Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER DUQUE (Mailed 3/12/02)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion Into the Operations and Practices of Bidwell Water Company and Its Owners and Operators, Thomas and Vicki Jernigan, and Order to Show Cause Why Findings Should Not Be Entered by the Commission Under Public Utilities Code Section 855.	Investigation 01-10-002 (Filed October 2, 2001)

Stephanie Martinez, Attorney at Law, and Thomas Joseph Jernigan, for Bidwell Water Company and its Owners and Operators, Thomas and Vicki Jernigan, respondents.

Carol A. Dumond, Attorney at Law, and Mark Bumgardner, for the Commission's Consumer Services Division.

OPINION ON ORDER TO SHOW CAUSE CONCERNING FINDINGS UNDER PUBLIC UTILITIES CODE SECTION 855

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OPINION ON ORDER TO SHOW CAUSE CONCERNING FINDINGS UNDER PUBLIC UTILITIES CODE SECTION 855

1. Summary

The Commission finds that a showing has not been made sufficient to support a determination that Bidwell Water Company (Bidwell) is unable or unwilling to adequately serve its ratepayers, or has been actually or effectively abandoned by its owners, or is unresponsive to the orders or rules of the Commission. However, the Commission finds that Bidwell has not fully complied with orders issued in a prior investigation. Today's decision requires Bidwell to develop a compliance plan for correcting these irregularities.

2. Background and Procedural History

The Commission issued its Order Instituting Investigation and to Show Cause (Order) on October 2, 2001.[1] The Order names Bidwell and its owner/operators, Thomas Jernigan and Vicki Jernigan, as respondents. Bidwell is a small family-owned water company serving the town of Greenville and its environs in Plumas County.

The Order directs the respondents to show cause why the Commission should not enter findings, based upon their conduct, that,

1. Bidwell is unable or unwilling to adequately serve its ratepayers; or

[1] Ordering Paragraphs (O.P.s) 2 and 3 of the Order state that this matter is set solely on the Order why the Commission should not make the determination necessary to petition the Superior Court for the County of Plumas (Court) for appointment of a receiver under Public Utilities Code Section 855. This proceeding was categorized as a ratesetting, and that categorization was upheld on appeal in Decision (D.) 01-11-030 (November 8, 2001).

2. Bidwell has been actually or effectively abandoned by its owners; or
3. Bidwell is unresponsive to the rules or orders of the Commission.

The Order makes clear that the Commission is considering the findings as a predicate to petitioning the Court for an order appointing a receiver pursuant to Public Utilities Code Section 855.[2] O.P. 1 required the respondents to appear before the Commission on the show cause question at 9:30 a.m. on October 30, 2001. The order was served upon the respondents and their attorney, and additional notice of the hearing was subsequently mailed to the parties.

The hearing was held on October 30 pursuant to the notice and order. The Commission appeared through its Consumer Services Division (CSD). Both sides presented evidence, and each side was permitted an opportunity to submit a post-hearing exhibit to offer corrections or additions to the Commission's Report on the Financial Condition of Bidwell (September 26, 2001) that has been prepared under the direction of the Legal Division.[3] Two rounds of briefs were filed, and the proceeding was submitted on January 4, 2002.

3. Discussion

Section 855 provides in relevant part,

> Whenever the commission determines, after notice and hearing, that any water … corporation is unable or unwilling to adequately serve its ratepayers or has been actually or effectively abandoned by its owners, or is unresponsive to the

[2] All statutory references are to the Public Utilities Code unless otherwise noted.

[3] This report was received as Exhibit (Ex.) 13 at the hearing. Each party submitted a post-hearing exhibit that has been received for the record without being marked numerically.

> rules or orders of the commission, the commission may petition the superior court for the county within which the corporation has its principal office or place of business for the appointment of a receiver to assume possession of its property and to operate its system upon such terms and conditions as the court shall prescribe.[4]

In fashioning the Order, the Commission restated the three alternative grounds for petitioning the Court for appointment of a receiver as findings the Commission would make unless the respondents showed good cause why those findings should not be entered.

Reducing these statutory grounds to their elements, the factual issues before the Commission are:

1. Is Bidwell unable to serve its ratepayers adequately?
2. Is Bidwell unwilling to serve its ratepayers adequately?
3. Have the Jernigans actually abandoned Bidwell?
4. Have the Jernigans effectively abandoned Bidwell?
5. Is Bidwell unresponsive to the rules of the Commission?
6. Is Bidwell unresponsive to the orders of the Commission?

If the answer to any of these questions is affirmative, the Commission may petition the Court for appointment of a receiver for Bidwell.

The Commission has designated this proceeding an investigation. Rule 57 of the Commission's Rules of Practice and Procedure ordinarily requires

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[4] The final sentence of Section 855 states, "The court shall provide for disposition of the facilities and system in like manner as any other receivership proceeding in this state," suggesting that the same standards and underlying principles apply in all California receivership proceedings.

Commission staff to make the initial presentation in an investigation. In this proceeding, both Rule 57 and the nature of the issues require the initial burden to be placed on CSD to support the contemplated findings to prevent the respondents from having to prove a negative. Once CSD satisfies its burden by presenting substantial evidence that one or more of the required findings should be made, the burden shifts to the respondents to show cause why they should not. Thus, we must first decide whether CSD satisfied this initial burden.

3.1 Service Adequacy

At the hearing, CSD presented evidence that Bidwell's mains are old and subject to periodic failure, requiring partial outages to effect necessary repairs. CSD presented no evidence that these outages exceeded any ascertainable standard of adequacy, or that Bidwell's water failed to meet any health, fire protection, or other standard that might indicate that it is not serving its ratepayers adequately. CSD did not present any testimony by ratepayers, so we have no basis for finding that its ratepayers regard the service they are receiving as inadequate. CSD elicited no testimony from the respondents that they were unwilling or unable to provide service to any standard of adequacy; in fact, the testimony CSD obtained from the respondents' witnesses was quite to the contrary.

The only substantial testimony on this issue offered by CSD in its case in chief was that of the Commission financial examiner who prepared Ex. 13. On direct examination he gave the following testimony:

> Q. . . . , but are you saying that Bidwell is currently able to serve its customers willingly – I mean adequately?
> A. From - - yes, I am saying that.
> Q. Okay

A. They are – their operation seems to be on the border right now. When we were up there at different periods of time, pipes would break. Customers would not have water delivered to them. This seemed to be common.

Q. Do you consider that adequate service?

A. Not if customers go without water for hours at a time.

Q. Is it common for customers of California water companies to go without water for hours at a time?

A. Not as current [sic] as Bidwell is having this problem.

Q. Would you say from your review that Bidwell was currently willing to serve customers adequately? And I understand that you can't get into somebody else's mind, but have you seen evidence that Bidwell is currently willing to serve customers adequately?

A. I - - I think what I have observed is – is contradictory. You have the statements which are made by Mr. Jernigan, versus them trying to actually, you know, physically keep the facilities going.

Could I have that question again, so that I make sure that I make sure I answer it correctly?

* * *

[The question is read back to the witness by the reporter.]

A. And my answer was that basically there is contradictory evidence, so I'll stick with that response.

Q. So, to sum up, you are not sure that Bidwell is willing or unwilling – whether Bidwell is willing or unwilling to serve its customers adequately?

A. To my knowledge, they are currently serving their customers adequately, but, you know, in discussions which I've had with Mr. Jernigan, he's indicated that he feels he . . . doesn't have enough money to operate how he feels the company should be adequately operated. And he is disturbed with that. And he has expressed concern whether he will be able to continue to operate the company as it is currently operating with the finances which he currently has. [Transcript (Tr.) 36:9 – 37:27]

This testimony is equivocal. It does not provide the substantial evidence required to support a finding that Bidwell is unable or unwilling to serve its ratepayers adequately. The witness noted that Bidwell had outages due to pipes breaking, and that these outages could last for hours, but that nevertheless Bidwell's service seemed adequate. The only suggestion of inadequate operation appears to be the feeling expressed by Mr. Jernigan that he would like to have the resources to provide service at a higher level than now exists, even though that service has not been shown to be inadequate. His statements to CSD's witness certainly do not demonstrate an unwillingness to provide adequate service. If anything, they indicate the opposite – that with improved financial resources Bidwell would strive to improve its service to customers. Accordingly, we cannot make the finding necessary to support the first ground for petitioning for appointment of a receiver.

3.2 Abandonment

As to the issue of whether the Jernigans have actually or effectively abandoned Bidwell, CSD presented no evidence to indicate that the Jernigans have done either. The testimony of CSD's witness clearly demonstrates that the Jernigans continue to operate Bidwell as they have for more than 25 years, procuring, treating, and distributing water, maintaining the plant, and performing normal billing and administrative activities.

CSD's case also relies upon evidence that Jernigan has formed an intent to cease operating the company or place it into bankruptcy, implying that ratepayers will lose their service altogether. For example, Thomas Jernigan, Bidwell's regulatory consultant, and Bidwell's attorney have all made statements to the effect that the owners are considering the possibility of filing for bankruptcy if they cannot obtain rate relief, or selling the company to a

prospective buyer. On one occasion, in response to a letter from a Commission attorney alleging that Bidwell was operating in violation of Commission orders, Jernigan left a recorded telephone message in which he said,

> If you'd give me a call back as soon as you can, I'd like to talk to you about closing this goddam water company down and we'll settle the whole thing out; in other words, you guys won't have to worry about it and I won't either. [Ex. 9.]

Although the tone of this message, as well as that of other communications by him, by the company's attorney, and by its consultant, reflect exasperation with problems experienced in the company's operation and regulatory compliance, these remarks fall short of an unequivocal communication by the owners that they are walking away from their public service obligation. Again, the attitude of the owners is best shown by the testimony of CSD's witness:

> Q. Have you seen any evidence that would lead you to believe that Bidwell is faced with abandonment by Mr. Jernigan?
>
> A. My response would be like the other question, where I have contradictory items where, you know, the appearance is that he is going to – he is trying to keep the – the utility operating, but, you know, he has indicated a couple of times to me from the things I've read that, you know, he's not sure he can continue to operate that company.
>
> Q. Has Mr. Jernigan ever told you that he was considering going out of business?
>
> * * *
>
> A. . . . I remembered hearing terms such as "bankruptcy" in discussions with him. I'll just stick with that, even though there's something else in the back of my mind in discussions I had with Mr. Jernigan, but I can't remember it clear enough to give you an answer. [Tr. 37:28 – 38:23]

Appointment of a receiver is a drastic remedy. In Bank of Woodland v. Stephens, 144 Cal 659, 660 (1904), the California Supreme Court called the appointment of a receiver, which "involves the taking of a defendant's property from his possession, . . . a measure more violent and drastic than an injunction." This characterization has no less vitality today than it did when the Court first expressed it. Without a doubt, receivership is more far reaching than merely seeking judicial enforcement of a utility's duties, and for this reason we regard the "abandonment" provision in Section 855 solely as a means to ensure the continuity of operation of a water utility when its owners have actually walked away from providing service, or by word or action indicate unequivocally that they intend to do so imminently.[5]

The Jernigans' failings do not rise to this level of concern. They continue to deliver water to Bidwell's customers, collect its revenues, make its payroll, and pay its bills. CSD has offered no substantial evidence of any prospect that they will cease to do so, unless they sell the company with Commission approval. We read the quoted portion of Ex. 9 in this context, and not as an indication that they intend to "pull the plug" on continued provision of service. Even if the Jernigans do put the company into bankruptcy in order to remedy its financial ills, this will not necessarily result in cessation of service to ratepayers, as recent Commission experience demonstrates.

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[5] Section 855 appears to have been added to the Pub. Util. Code as part of a legislative revamping of Section 564 of the Code of Civil Procedure, which provides for receivership as an extraordinary remedy in various kinds of judicial proceedings. The enactment of Section 855 did not liberalize the judicial attitude that receivership is a "violent and drastic" remedy.

By comparison, seeking the appointment of a receiver is a draconian measure available to the Commission to prevent imminent cessation of service, or to remedy an indefinite interruption of service when the owners have simply walked away from their responsibilities. To make such a finding here would require acts or omissions on the Jernigans' part that exceed what we have seen so far. Accordingly, we cannot make the findings necessary to support our seeking the appointment of a receiver on the basis of abandonment of the company.

3.3 Unresponsiveness to Rules or Orders

Finally, we turn to the issue of whether Bidwell is unresponsive to the Commission's rules or orders. CSD's showing, essentially, is that Bidwell has failed to deposit all of the collected surcharge for repayment of a Safe Drinking Water Bond Act (SDWBA) loan it has obtained into a surcharge account, as required by the final order in I.97-04-013. In sum, that investigation determined that Bidwell had for some time failed to deposit the surcharge into its trust account for repayment of the loan, as required by D.90714, in which we initially granted Bidwell authority to obtain the loan. To remedy Bidwell's omission to do so, the modified final order in I.97-04-013 required Bidwell to credit its SDWBA account with all past surcharge collections, plus interest, and to reduce the surcharge prospectively until the full credit is made. The Commission also ordered Bidwell to file an advice letter implementing the decision within 60 days of the final order, and to pay a $1000 fine within that period.

Bidwell failed to comply with the terms of the order by not implementing the adjustment and paying the fine within its specified deadlines. In response the Commission issued Resolution (Res.) W-4243, implementing the decision by changing Bidwell's tariff to reflect a decrease in the surcharge. Bidwell filed an application for rehearing, which was denied on February 23,

2001, by D.01-02-079. Since that date, Bidwell has reduced its surcharge as required in Res. W-4243, but has still not complied with the repayment provisions on the grounds that the company believes it lacks the necessary cash flow.

CSD's evidence of Bidwell's noncompliance is largely undisputed. Indeed, on cross-examination, Thomas Jernigan admitted that Bidwell used some of the SDWBA surcharge funds to operate the company (Tr. 52:21-22). It is also undisputed that Bidwell was tardy in paying the fine and providing ratepayers with notice of the new rates. These facts demonstrate that Bidwell did not fully comply with certain aspects of Commission orders. On the other hand, CSD's own testimony was that Bidwell did comply with other terms of the same orders, albeit belatedly in certain instances. This raises the question whether Bidwell is truly unresponsive to our orders within the meaning that term should be given in Section 855, or simply not yet in full compliance with our orders.[6]

As explained above, receivership under Section 855 is a drastic remedy. We may invoke it as a last resort when we find that a water utility has ceased providing service to its ratepayers, or imminently threatens to stop service, but we must construe the term "unresponsive," as used in Section 855, in a manner that is consistent with this overarching principle. We must also interpret it in a manner harmonious with the other two grounds for seeking appointment of a receiver. Both of these alternative grounds require a high degree of proof of unambiguous conduct by the utility indicating that it is terminating (or has terminated) the performance of its public service obligations

[6] Bidwell's conduct may also violate certain of the Commission's rules, although this argument was not raised by CSD.

to ratepayers, *i.e.*, a showing of objective inability to perform; an unequivocal communication of unwillingness to perform; actual abandonment of the business; or conduct that by its nature is tantamount to abandonment because it is clearly inconsistent with the ongoing operation of the system. By extension, we must construe "unresponsive" to signify total disregard for, express repudiation of, or substantial and knowing refusal to comply with, our orders. If, on the other hand we construed "unresponsive" so as to allow us to seek appointment of a receiver whenever a water utility simply did not comply with our orders, we could too easily resort to the Superior Court to carry out our regulatory responsibilities by forcing a change in a utility's management or ownership. We do not believe this is a result the Legislature intended when it enacted Section 855.

Ex. 13 describes Bidwell's compliance with Commission orders as, at best, "marginal and reluctant." Although compliance at this level is troubling, and indicates a need to take further steps to ensure that management carries out Bidwell's compliance responsibilities, it does not justify the appointment of a receiver. On the record before us, we cannot find that Bidwell's behavior rises to the level of unequivocal disregard for, or rejection of, our authority. Accordingly, we cannot determine that Bidwell is unresponsive to our rules or orders within the meaning of Section 855.

For the foregoing reasons, we conclude that CSD did not make a showing that constitutes sufficient grounds for the Commission to seek judicial appointment of a receiver under Section 855. That statute requires the demonstration of a much more imminent threat to service than has been made on this record in order to justify judicial intervention and the disposition of Bidwell's facilities and system under court supervision. However, later in

today's decision, we will set forth the further steps we will take to finally resolve the irregularities that prompted this proceeding. Before we do so, we will examine Bidwell's response to our Order to Show Cause.

3.4 Bidwell's Showing

Our review of respondents' showing reinforces our conclusion that appointment of a receiver is both unjustified and unnecessary at this time.

Thomas Jernigan, testified that the company is "absolutely" able to serve its customers adequately at this time. [Tr. 49: 20-22.] He also testified that he had no present intention of closing the company down. (*Id.*, 14–16.) The company's water quality is excellent, and Jernigan described the filter plant as being "like an operating room" when the CSD witness visited it, an assertion that CSD did not contest. (*Id.*, 23–28.)

Jernigan admits to austerity in making repairs to the system's lines, but attributes the company's failure to undertake major replacements to the inadequacy of Commission-authorized rates. As he explained, if a section is not reparable, the company cuts the line and puts a new piece in it rather than replacing the entire line. [Tr. 58: 15–19.] Nevertheless, the company until recently has gone for as long as five years without an outage in any part of the system, except during a major storm and flood in 1997. [Tr. 58: 26-59; 60: 1-4.]

Darren Jernigan, Thomas Jernigan's son and the company's vice president, reiterated "absolutely" his intention and ability as a manager to continue the operation of the company. [Tr. 66: 6-9, 21; 25-26.] He describes total outages as being rare. [Tr. 64:1.] Partial outages may result from spot repairs to pipes in the system, but these are usually of short duration and occur at night whenever possible. Like his father, Darren indicated that there is a need for rate

relief to insure the long-term survival of the company, but he did not suggest that any acute problems threatened the imminent cessation of service.

The company's management consultant testified that all of the company's loan payments are current, and that its two private sector loans, totaling nearly $16,000, should be paid off early next year under the company's present financial circumstances. [Tr. 74: 18-75: 6.]

Taken as a whole, these facts form a credible picture of a company that, although struggling, is far from the brink of shutting down, voluntarily or otherwise. Its compliance problems principally appear to be in the nature of accounting errors and concededly unauthorized diversion of revenues to meet the company's operating expenses. Although we do not condone these activities, nor the occasionally abusive remarks the owner and the company's consultant have directed at Commission staff, the company's showing effectively disputes all of the bases for resort to a court action under Section 855. Rather, as we next discuss, less drastic means are available to the Commission to remedy the company's ills, and to redress any improper treatment of our staff.

4. Compliance Plan

From all indications in the hearing room, the company and its owners are earnest about cooperating with the Commission to achieve compliance and place the company in financial and regulatory condition to be sold (with Commission approval) to a qualified buyer. Thomas Jernigan seemed genuinely contrite about vulgar remarks he directed to a Commission attorney (Ex. 9), and demonstrated a desire to respond to every regulatory requirement imposed on the company if the necessary financial resources can be made available. We believe the respondents should be given a further opportunity to regularize their operation and satisfy the corrective orders issued in I.97-04-013. We accordingly

direct the respondents, within 90 days of the effective date of today's decision, to file and serve a compliance plan with the following features.

First, we expect regulated companies to show our staff the same courtesy they show their customers, suppliers, and employees. The compliance plan must recognize and express commitment to this principle.

Second, the compliance plan must fully and candidly set forth the status of Bidwell's efforts to comply with our orders in I.97-04-013. To the extent Bidwell is not yet in full compliance, the plan must identify those particulars, and must describe what the company will do to achieve full compliance and the date by which it believes it will have done so. To the extent Bidwell believes it will need substantial additional time to achieve full compliance, the plan must include a schedule for progress reports.

As noted above, Bidwell's owners are seeking a qualified buyer for the water utility, and of course they may file at any time an application for authority to transfer the utility. However, the search for a buyer does not displace the need to comply with our orders. We will consider a transfer application as an alternative to the compliance plan only if the transfer application is submitted for filing no later than the due date for the compliance plan, i.e., within 90 days of the effective date of today's decision.

If Bidwell files and serves a compliance plan, CSD will have 20 days from the date of the filing within which to file and serve comments on the plan, and Bidwell will have 10 days thereafter within which to file and serve its reply to the comments. We will review the compliance plan in a further order in this proceeding. If we approve the plan, we will dismiss the Order to Show Cause and close this proceeding; we may also conditionally approve the plan or reject it, and in these instances we will specify next steps, as appropriate..

If Bidwell fails to timely file a compliance plan or an application as directed in today's decision, there will be no need for further proceedings here, as Bidwell's inaction will conclusively demonstrate its unresponsiveness to Commission orders within the meaning of Section 855. In that case, our General Counsel will petition the Court for appointment of a receiver pursuant to Section 855.

5. Comments on Alternate Draft Decision

The alternate draft decision of assigned Commissioner Duque was mailed to the parties in accordance with Pub. Util. Code § 311(d) and Rule 77.1 of the Rules of Practice and Procedure. Comments were received on _____.

Findings of Fact

1. Bidwell Water Company is a water corporation within the meaning of the Public Utilities Code.

2. Bidwell's principal office and place of business is in Plumas County, California.

3. The Commission conducted a hearing on October 30, 2001, to determine whether Bidwell is unable or unwilling to adequately serve its ratepayers, or has been actually or effectively abandoned by its owners, or is unresponsive to the rules and orders of the Commission.

4. Timely notice of the hearing was served upon respondents Bidwell and its owners, Thomas and Vicki Jernigan.

5. Bidwell's mains are old and subject to periodic failure, requiring partial outages to effect necessary repairs. System outages are rare, and CSD staff

believes Bidwell is currently serving its customers adequately. Similarly, CSD staff does not contest Bidwell's compliance with water quality standards.

6. Bidwell's relations with Commission staff have been marred by occasional verbal abuse directed at staff by Bidwell's officers and agents.

7. Management has not actually or effectively abandoned Bidwell, and it shows no intention of doing so.

8. Bidwell has, on occasion, used SDWBA surcharge funds to operate the system, and has not fully complied with Commission orders in I.97-04-013 to restore funds to its trust account for repayment of the SDWBA loan.

Conclusions of Law

1. On the basis of the record, the Commission cannot determine, as a matter of law, that Bidwell is unable or unwilling to adequately serve its ratepayers, or that it has been actually or effectively abandoned by its owners, or that it is unresponsive to the rules or orders of the Commission, within the meaning of Section 855 of the Public Utilities Code.

2. At this time, and while awaiting the filing of a compliance plan as set forth in Section 4 of the foregoing Opinion, the Commission should not petition the Superior Court for the County of Plumas for the appointment of a receiver to assume possession of, and to operate, the facilities of Bidwell.

3. The Commission should order Bidwell to file and serve a compliance plan, or an application for authority to transfer the water utility, as set forth in Section 4 of the foregoing Opinion. Failure to timely file such compliance plan or application would constitute unresponsiveness to Commission order, within the meaning of Public Utilities Code Section 855.

4. This Order should be effective immediately in order to remedy as soon as possible the long-standing problems affecting Bidwell.

O R D E R

IT IS ORDERED that:

1. Bidwell Water Company (Bidwell) shall timely file and serve in this proceeding a compliance plan, or an application for authority to transfer the water utility, as set forth in Section 4 of the foregoing Opinion, and there shall be an opportunity for comment and reply on the compliance plan as set forth in Section 4. If Bidwell files an application for authority to transfer, the application shall comply with our applicable Rules of Practice and Procedure and be considered in a docket consolidated with this proceeding.

2. If Bidwell fails to timely file a compliance plan or an application pursuant to Ordering Paragraph 1, the Commission's General Counsel is authorized to petition the Superior Court for the County of Plumas for appointment of a receiver under Public Utilities Code Section 855.

3. Investigation 01-10-002 shall remain open for submission of the compliance plan.

This order is effective today.

Dated _____, at San Francisco, California.