

Decision 07-04-017 April 12, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Peter W. Huebner and 26 Other Ratepayers
Similarly Situated,

Complainants,

vs.

R. R. Lewis Water Company,

Defendant.

Case 06-06-030
(Filed June 30, 2006)

OPINION DISMISSING COMPLAINT

This decision dismisses the complaint against R. R. Lewis Water Company (Water Co.) filed by Peter W. Huebner (Complainant) and 26 other similarly situated ratepayers. We find that the complaint fails to state a claim upon which relief may be granted because it is overly vague and constitutes an improper collateral attack on Resolution W-4569, which approved the surcharge addressed in the complaint. This decision does not preclude Complainant from filing a petition for modification of Resolution W-4569, if doing so is otherwise permissible under Rule 14.6.¹

¹ All Rule citations are to the Commission Rules of Practice and Procedure, unless otherwise stated.

Background

A. Resolution W-4569

On November 18, 2005, the Commission approved Resolution W-4569, which granted Water Co. an offset rate increase in gross annual revenues of \$38,428, to be recovered through a quarterly surcharge of \$87.34 to each customer's bill for four consecutive quarters. Water Co. sought this increase through Advice Letter 20 (AL 20), filed with the Commission on August 29, 2005. The surcharge approved in Resolution W-4569 allows Water Co. to recover \$38,428 which had been recorded in its Water Quality Memorandum Account (WQMA). The balance in the WQMA included \$25,960 for a temporary chlorination facility ordered by the State Department of Health Services (DHS) and an additional \$12,468 for compliance with DHS drinking water regulations, including water sampling, testing, reporting and treatment costs from January 2003 through June 2005.

Resolution W-4569 noted that Water Co. had given notice of the proposed surcharge by notifying each customer and publishing a notice in a newspaper of local circulation on September 8, 2005. There were seven letters of opposition to the proposed increase. According to Resolution W-4569, most of the letters did not support the temporary chlorination facility ordered by DHS, but would have preferred the installation of a permanent chlorination facility. The Resolution also states that the Commission Water Division reviewed the invoices submitted by the Water Co. as documentation of its expenses for the temporary chlorination facility and found them reasonable. In addition, Resolution W-4569 notes that one customer had complained about not having the opportunity to review the filings in the utility service area, and the Commission Water Division had directed the utility to make the filings available for inspection in the service area.

B. The Complaint

Complainant filed this complaint against Water Co. on June 30, 2006. The complaint states that the issues relate to the approval of AL 20 and the approved surcharge of \$38,428.00, and are based on the Complainant's protest letter to the Commission dated September 11, 2005, and Complainant's other letters dated October 29, 2005 and February 2005. The complaint does not specifically state the allegations against the Water Co., but includes voluminous documentation such as correspondence, invoices, and receipts. The complaint also alleges that invoices from Water Co., prepared by its manager, Larry Ostrom, were overstated and refers to an audit amount of \$6,369.90. The complaint prays that the Commission grant a refund to ratepayers of \$32,057.90.

On August 18, 2006, Water Co. filed an answer to the complaint. Water Co. admitted that it owns the water distribution system at issue in the complaint and serves approximately 119 residences within its assigned service area in Sierra County. The answer also alleges the following:

- Water Co. established its WQMA in response to various citations and notices of compliance from the State Department of Health Services (DHS) to track the expenses associated with compliance, including costs associated with a temporary chlorination facility. The WQMA remains open because Water Co. still needs to provide a permanent chlorination facility and is waiting for funding.
- In August 2005, Water Co. filed AL 20 with the Commission to recover its costs for the temporary chlorination system and compliance with DHS requirements through a surcharge to customers.
- AL 20 was published in the Mountain Messenger, a newspaper of general circulation in the local area, on September 8, 2005. Copies of AL 20 were also mailed to each customer and interested parties on September 6, 2005 and copies were posted at the Sierra City Post Office on September 6, 2005.

- The protest period for AL 20 ended on September 29, 2005, except for customer T. Beals who requested and was granted an extension in which to file a protest until October 6, 2005.
- Water Co. made records related to AL 20 available for inspection by ratepayers on October 4, 2005 between 10:00 a.m. and 12:00 noon. No one appeared to review the records or requested another time in which to do so.

In the answer, Water Co. also denied that it had billed anything other than Commission-approved rates to customers, or has charged anything to its WQMA that was not authorized by its tariffs or required by DHS orders.

In addition, Water Co. alleged that the complaint included only 16 customer signatures, rather than 25 as required by then Rule 4.1, because one individual who had signed the complaint was not a utility customer and many others who signed the petition are husbands and wives, who together represent only one account.

Water Co. therefore requested dismissal of the complaint.

On August 24, 2006, the assigned Administrative Law Judge (ALJ) held a telephonic prehearing conference (PHC), which was attended by Complainant and Larry Ostrom (Ostrom), manager of Water Co. At the PHC, Complainant admitted that the issues stated in the complaint were the same as those raised in his protest to AL 20 and considered in Resolution W-4569, but claimed that the ratepayers did not receive adequate notice of the proposed surcharge or a sufficient opportunity to review the invoices and cancelled checks related to the expenses recorded in the WQMA.² Complainant also stated that after the Commission approved AL 20, he reviewed copies of the invoices and cancelled

² Reporters Transcript, pages 7-9.

checks related to the expenses that were the basis for the rate increase, and believes that the ratepayers should be paying a total surcharge of \$6,369, rather than \$38,427.65.³ Complainant also stated his belief that the owner of the water company was not keeping his personal accounts separate from Water Co.'s accounts.

Water Co. responded that it published notice of the proposed surcharge increase in the newspaper, sent a letter regarding the surcharge to each ratepayer, and posted a notice at the Sierra City Post Office. Water Co. also stated that it had posted a notice at the Sierra City Post Office that records related to the proposed increase would be available for inspection by customers on October 4 between 10:00 a.m. and 12:00 noon, as ordered by Commission Water Division staff, at the residence of Water Co.'s manager. Ostrom also stated that Water Co. is owned by the Ostrom Family Trust, and denied that he commingles Water Co.'s accounts with his other accounts.

At the conclusion of the PHC, the assigned ALJ directed Complainant to file an amendment to the complaint that specifically alleges the grounds for contesting each invoice⁴ and to serve the amendment on Water Co., and Water Co. to file the notices regarding rate increase approved in Resolution W-4569 that were published in the newspaper, sent to customers, and posted in the Sierra City Post Office with the Commission and to serve a copy on Complainant. The assigned ALJ also granted Complainant's request for certain discovery regarding Water Co.'s accounts.

³ Reporters Transcript, page 11:9-11.

⁴ Reporters Transcript, page 21:2-28, 22:1-12.

On August 24, 2006, Complainant filed an amendment to the complaint, which included 15 additional customer signatures. Water Co. subsequently withdrew its objection to the number of signatures on the complaint.

On September 1, 2005, the assigned ALJ issued a ruling which confirmed the orders given to the parties at the PHC and directed Complainant to amend the complaint to specifically allege whether the contested invoices had previously been considered in Resolution W-4569, whether any circumstances had changed since the Commission's approval of Resolution W-4569, and the specific grounds for contesting each invoice within 45 days.

On September 5, 2005, Water Co. filed copies of the notice sent to customers, the affidavit of publication of the notice in the Mountain Messenger on September 8, 2005, and other information related to AL 20 in response to the ALJ's order.

On November 13, 2006, Complainant filed a response to the ALJ's order, which failed to allege the exact reason for contesting each of the invoices attached to the complaint or to identify any changed circumstances which had arisen since the Commission's approval of Resolution W-4569. Instead, the response stated that Ostrom owns the Ostrom Family Trust and that the Water Co. is a sole proprietorship governed by him alone. The response alleged that Water Co. has previously represented that it is a corporation. The response also questioned why ratepayers have to pay expenses for Ostrom or the Ostrom Family Trust, and why a filing was done for funding of Resolution W-4569 with the Commission before the 20-day protest period had expired. The response also alleged that the Water Co. and the Commission had received many complaints regarding the \$38,428 surcharge from ratepayers with requests for itemized charges, and these complaints were ignored. In addition, Complainant alleged

that the notice given regarding the opportunity for inspection of the Water Co.'s invoices on October 4, 2005 from 10:00 a.m. until 12:00 noon was inadequate, and that 12 % of the ratepayers had asked to see the invoices and cancelled checks, rather than only 1 customer as claimed by the Water Co.

Water Co. subsequently filed a request for dismissal of the complaint.

Discussion

Under Rule 4.2, a complaint may be filed by any person or organization setting forth any act or omission by a public utility, including any rule or charge established or fixed by or for the public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission.

However, under Rule 4.2(a), in order to constitute a valid complaint:

The specific act complained of shall be set forth in ordinary and concise language. The complaint shall be so drawn as to completely advise the defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief which is desired.^{5 6}

Here, Complainant has failed to specifically allege the facts which constitute the grounds for contesting the invoices in the complaint, other than alleged problems with notice and the opportunity for ratepayers to inspect the

⁵ Rule 4.2(a).

⁶ Further, under Rule 4.1, the Commission will not consider a complaint, except on its own motion, regarding the reasonableness of any rates or charges of a public utility, unless the complaint is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electric, water, or telephone service. However, here, Complainant has presented the required number of customers' signatures on the complaint.

invoices, despite being directed to do so by the assigned ALJ and being given the opportunity to amend the complaint. Therefore, the complaint fails to comply with the requirements of Rule 4.2(a) and should be dismissed because it is overly vague.

Further, the complaint is an impermissible collateral attack on Resolution W-4569 under Section 1709. Section 1709 states:

In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

Section 1709 is designed to prevent a party from making a collateral attack on a Commission decision.⁷ A collateral attack is an attempt to invalidate the judgment or order of the Commission in a proceeding other than that in which the judgment or order was rendered.⁸

Here, Complainant has had the opportunity to file a timely application for rehearing or a petition for modification regarding Resolution W-4569. The issues in the complaint relate to whether the Commission properly allowed Water Co. to recover certain expenses through the surcharge imposed on customers and whether Water Co. followed legally adequate procedures in giving notice to customers of the proposed surcharge and the opportunity to review the invoices and cancelled checks related to the surcharge, and whether customers had an adequate opportunity to review the invoices and cancelled checks. The

⁷ D.03-08-036.

⁸ Id.

Commission should consider these issues in a timely application for rehearing⁹ or in a petition for modification of Resolution W-4569, rather than in a separate complaint proceeding that seeks to invalidate the Resolution.¹⁰ In addition, as stated in D.98-08-033:

Rates that the Commission has previously approved should be presumed to be just and reasonable, and the strength of that presumption should change with time as facts and circumstances change. Immediately following the approval of rates by the Commission, the presumption should be conclusive in the absence of a showing of legal error by someone with standing to apply for rehearing ... the presumption should be strong during the initial year after the Commission's decision, and the parties seeking to change established rates should do so through a petition for modification. (Emphasis added.)

Under these circumstances, it is unnecessary to hold a hearing or conduct further proceedings on the complaint.

In addition, although Complainant could have timely filed a petition for modification on June 30, 2006, the filing date of the complaint, we do not find it appropriate to construe the complaint as a petition for modification. Under Rule 16.4, a petition for modification must propose specific language to carry out all requested modifications to the decision. Further, any factual allegations must be supported with specific citations to the record in the proceeding or to matters which may be officially noticed. Allegations of new or changed facts must be

⁹ Under Rule 16.1, an application for rehearing must be filed within 30 days of the date of the Commission's mailing of the contested order or decision. Therefore, the time for filing an application for rehearing of Resolution W-4569 has expired.

¹⁰ See D.03-08-036, D.05-10-026.

supported by an appropriate declaration or affidavit. Since the complaint fails to meet these requirements, we cannot treat the complaint as a petition for modification.

As a result, the complaint should also be dismissed as an improper collateral attack on Resolution W-4569 pursuant to Section 1709. Nothing in this decision precludes Complainant from filing a petition for modification regarding Resolution W-4569, so long as the petition is otherwise permissible under Rule 16.4.¹¹.

Conclusion

For all of the foregoing reasons, the complaint should be dismissed.

Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. No comments were filed.

¹¹ Rule 16.4 (Petition for Modification) states in part:

(a) A petition for modification asks the Commission to make changes to an issued decision. Filing a petition for modification does not preserve the party's appellate rights; an application for rehearing (see Rule 16.1) is the vehicle to request rehearing and preserve a party's appellate rights.

(d) Except as provided in this subsection, a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition. (Emphasis added.)

Assignment of Proceeding

John A. Bohn is the assigned Commissioner and Myra J. Prestidge is the assigned ALJ in this proceeding.

Findings of Fact

1. In Resolution W-4569, the Commission approved AL 20, which authorized Water Co. to charge an offset rate increase in gross annual revenues of \$38,428, which will be recovered through a quarterly surcharge of \$87.34 to each customer's bill for four consecutive quarters.

2. The surcharge approved in Resolution W-4569 will enable Water Co. to recover the costs recorded in its WQMA for a temporary chlorination facility ordered by DHS and water sampling, testing, reporting and treatment costs from January 2003 through June 2005, that were required by DHS.

3. Resolution W-4569 states that the Commission Water Division reviewed the invoices submitted by Water Co. for the temporary chlorination facility and found them reasonable.

4. Resolution W-4569 states that Water Co. gave notice of the proposed surcharge by notifying each customer and publishing a notice in a local newspaper of general circulation on September 8, 2005.

5. Resolution W-4569 states that one customer complained regarding not being able to review Water Co.'s filings in the service area, but the Commission Water Division told Water Co. to make the filings available for inspection by customers in the service area.

6. The complaint does not clearly state the grounds for contesting each of Water Co.'s invoices related to the surcharge approved in Resolution W-4569.

7. At the PHC, Complainant admitted that the issues raised in the complaint are the same as those addressed in his protest of AL 20, but claimed that

ratepayers did not receive proper notice of the proposed surcharge or the opportunity to review Water Co.'s invoices and records related to the surcharge.

8. In a ruling dated September 1, 2005, the assigned ALJ directed Complainant to amend the complaint to state whether each of the challenged invoices had previously been considered in Resolution W-4569, whether circumstances had changed since the Commission's approval of the invoices, specific grounds on which each invoice is contested within 45 days.

9. On November 18, 2006, Complainant filed a response which did not comply with the ALJ's order.

10. Water Co. has requested dismissal of the complaint.

11. Complainant has had the opportunity to file a timely application for rehearing or a petition for modification regarding Resolution W-4569.

Conclusions of Law

1. Under Rule 4.2, a complaint must specifically and concisely state the act which is the subject of the complaint and must specifically advise the defendant and the Commission of the facts constituting the grounds for the complaint, the injury complained of, and the exact relief desired.

2. The complaint should be dismissed because it is overly vague in violation of Rule 4.2.

3. Section 1709 prohibits a collateral attack on a Commission order or decision that has become final.

4. Complainant should have addressed legal or factual errors in Resolution W-4569 through a timely application for rehearing or a petition for modification, rather than a separate complaint proceeding which is a collateral attack on the Commission's order in Resolution W-4569.

5. The complaint does not meet the procedural requirements for a petition for modification under Rule 16.4.

6. This decision does not preclude Complainant from filing a petition for modification regarding Resolution W-4569, if doing so is otherwise permissible under Rule 16.4.

7. Based on the circumstances of this case, no hearing or further proceedings on the complaint are necessary.

8. The complaint should be dismissed.

O R D E R

IT IS ORDERED that:

1. The complaint of Peter W. Huebner and 26 other similarly situated ratepayers against California RR. Lewis Small Water Company, and Larry Ostrom, Manager, is dismissed.

2. No hearings are necessary.

3. Case 06-06-030.

This order is effective today.

Dated April 12, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners