).

others.[2] We determined that the allegations raised about the safety of the drinking water provided by the regulated water utility defendants to twenty percent of Californians are matters of statewide concern, and that an investigation should be conducted into the operations of those utilities.

In our Order Instituting Investigation, we posed the following questions to be addressed:

> "Are the prevailing drinking water standards safe, including those relating to VOCs and Perchlorate and any other known contaminants?
>
> "Are water utilities complying with prevailing safe drinking water standards including those relating to VOCs and Perchlorate and any other known contaminants?
>
> "Are water quality standards adequate and safe, including, without limitation, whether the maximum contaminant levels (MCLs), Action Levels, and other Safe Drinking Water Act requirements relating to substances such as VOCs and Perchlorate and any other contaminants, such that these standards adequately protect the public health and safety?
>
> "What appropriate remedies should apply for non-compliance with safe drinking water standards?
>
> "The extent to which the occurrence of temporary excursions of contaminant levels above regulatory thresholds, such as MCLs and action levels, may be acceptable in light of economic, technological, public health and safety issues, and compliance with Public Utilities Code Section 770."
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> (Drinking Water Investigation (1998) I.98-03-013, slip opinion, pp. 10-11.)

On December 4, 1998, two parties filed motions challenging our jurisdiction to conduct this proceeding. One motion was filed jointly by the law firms of Engstrom,

[2] On September 1, 1999, the First District Court of Appeal issued a decision in these cases (in which nine writ petitions and one appeal had been consolidated for decision in that Court) which held that the Commission's statutory authority over water quality and its exercise of jurisdiction in addressing water quality issues preclude private actions against the regulated utilities, but do not bar the plaintiffs' actions against defendants not regulated by the Commission. *Hartwell Corporation et al. v. The Superior Court of Ventura County* (September 1, 1999, A085477, A085482, A085486, A085488, A085495, A085496, A085501, A085502, A085761) __Cal.App.4th__.

Lipscomb and Lack, Girardi and Keese, and Dewitt, Algorri and Algorri (EL&L). The other motion was filed by the law firm of Rose, Klein and Marias. Seven parties filed responses to these motions, and both movants filed replies. Movants are all law firms which represent plaintiffs in the above mentioned civil lawsuits. EL&L's motion asked that the area of inquiry be strictly limited to issues over which it believes the Commission does have jurisdiction, i.e., cost and rate issues related to the provision of safe drinking water.

On June 10, 1999, we issued Decision (D.) 99-06-054,[3] a comprehensive 54-page decision denying the motions challenging jurisdiction. EL&L filed a timely application for rehearing.

EL&L specifically alleges error in Finding of Fact 2, and Conclusions of Law 1, 2, 4, 5, 7, and 8. Finding of Fact 2 states that EL&L is participating in this proceeding as a "joint interested party." The specified Conclusions of Law deal with our jurisdiction to pursue the five questions which were made the subject of the OII.

The California Water Association (CWA), a party in the OII, filed a response in opposition to the application for rehearing.

We have considered all of the allegations of error raised by EL&L, and are of the view that insufficient grounds for granting rehearing have been presented. Therefore, we will deny the application for rehearing. We will, however, make several clarifying modifications to D.99-06-054. Our reasoning is discussed below.

II. DISCUSSION

A. Jurisdictional Issues

EL&L's primary objection is in the area of water quality standards. It contends that this Commission lacks the authority to consider whether or not the drinking water standards which apply to the regulated water utilities are safe, whether the maximum contaminant levels adequately protect the public, or whether the occurrence of temporary excursions of contaminant levels above regulatory thresholds may under

[3] As corrected by D.99-07-004, issued July 7, 1999 with an attached corrected copy of D.99-06-054.

certain circumstances be acceptable in light of economic, technological, public health, and safety issues. EL&L maintains that this is the exclusive province of the Department of Health Services (DHS), and that the Commission's sole area of jurisdiction deals with "water utilities' service rates, the quality of service or the areas the water utilities must serve, the water utilities' profit margin, debt, and the construction, modification, or expansion of any portion of the water plant that was necessary and useful to the utilities' service[.]" (Application for Rehearing, p. 4.) "Simply put, the Commission is there to ensure that the water utilities do not charge such prohibitive rates that the public is unable to obtain a necessity of life, safe drinking water. What is safe drinking water is the responsibility of the DHS and the EPA [Environmental Protection Agency]." (*Id.*, p. 5.) EL&L cites to various earlier Commission decisions as well as to D.99-06-054 itself, which it claims support its view of this absolute dichotomy of roles.

EL&L concludes that because the Commission's responsibilities in the area of drinking water quality are completely separate and distinct from those of DHS, anything the Commission tries to investigate which encroaches on DHS' area of authority and responsibility exceeds the Commission's authority. Thus EL&L argues its application for rehearing should be granted, and at a minimum, we must limit and narrow our investigation to only those areas over which we have authority.

CWA argues in opposition that EL&L has presented nothing new, and that consequently, it has not satisfied the requirements of Public Utilities (P.U.) Code section 1732, which provides that applications for rehearing "shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful." (See also Rule 86.1 of the Commission's Rules of Practice and Procedure, which reiterates the statute and warns parties that vague assertions to the record or the law, without citation, may be given little weight.) CWA also argues that EL&L cites to uncontested points which are ultimately irrelevant, and quotes selectively from D.99-06-054 to give a false impression of what that decision holds. CWA further contends that EL&L fails to explain or support its contention that the differing roles of the Commission and DHS are mutually exclusive in a way that would prevent the

Commission from carrying out its investigation; fails to explain how these roles undercut the Commission's authority to "[a]scertain and fix adequate and serviceable standards for the measurement of quantity, quality . . . or other condition pertaining to the supply of the product, commodity or service rendered by any . . . public utility" pursuant to P.U. Code section 770(b); ignores the long history of the Commission's public health and safety authority relative to the water utilities it regulates; and ignores the water quality provisions of General Order 103. In short, CWA argues that EL&L fails to identify any legal error in D.99-06-054.

CWA is correct that the arguments EL&L raises on jurisdiction are not new, but are simply restatements of those EL&L made in its motion challenging jurisdiction. It is not necessarily inappropriate for a party to raise arguments which it has raised before, especially in the context of jurisdiction, if the party is still of the view that the Commission is wrong. However, CWA is also correct that EL&L's arguments are framed in very nonspecific terms, with almost no supporting citation. Those few citations that are included are not at all helpful to its case. EL&L does not address its arguments to the lengthy discussion presented in D.99-06-054, but merely reasserts its view that DHS' responsibility for setting water quality standards and the Commission's responsibility for setting water utility rates are mutually exclusive and can never overlap.

This view is oversimplified and legally incorrect. As is discussed exhaustively in D.99-06-054, the Commission's cost setting and regulating role is inextricably bound to the quality of water provided by the regulated utilities. At this point the question in terms of jurisdiction is whether the Commission has the power to investigate the issues raised in the OII. We remain strongly of the view that the Commission does have such power.

D.99-06-054 qualifies and delineates the extent of that power, and as such, it is part and parcel of the OII. D.99-06-054 stresses that our investigation applies only to the regulated water utilities (and not to other water providers or to the large industrial companies which are alleged to be polluters of many sources of ground water utilized by many of the water utilities, regulated or not). It discusses the authority and

responsibilities of both this Commission and DHS, and demonstrates how the two are intertwined with and complementary to each other. Finally, it makes clear that our investigation is only a starting point, with possible consideration of enforcement actions or new standard setting being matters for the future.

It is essential that D.99-06-054 be read in conjunction with the OII in order to get the most complete and accurate view of the Commission's authority to undertake I.98-03-013. To underscore this point, we will make various minor modifications to D.99-06-054 to clarify that this decision not only discusses the basis for the Commission's jurisdiction to carry out our investigation, but also augments the OII by explaining fully the extent of that jurisdiction.

B. Due Process

EL&L next argues that "because of the way the issues are framed in the OII, when considered with the California Supreme Court decisions in San Diego Gas & Electric v. Superior Court (1996) 13 Cal.4th 893 [Covalt], Waters v. Pacific Telephone Co. (1974) 12 Cal.3d 1, and its progeny, the due process rights of certain ratepayers have been threatened." (Application for Rehearing, p. 6.). EL&L goes on to argue that the water utilities have been successful to date in staying EL&L's civil lawsuits by turning the Commission's investigation into one about EL&L's contentions in those lawsuits. Moreover, the Commission has a "duty to provide a fair hearing to any party whose constitutional rights may be affected." (*Id.*, p. 7.) Thus according to EL&L, the Commission not only lacks the authority to conduct this investigation, but the investigation has "completely lost its focus." (*Id.*)

CWA responds that EL&L fails to explain what and whose constitutional rights have been threatened. CWA further contends that EL&L fails to explain what relevance the form of the OII questions has on any constitutional rights, and its apparent "complaint" about a "fair hearing" is inconsistent with the procedural record in this case. (Response to Application for Rehearing, p. 6.) CWA contends EL&L has been accorded full due process in the Commission's proceeding, including being granted an oral argument on its jurisdiction motion which it did not even attend.

We find that the assertions EL&L strings together present no logical argument in support of any legal error. Certainly, EL&L has not been denied due process in the investigation proceeding, nor has this Commission filed anything in the civil suits relating to its jurisdiction to undertake its investigation, the potential impact of the investigation on those civil suits, or anything else.

C. EL&L's Status as an Intervenor

Finally, EL&L argues that Finding of Fact 2 is erroneous in referring to EL&L as a "joint interested party." EL&L argues that it intervened for the sole purpose of monitoring the proceeding, and that since it was only at the Commission's behest that EL&L filed its formal motion challenging jurisdiction, it should not now be viewed as an interested party.

CWA points out that EL&L's petition to intervene did not limit the scope of its intervention. CWA further argues that EL&L not only made a statement in the hearing room indicating that its intervention was intended to go beyond simply monitoring the proceeding and objecting to the Commission's jurisdiction, but has filed at least four sets of comments in the course of the proceeding to date.

Rule 54 of our Rules of Practice and Procedure states that in an investigation proceeding, an appearance may be entered at the hearing without filing a pleading if, among other things, no affirmative relief is sought. Clearly, a motion challenging jurisdiction and asking that the proceeding either be terminated or substantially limited is seeking affirmative relief. Therefore, we did not ask EL&L to file a motion to intervene; our rules required EL&L to do so. EL&L certainly was free to decide that it did not want to do so, but chose to go forward with its intervention petition and its motion. This alone would be enough to support EL&L's status as an interested party.

In addition, EL&L stated on the record that:

> "[W]e do object to the jurisdiction of the PUC. But it was our understanding that we were going to be participating in this proceeding so we wanted to have input in the proceeding. But we still reserve our right to object to the jurisdiction[.]"

> (Prehearing Conference, July 7, 1998, Reporter's Transcript, at 24:7-12.)

The above statement, EL&L's filing of several sets of comments, and the filing of its application for rehearing, further support its status as an "interested party." Finding of Fact 2 is not in error.[4]

III. CONCLUSION

For the foregoing reasons, we are denying EL&L's application for rehearing. However, we will modify D.99-06-054 in several respects to clarify that this decision not only addresses our jurisdiction to carry out this investigation, but also augments I.98-03-013, so that both decisions together provide a complete and accurate explanation of the extent of that jurisdiction.

THEREFORE, IT IS ORDERED that:

1. Decision 99-06-054 is modified as follows:

   a. Conclusion of Law 1 is modified to read:

   > "Pursuant to provisions of the California Public Utilities Code, including but not limited to Sections 451, 761, and 768, and as fully explained in this decision, the Public Utilities Commission has jurisdiction to regulate the service of water utilities with respect to the health and safety of that service."

   b. Conclusion of Law 2 is modified to read:

   > "Pursuant to provisions of the California Public Utilities Code and the California Health and Safety Code, including but not limited to Pub. Util. Code § 770 and Health & Saf. Code § 116465, and as fully explained in today's decision, the Public Utilities Commission has concurrent jurisdiction with the State Department of Health services over the quality of drinking water provided by regulated water utilities."

[4] We note that EL&L filed an "Objection to the Assigned Commissioner's Scoping Memo and Ruling on Motions to Compel and Notice of Withdrawal of Petitions to Intervene" on May 17, 1999. The Administrative Law Judge ruled that the Notice of Withdrawal be treated as a motion, responses were filed, and the Commission has not yet ruled on it.

c. Conclusion of Law 5 is modified to read:

"The Public Utilities Commission has subject matter jurisdiction to pursue the issues in this proceeding specified in the Order Instituting Investigation issued March 12, 1998, as explained in detail in today's order."

d. Conclusion of Law 8 is modified to read:

"The investigation in this proceeding, as outlined in the Order Instituting Investigation and as further explained, refined, and augmented by today's decision, should be completed."

e. Ordering Paragraph 1 is modified to read:

"This Interim Order constitutes the Commission's final decision with respect to the allegations raised on the disputed issue of the Commission's subject matter jurisdiction to conduct this proceeding, and with respect to the scope and extent of that jurisdiction."

2. Rehearing of Decision 99-06-054, as modified herein, is denied.

This order is effective today.

Dated September 16, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners