

Decision **PROPOSED DECISION OF ALJ McKENZIE** (Mailed 8/6/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation of the Commission's own Motion into the Operations and Practices of Ponderosa Sky Ranch Water Company and its Owner and Operator, Orville Figgs, and Order to Show Cause Why Findings Should Not Be Entered by the Commission under Public Utilities Code Section 855.

Investigation 02-03-023
(Filed March 21, 2002)

Monique M. Steele, Attorney at Law,
for the California Public Utilities Commission.
Orville A. Figgs, pro se, for himself and Ponderosa
Sky Ranch Water Company.
Kevin E. Figgs, pro se, for himself.

**DECISION AUTHORIZING SUPERIOR COURT ACTION
PURSUANT TO PUBLIC UTILITIES CODE SECTION 855
TO SEEK APPOINTMENT OF A RECEIVER**

By this decision, we authorize and direct the Commission's Legal Division to commence proceedings in the Superior Court of Tehama County pursuant to Section 855 of the Public Utilities Code for the appointment of a receiver to take possession of and operate respondent Ponderosa Sky Ranch Water Company (Ponderosa). Based on the Declaration of Donald McCrea (McCrea Declaration) attached to the Order Instituting Investigation and Order to Show Cause (OII), as well the record adduced at a hearing held on May 2-3, 2002, we have concluded that the individual owners of Ponderosa, respondents Orville A. Figgs (Orville)

and Kevin E. Figgs (Kevin), have failed to show cause why the Commission should not seek the appointment of a receiver pursuant to Section 855.

Background

Ponderosa is a Class D water company located about 20 miles east of Red Bluff in Tehama County; it currently serves 67 customers. It came into being sometime after 1958, when the Ponderosa Sky Ranch was subdivided. The parents of Orville and Kevin acquired the subdivision around 1964 and began to sell lots and operate the water company.

In September 1969, three customers filed a complaint alleging that Ponderosa was a private water company operating without authorization from the Commission. On March 31, 1970, the Commission issued Decision (D.) 77019, 70 CPUC 485, which (1) concluded that Ponderosa was a public utility subject to the Commission's jurisdiction, and (2) set rates for the utility. This decision is attached as Exhibit 1 to the McCrea Declaration. Ponderosa also received rate increases through the Commission's informal advice letter processes in 1977 and 1982.

The problems that ultimately led to the issuance of the OII began in late 1989, when the father of Orville and Kevin died. At the time of his death, the elder Figgs had been divorced from the respondents' mother, but a judgment dividing their property had not yet been entered. (Transcript, p. 106.) As a result of this situation, the control of and responsibility for operating Ponderosa (and apparently the elder Figgs' other business interests) eventually passed into the hands of the Tehama County Public Administrator. As we shall see, during the time the Public Administrator was in charge, the water system failed several bacteriological tests and its property taxes were not paid. Control of the water

system did not formally revert to Orville and Kevin until 1997. (McCrea Declaration, ¶ 30; Tr. 116-17.)¹

The McCrea Declaration states that in 1999, the Commission's Water Division began to receive complaints from customers about irregular billing. Similar complaints were received in 2000, and even though the Water Division requested that Ponderosa respond to them, the water company failed to do so. On November 27, 2000, the Director of the Commission's Water Division, Dean Evans, wrote to Kevin requesting responses to the complaints and to a citation issued by the California Department of Health Services (DHS). The letter closed by noting that if "you choose to remain silent on the matters, we will take appropriate regulatory action." (McCrea Declaration, Exhibit 3.)

Ponderosa did not respond to this letter. On March 1, 2001, the Chief of the Commission's Water Advisory Branch, Fred Curry, wrote to Orville that additional billing complaints had been received from the Ponderosa Sky Ranch Homeowners Association (Association). Curry described the problem posed by the complaints as follows:

"Customers indicate that they have not been billed on a regular basis. In some instances they have gone several quarters without receiving a bill. When a bill does arrive, it requires payment for the quarter or quarters that have not been previously billed for. This means that customers would be required to pay an amount that is at least twice what it should

¹ According to paragraph 30 of the McCrea Declaration, control over the water system was returned to Orville and Kevin in September 1997. However, in both his April 26 response to the OII and at the hearing, Orville maintained that control of the water system was returned to the Figgs brothers in January 1997. (April 26 Response, p. 1; Tr. 162.) Except where otherwise noted in this decision, the difference does not appear to be material.

normally be. This is unacceptable because it presents an undue hardship to many customers." (McCrea Declaration, Ex. 4.)

After urging Ponderosa to resume regular billing, to allow customers with unusually high bills to pay in installments, and to submit a plan by March 20, 2001 for dealing with the billing cycle problem, Curry warned that if a response was not received to the March 1 letter, "the Branch will recommend that the Commission initiate a formal investigation into the operation and billing practices of [Ponderosa]. Any violations found in the investigation could result in fines and penalties."

According to the OII, Ponderosa's next contact with the Commission occurred on April 9, 2001, when Orville sent a letter to the Chief of the Water Advisory Branch requesting an "immediate, emergency rate increase" to enable Ponderosa to pay its electricity bill from Pacific Gas and Electric Company (PG&E). Without a rate increase of approximately 250 per cent, Orville asserted, Ponderosa would soon "not be able to pay for the electricity to run its pumps." (McCrea Declaration, Ex. 5.)

McCrea responded to Orville by letter on May 4, 2001. (McCrea Declaration, Ex. 7.) In his letter, McCrea noted that the Commission allows offset increases for items such as purchased power only when a water company has had a rate case within the past five years. Since Ponderosa had not had a rate increase since 1982, McCrea stated that a general rate case (GRC) would be necessary. However, the Water Advisory Branch offers assistance to small water companies needing GRCs, including the use of an Informal Rate Change Workbook that simplifies compilation of the data needed to process a GRC. McCrea enclosed a copy of the Informal Rate Change Workbook with his May 4 letter and offered to help Orville fill it out when McCrea visited the area two weeks later. McCrea did visit Orville on May 18, 2001 and was given a

partially-completed workbook, but the rest of the necessary data was never furnished.

After the May 18, 2001 meeting, the next significant contact between Orville and the Commission took place on November 1, 2001, when Orville informed the Water Division that PG&E would be cutting off Ponderosa's power because the electricity bill had not been paid since July 2001. (McCrea Declaration, ¶22.) The power was cut off later that day, and the Water Division received telephone calls from some Ponderosa customers saying they were out of water. Thanks to the intervention of the Director of the Commission's Energy Division, the power was turned back on later in the day on November 1, after Orville had agreed to a payment plan by which Ponderosa's account with PG&E was to be brought current. (*Id.*, ¶¶ 26-27; Ex. 9.)

According to the OII, Orville did not honor his payment commitments to PG&E, and when McCrea attempted to contact Orville about this, he was unsuccessful. Several messages left on Orville's telephone answering machine were not returned, and when McCrea visited Orville's home on February 21, 2002, no one would answer the door, even though the house appeared occupied and the television set was on. (*Id.*, ¶¶ 28-29; Ex. 8.)

On March 7, 2002, McCrea sent Orville a letter. (*Id.*, Ex. 8.) After noting his many unsuccessful efforts to contact Orville directly, McCrea stated that the Water Division was "concerned the water company is not earning sufficient revenue to pay the PG&E electric bill, water testing bills and other operational expenses necessary to provide adequate service to your customers." McCrea noted that Orville had not completed the Informal Rate Change Workbook provided to him in 2001, and pointed out that "under the law, we need to get certain recorded and projected figures on which to base our [rate] estimates." The letter closed with a warning that "if we do not hear from you within 10 days,

we will have to take appropriate legal action to insure that service to your customers in the near future is not jeopardized in any way." No response to the March 7 letter was received by the Commission.

Two weeks later, on March 21, 2002, the Commission issued the instant OII. In addition to laying out the facts set forth above, the OII noted that since 1994, "respondents have a history of non-compliance with Department of Health Services (DHS) Rules and Orders," including "consistently fail[ing] to meet bacteriological standards, file annual reports and conduct the required monitoring of the system . . ." (OII, p. 6.) The OII also noted that respondents had failed to pay property taxes for seven years on the parcel where Ponderosa's source-of-supply well was located, and that the Tehama County Tax Collector intended to auction this parcel on May 17, 2002. (*Id.*)

On April 4, 2002, the Commission issued D.02-04-022, which amended the OII to add Kevin Figgs as a respondent, since records from the County Tax Collector confirmed that he was a co-owner of Ponderosa.

The Scope of the OII

As noted above, the OII was commenced pursuant to Section 855 of the Public Utilities Code, which provides in pertinent part:

"Whenever the commission determines, after notice and hearing, that any water or sewer system 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 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."

The OII alleged that all three of the conditions justifying the appointment

of a receiver under Section 855 (*i.e.*, inability to serve customers adequately, actual or effective abandonment, and unresponsiveness to Commission orders) held true with respect to Ponderosa:

"The [Water] Division believes, based on the record, that Figgs is unable to operate the water system, which includes meeting regulatory requirements, and [is] unwilling to work with the Division to determine the rates necessary to meet [Ponderosa's] financial obligations. Figgs' inability or unwillingness to pay [Ponderosa's] property taxes has caused the Tehama County Tax Collector to schedule an auction for the parcel where the supply well is located. Because it is vital that proper rates are calculated, electricity costs be covered and water be delivered, it is necessary to replace Figgs with someone who will communicate with the Commission. Figgs' failure to adequately serve [Ponderosa's] ratepayers cannot be allowed to continue. Figgs' conduct constitutes an effective abandonment of the water system.

"Based on our experience with other small water utilities[,] the Division believes that it may be financially impossible for [Ponderosa] to pay its electric bill at its present rates, but, without the cooperation of its owner, the Commission cannot fulfill its legal mandate to assure that rates are just and reasonable. This level of inaction is unacceptable, and to the extent it results in underpayment, dangerous to the supply reliability of [Ponderosa]. The Division sees no alternative to requesting that the Superior Court appoint a receiver."
(OII, p. 7.)

On the legal question of the burden of proof, the OII pointed out that in an order-to-show-cause proceeding, "the burden is on the respondent to show good cause why the proposed legal action should not go forward." (*Id.* at 8.) Since the proposed legal action under Section 855 is a petition to the superior court to appoint a receiver, and a Commission proceeding under Section 855 is not penal in nature (*id.* at 9-10), the hearing held by the Commission would be "limited to

the question of whether Respondents can show that their operational and financial conduct does not fall into one or more of the [three] categories" listed in the statute. (*Id.* at 9, Ordering Paragraph (OP) 2.)

Pursuant to OP 2 of D.02-04-022, the assigned Administrative Law Judge (ALJ) issued a ruling on April 19, 2002 providing that the order-to-show-cause hearing would be held in Red Bluff beginning on May 2, 2002. The ALJ also directed that any written response to the OII by the respondents should be submitted via facsimile no later than 3 p.m. on April 26, 2002. Orville faxed a response on behalf of himself and Ponderosa to the ALJ within the time allowed. The contentions in this response, which is hereinafter referred to as the "April 26 Response," are discussed below.

Pursuant to the April 19 ruling, the hearing on the order to show cause was held in Red Bluff on May 2 and 3, 2002. At the conclusion of the hearing, the ALJ set May 17, 2002 as the due date for briefs, a deadline that was subsequently extended to May 24, 2002. The Water Division submitted a brief on that date, but neither of the Figgs brothers did so.

The Issues at the Order to Show Cause Hearing

At the order-to-show cause hearing, both Orville and Kevin Figgs were given an opportunity to cross-examine Donald McCrea and other witnesses about the factual statements contained in the OII. There was also a good deal of testimony by the various witnesses on the general issue of how Ponderosa had been managed since the mid-1990s.

Most of the cross-examination was conducted by Orville, because management of the water company has been in his hands since 2000. The testimony disclosed that Orville controls Ponderosa's accounts, and that since 2000, Kevin has refused to participate in the management of the water company

because he has been denied access to these accounts and to Ponderosa's other books and records. (Tr. 155-56; 176-77.) At times the relationship between the brothers has been so bad that they have had physical altercations. (Tr. 148-49, 152, 155-57, 163.)

Although Orville was able to cast doubt on some assertions in the McCrea Declaration (such as whether he had received the Commission's November 27, 2000 letter addressed to his brother), Orville did not seriously dispute the instances of mismanagement set forth in the OII. These instances, which are discussed individually below, include (1) Orville's failure to render water bills to some of Ponderosa's customers for substantial periods of time, (2) Orville's failure to conduct required bacteriological tests on a regular basis, (3) Orville's failure to furnish data on capital expenditures that was needed to process a rate increase, despite repeated requests to do so, (4) failure to pay property taxes for nearly a decade on the parcel containing most of Ponderosa's assets, including its principal source of supply, and (5) Ponderosa's continuing indebtedness to PG&E for power consumed between July and October 2001, despite the payment schedule Orville had agreed to.

1. Delayed Billing and Failure to Test for Bacteria

On the issue of delayed billing of customers (and the consequent hardship this can create for ratepayers on fixed incomes), Orville's position in his April 26 response was to object to references in the OII to customers who had experienced billing delays, because the OII did not name any of the aggrieved customers. (April 26 Response, p. 1.) The April 26 response also asserted that "the majority of the Utility's customers are happy with the operation" of Ponderosa. (*Id.* at 4.) At the hearing, however, counsel for the Commission introduced complaint letters from four customers, three of whom -- Carlon Ginn-

Edwards, Don Canada and Donald and Barbara Webber -- appeared to be alleging delays by Ponderosa of six months or more in reading meters and rendering bills. (Commission Exhibits 5-8.)² During cross-examination, Orville refused to concede that Ginn-Edwards and the Webbers had not received timely bills, although he could not substantiate his denial with any records. (Tr. 178-80.) Orville did acknowledge, however, that as a result of Kevin's refusal to help with the April 2001 meter reading, meters were not read and bills were not sent from February 2001 until November 2001.³

"Later on in the month of April 2001, I myself personally had kidney stone problems for a couple of months. I mean, I was basically out of it during that two-month period. But I'm the only one that was there to be, like, reading the meters and carrying on the business during that period of time. Then my back was out until -- actually my back was out even in November when I went out and read the meters in 2001." (Tr. 173.)⁴

As noted in the OII, the erratic billing created hardship for some of Ponderosa's customers. While acknowledging that Orville had apparently been willing to make payment arrangements with some customers who could not pay large, multi-quarter bills in one installment (*id.* at 206), Kent Wallace, the president of the Association, concluded:

² The fourth complaint, by Michael Juring, appears to be about high bills. (Com'n Ex. 5.)

³ Ponderosa's tariffs provide for meter reading and billing on a quarterly rather than monthly basis.

⁴ It should also be noted that Kevin claimed he had never agreed to help with the April 2001 billing, and Orville testified he did not hire other help to assist with meter reading and billing during his illnesses because Ponderosa lacked the funds to do so. (Tr. 172-173.)

"I think [irregular billing] caused some financial hardships for some of the people on low [or] fixed incomes. That is not to say it is Orville's fault they didn't budget for it, but the result was still the same." (Tr. 204.)

The principal witness who testified about bacteriological testing of Ponderosa's water was Tim Potanovic of the Tehama County Environmental Health Department (Tehama EHD), which in July 2001 took over the responsibility from the DHS for ensuring Ponderosa's compliance with the California Safe Drinking Water Act. (Tr. 127, 137.) Potanovic stated that no sample results were submitted by Ponderosa for five months, from November 2001 through March 2002, and that when Tehama EHD finally took its own samples on April 23, 2002, one of them turned out positive for bacteria. (*Id.* at 138.)⁵ Potanovic also testified that the result of failing to conduct bacteriological tests for five months was that there was no measure of the basic potability of Ponderosa's water, an issue that is "important intrinsically for the protection of public health." (*Id.* at 142.) It appears the bacteriological tests were not conducted because Orville lacked the funds to pay the testing laboratory, as evidenced by Kevin's testimony that a bill of nearly \$1,000 from Monarch Laboratories was still unpaid. (*Id.* at 150.)

While the failure to conduct bacteriological tests for five months in 2001-2002 was disturbing enough, it took on added significance when considered along with adverse test results from earlier periods under the Figgs brothers' management. As stated in the McCrea Declaration (¶ 30), water samples from Ponderosa tested positive for bacteria in November 1997 and November 1998.

⁵ Potanovic acknowledged that a retest conducted in the same area of the Ponderosa system the next day came back negative for bacteria. (*Id.* at 138.)

At the hearing, Orville acknowledged these prior test results, although he tried to get Richard Hinrichs, the DHS witness, to concede that the most likely cause was a routine error in the procedures used to repair a water main. (Tr. 117-18.)

2. Failure to Provide Information Necessary for A Rate Increase

As noted above, Ponderosa's lack of adequate revenue was the reason given by Orville for not hiring staff to help with meter reading. It also explains his inability to pay Ponderosa's power bill (which led PG&E's cutoff of power on November 1, 2001), and is the only apparent explanation why bacteriological tests were not conducted from November 2001 to March 2002. Because the lack of adequate revenue was central to Ponderosa's problems, a good deal of hearing time was devoted to cross-examination by Orville designed to demonstrate that he had requested timely rate relief from the Commission, but that the staff of the Water Division had not given him the necessary assistance. Staff's position, on the other hand, was that Orville had failed to utilize the Commission assistance that was offered to him.

As noted in the introduction, Orville's first clear request for assistance came on April 9, 2001, when he sent a letter to the Water Advisory Branch requesting an "immediate, emergency rate increase" for the purpose of paying Ponderosa's PG&E bills. (McCrea Declaration, Ex. 5.)

As a result of the April 9 letter, McCrea wrote to Orville on May 4, 2001 and offered him assistance in filling out the Informal Rate Change Workbook. It is undisputed that McCrea picked up the Workbook during his visit on May 18, 2001, although he apparently had time that day only to glance at it quickly. On cross-examination, McCrea testified that he told Orville on May 18 that the Workbook was incomplete because the pages relating to capital items were not filled out, and because the necessary annual reports had not been

submitted. (Tr. 55.) A copy of the Workbook that Orville handed to McCrea on May 18 was admitted into evidence as Commission Exhibit 1.

Although they agree on what transpired on May 18, Orville and McCrea differed sharply on the extent of their contacts after that date until November 1, 2001, when all agree that Orville contacted the Water Division to warn that PG&E was about to shut off Ponderosa's power. Orville insisted that he had no telephone contacts from the Commission (whether directly or via messages left on his answering machine) from May 18 until November 1, (Tr. 165-66), whereas McCrea insisted that he had telephoned Orville at least once a month during this period to follow up on his request for the material missing from the Informal Rate Change Workbook. (*Id.* at 50). McCrea also testified that in at least one of his follow-up calls, he spoke directly with Orville, who said that he could furnish the missing information about capital items, but would need to do some research to find it. (*Id.* at 56-57.) McCrea and Orville agreed that between May 18 and November 1, 2001, Orville did not furnish any additional documentation to the Commission. (*Id.* at 57, 182.)

The two men also differed sharply over the nature of the representations made by the Commission's staff to Orville concerning the likelihood of obtaining an emergency rate increase. In his April 26 response to the OII, Orville stated that during the period from May to October 2001, Ponderosa was "expecting a[n] electric rate roll back or an electric surcharge to be applied to the customer accounts . . . as promised by Mr. Donald McCrea." (April 26 Response, p. 3.) The response also stated that when Orville spoke on November 1 with Art Jarrett, McCrea's supervisor:

" . . . [Jarrett] guaranteed Orville A. Figgs that an electric surcharge would be passed, by the CPUC, on November 13, 2001. This was not done. Mr. [Jarrett] explained that the time had just been too short, but he

assured the Utility, the electric surcharge would be the first item on the CPUC, December 11, 2001, agenda. The electric surcharge did not get passed this time either." (*Id.* at 4.)

McCrea testified that he could recall no such unconditional guarantee being made. When asked whether he was aware of any representations to Ponderosa about a surcharge to cover energy costs, he replied:

"That was not a guarantee. That was a promise of making our best efforts to be able to get it on [the Commission agenda], if sufficient information was supplied to us, such as the capital amounts and the annual reports which we requested." (Tr. 75.)

Later, after noting that both he and Jarrett had conveyed to Orville what would be necessary to obtain a rate surcharge, McCrea added that he "can't fathom Mr. Jarrett making any kind of [an unconditional] promise like that, unless there was additional information . . . provided." (*Id.* at 77.)

3. Payments to PG&E by Ponderosa on Its Past-Due Account

As noted above, there is no material dispute about what happened on November 1, 2001. That morning, Orville telephoned the Water Division to inform them that because Ponderosa had been unable to pay its power bill, PG&E would be shutting off the power later that day. After PG&E did so (and several Ponderosa customers called to complain that they were without water), the Water Division attempted to contact PG&E through the Commission's Consumer Affairs Branch to get the power restored. When these efforts were unsuccessful, the Director of the Energy Division, Paul Clanon, contacted PG&E and persuaded them to turn the power back on, after Orville had agreed to a schedule for paying the amounts past due. (OII, pp. 5-6.)

McCrea testified at the hearing that in a telephone conversation with

Orville, the latter had agreed to the payment schedule set forth in Exhibit 9 to the McCrea Declaration. (Tr. 70.) This schedule called for Orville to make payments to PG&E totaling \$4,900 by November 25, 2001, and then over the next three months, to pay \$2,600 per month plus the current bill. In this way, the arrearage of over \$12,000 would be eliminated by the end of February 2002.

Orville conceded that he did not honor this payment schedule. Instead, he acknowledged that the figures shown on Commission Exhibit 4, which was introduced at the hearing, accurately reflected both his payments and the amounts billed by PG&E to Ponderosa since February 2001. (Tr. 85, 183.) This exhibit showed that although Orville did pay \$4,500 by November 26, 2001, his payments to PG&E between that date and the end of February 2002 totaled only \$4,655. The effect of these payments was to reduce the balance due to PG&E to approximately \$6,250 by January 25, 2002, and with new billings, the balance due fluctuated between that figure and \$5,250 until the date of the hearing.

At one point counsel for the Water Division asked Orville if he had any plan for paying the balance due PG&E. He replied that he expected to read the meters and render bills within the next few days, and that about \$3,500 of revenue should come in as a result of this billing. Of this amount, he planned to pay PG&E \$2,500 to \$3,000. He conceded, however, that this would leave a balance due of at least \$3,000, and that since the total annual operating revenue for Ponderosa is about \$12,700 at current rates, “there is no way to – without the electric surcharge, there is no way to catch those bills up.” (Tr. 183-84.)

4. Past-Due Property Taxes

The final major issue at the hearing was the status of unpaid property taxes on the water system. This was a significant issue because, as stated in the supplemental declaration of McCrea attached to D.02-04-022, the amount of unpaid taxes at the time of hearing was \$18,149.49, and the Tehama County Tax

Collector had given notice that she intended to sell the parcel at a public auction on May 17, 2002 unless it was redeemed. Orville testified that the 390-acre parcel to be auctioned contained about two-thirds of the water system's assets, including the well that is its principal source of supply. (Tr. 168-171.)

The Treasurer and Tax Collector of Tehama County, Dana Hollmer, was called as a witness by the Water Division. Hollmer testified that the property taxes on the parcel first became delinquent on June 30, 1993. No taxes were paid on the parcel from then until June 30, 1998, when Orville paid the taxes for 1997-98 and entered into an agreement with Hollmer's office to pay the past-due balance over five years. (*Id.* at 194-95.)⁶ However, after no further payments were made, Hollmer scheduled the property to be sold at auction on May 24, 2001. (*Id.* at 195.) She removed the parcel from that tax sale when she learned that it contained the water supply for Ponderosa, and also because the Figgs brothers led her to believe that a buyer for the water system might soon be found. (*Id.* at 195-96.)

When asked whether he had a plan for paying the \$18,000 in property taxes, Orville said that if the water system could not be sold in the near future, he and Kevin planned to file for bankruptcy under Chapter 13, and then take out a short-term loan to pay the back taxes. Orville estimated that after taking into

⁶ Hollmer explained the five-year installment plan agreed to by Orville as follows:

"In order to remain in good standing on the five-year plan, the owner needed to pay 20 percent each year, plus interest on the balance, and keep the current taxes in good standing.

"On June 30th [1998] the taxes for the tax year '97/'98 were completely paid and a 20 percent principal payment was made to take out the formal plan. That was the only payment that was made." (Tr. 195.)

account points and loan fees, a loan of \$24,000 to \$25,000 would be necessary to pay the taxes, and that it would probably be due in two years. (Tr. 185.)

On May 15, 2002, Kevin filed a voluntary petition pursuant to Chapter 13 of the Bankruptcy Act in the United States District Court for the Eastern District of California.⁷ As a result of this petition, Hollmer removed the 390-acre parcel from the auction scheduled for May 17, 2002. On July 19, 2002, counsel for the Water Division informed the assigned ALJ that Kevin had voluntarily dismissed his bankruptcy petition on July 16, 2002.⁸

Discussion

As stated in the OII, the burden at the May 2-3 hearing was on the respondents to show cause why the Commission should not petition the Tehama County Superior Court to appoint a receiver to take possession of and operate

⁷ Case No. 02-25567-A-13J.

⁸ Even though Kevin has now dismissed his bankruptcy petition, we note that the automatic stay against a Chapter 13 petitioner provided for in section 362 of the Bankruptcy Act (11 U.S.C. § 362) would not preclude an action by the Commission to seek a receiver under § 855 of the Pub. Util. Code.

Section 362(b)(4) contains an exception to the automatic stay of litigation in cases where an action or proceeding is brought to enforce a “governmental unit’s or organization’s police and regulatory power, including the enforcement of a judgment other than a money judgment.” Pursuant to this exception, the courts have permitted such actions as a proceeding by a state water quality board against a bankrupt oil company to fix civil liability for failure to comply with a state water quality control act, and a proceeding by a state bar association to impose discipline upon a bankrupt attorney. *In re Commerce Oil Company*, 847 F.2d 291 (6th Cir. 1988) (§ 362 did not stay action against oil company under Tennessee Water Quality Control Act); *In re Wade*, 948 F.2d 1122 (9th Cir. 1991) (state bar disciplinary proceedings not stayed). *See also*, COLLIER ON BANKRUPTCY ¶ 1300.46[3]. In view of the findings necessary for the Commission to seek appointment of a receiver under § 855, an action under that provision falls squarely within the § 362 (b)(4) exception for actions or proceedings by governmental agencies to enforce their police or regulatory powers.

Ponderosa pursuant to Section 855 of the Public Utilities Code.

Based upon the McCrea Declaration and the evidence presented at the hearing, we agree with the Water Division that the appointment of a receiver should be sought in this case. The record leaves no doubt that Orville and Kevin Figgs have been unable or unwilling to serve Ponderosa's ratepayers adequately, and that Orville – who has had effective control of the water system since July 2000 – has been unresponsive to rules and orders of the Commission.

While it is a close question, we do not agree with the Water Division that both the Figgs brothers can be said to have actually or effectively abandoned the water system. It seems clear from the record that Orville has not abandoned the system and has tried, however ineptly, to operate Ponderosa since the late 1990s. Kevin, on the other hand, effectively abandoned the water system in July 2000, and reiterated his refusal to be involved when he declined Orville's request for assistance with meter-reading in April 2001. While Kevin's abandonment of Ponderosa appears to be due principally to Orville's refusal to give him any say in the water system's finances (as well to the brothers' physical altercation in July 2000), these circumstances cannot be allowed to excuse the effects of the brothers' antagonism on Ponderosa's ratepayers. These effects include erratic billing, interruption of water service on November 1, 2001 (due to the power cut-off by PG&E), and a failure to test the water system for bacteria in the five months thereafter.

The first effect, erratic billing, requires little discussion. As noted above, Orville acknowledged at the hearing that Ponderosa's customers were not billed from February 2001 until November 2001, even though the water system's tariffs provide for quarterly billing. Although the OII does not mention Commission General Order (GO) 103, the failure to bill regularly is a clear violation of section VII.2 of that order, which provides that "each [water] utility shall render a bill to

each customer for each billing period." Moreover, while Orville claimed at the hearing that he had responded to customer complaints by Don Canada, Carlon Ginn-Edwards and Donald and Barbara Webber about irregular billing in prior periods, he could not substantiate his claim with records. (Tr. 178-80.) His inability to produce the responses to these complaints suggests a violation of section I.8. of GO 103.⁹

Although the erratic billing is troublesome, the most inexplicable element in this whole story is Orville's continuing passivity and indifference, especially after he wrote to the Commission on April 9, 2001 requesting an emergency rate increase to pay power bills. After this letter was received, McCrea wrote back to Orville making it very clear that Orville would need to fill out the Informal Rate Change Workbook so that a GRC could be processed. McCrea also offered to assist Orville in filling out the workbook when McCrea visited the area on May 18, 2001.

The workbook that Orville gave McCrea on May 18 was admitted into evidence at the hearing. As McCrea testified, the pages dealing with "Changes to

⁹ Section I.8. of GO 103 provides in pertinent part:

"Upon complaint to the utility by a customer either at its office, by letter or by telephone, the utility shall promptly make a suitable investigation and advise the complainant of the results thereof. It shall keep a record of all complaints which shall show the name and address of the complainant, the date and nature of the complaint, and the adjustment or disposition thereof for a period of two years subsequent to the final settlement of the complaint."

Commission Exhibits 6, 7 and 8 show that Carlon Ginn-Edwards sent a letter to the Commission in mid-December 2001 complaining about Ponderosa's erratic billing, that Don Canada did so on January 22, 2001, and that the Webbers did so on February 7, 2002.

Ratebase" (i.e., capital expenditures) are not filled out. In light of this, we accept McCrea's testimony that the workbook given to him was incomplete, and that over the next five months, he regularly tried to telephone Orville to request that the missing capital items be supplied. We also accept McCrea's testimony that on the one occasion during this period when he was apparently able to speak with Orville directly, Orville led him to believe that he understood what McCrea wanted, but needed to do some research to get the data. This situation continued until PG&E cut off Ponderosa's power on November 1, 2001 and Commission intervention was necessary to get it restored.

Orville's version of events during the May 18 - November 1, 2001 time period is unworthy of belief. First, in his April 26 response, he asserted that McCrea had made no objection on May 18 to the incomplete workbook.¹⁰ Then at the hearing, he tried to claim that he was not aware of any attempts by the Commission to contact him during the May to November period. (Tr. 165-66.) He also sought to argue that he had been "promised" a rate increase, and therefore didn't need to do anything further.¹¹ The truth seems to be that, as Orville eventually admitted, he did not understand the nature of the "capital items" for which McCrea was requesting data, but was too embarrassed to admit it.¹² Orville and McCrea do agree, however, that Orville never submitted the

¹⁰ Page 3 of the April 26 Response states that on May 18, "Mr. McCrea was sure the Workbook was fine, since he had also received printouts of 12 months of P.G.&E.bills."

¹¹ On this issue, we agree with McCrea that one cannot "fathom Mr. Jarrett [or anyone else at the Commission] making any kind of a promise like that, unless there was additional information . . . provided." (Tr. 77.)

¹² On this issue, Orville testified at the May 3 hearing:

"Until just yesterday I did not realize that the capital improvements

Footnote continued on next page

additional data needed to finish processing a GRC.

Orville's failure to provide the Water Division with the data it needed to process a rate increase, which culminated in the power shut-off of November 1, 2001, constitutes an unwillingness or inability to serve Ponderosa's ratepayers adequately. Further, under the unusual circumstances of this case, it also constitutes a violation of section II.2.a. of GO 103, which requires that each water utility "shall make all reasonable efforts to prevent [emergency] interruptions of service[,] and when such interruptions occur shall endeavor to reestablish service with the shortest possible delay consistent with the safety to its customers and the general public." Although it appears that Orville acted promptly on November 1st to notify the Water Division of PG&E's intent to cut off power later that day, it was his failure to pay PG&E's bills for five months that had produced this crisis.

Even after the power was restored on November 1st -- as a result of which Ponderosa became obligated to make more than \$12,000 in payments to PG&E by February 25, 2002, (McCrea Declaration, Ex. 9) -- Orville apparently made no effort to find out what additional data the Commission needed to grant a rate increase.¹³ Instead of honoring the payment schedule he had agreed to (Tr. 70),

account had been changed from the plant acquisitions account, that the capital improvements is what used to be called plant acquisitions, if you buy pumps or make major additions to your facilities. And he [McCrea] was calling that the 'capital improvements account.' Which capital, to me, meant money, like in your bank account." (Tr. 181.)

¹³ As Exhibit 8 to the McCrea Declaration makes clear, McCrea continued trying to contact Orville during this period, but without success. After noting his attempts to make contact (including a personal visit to Orville's home on February 21, 2002), McCrea's letter of March 7, 2002 reiterated that the Commission needed the data described in the Informal Rate Change Workbook to grant a rate increase, and said "we

Footnote continued on next page

Orville made a series of partial payments that, by the time of the hearing, left Ponderosa owing approximately \$6,000 to PG&E. We agree with the Water Division that this conduct "puts the ratepayers at risk of losing their water service should PG&E disconnect the power to [Ponderosa] again." (Water Division Brief, p. 3.) As such, it constitutes another instance of the respondents' unwillingness or inability to serve Ponderosa's ratepayers adequately.

Orville's failure to communicate with the Water Division during the May-November 2001 period appears to be part of a pattern in which Orville made himself inaccessible when he didn't want to communicate with regulatory authorities. At the hearing, McCrea testified that in March 2002, he had twice sent a letter to Orville by certified mail with a return receipt requested, but that both mailings had been returned by the post office as unclaimed. (Tr. 67-69.)¹⁴ Hinrichs of DHS testified that he had also sent Orville certified letters that were refused or returned as unclaimed, and that Orville was not consistent about returning telephone calls. (*Id.* at 125-28.)¹⁵ Kevin testified that he had also experienced frequent difficulties in contacting his brother. (*Id.* at 146.) Finally, Potanovic of Tehama EHD testified that shortly before the hearing, he had tried to telephone Orville, but the latter's phone was disconnected. (*Id.* at 139.)¹⁶

want to help you, but you need to co-operate with us by sending certain information."

¹⁴ Although the testimony is not clear on this point, the letter sent twice by certified mail appears to be the one dated March 7, 2002 that is attached as Exhibit 8 to the McCrea Declaration.

¹⁵ Like McCrea, Hinrichs also recalled an incident in which he had gone to Orville's house and seen the lights and television on, but no one would answer the door. (*Id.* at 126-27.)

¹⁶ On the other hand, the testimony indicated that at least one letter from the Commission did not reach Orville. The November 27, 2000 letter from Dean Evans

Footnote continued on next page

Another obvious instance of the respondents' failure to serve Ponderosa's ratepayers and to follow Commission orders is the failure to conduct bacteriological testing from November 2001 through March 2002. As Potanovic testified, this basic test -- which is only one of a number required by law (Tr. 131-35) -- is "important intrinsically for the protection of public health." (*Id.* at 142.)¹⁷ Moreover, section II.1.a. of GO 103 requires that "any utility supplying water for human consumption" must hold or apply for a permit from the state or local Department of Health Services "and shall comply with the laws and regulations" of that department. Potanovic testified that in July 2001, his department assumed responsibility for enforcing the California Safe Drinking Water Act for systems like Ponderosa, and that he had issued a citation to Kevin and Orville due to their failure to conduct the required bacteriological testing. (Tr. 137-38.)¹⁸

(Exhibit 3 to the McCrea Declaration) was sent to Kevin, who did not forward it to Orville because of the bad relationship between the brothers. (Tr. 35-36.) We find it impossible to believe, however, that mail delivery to Orville's home and office was as unreliable as he claimed it was. (*Id.* at 84, 223-25.)

¹⁷ As noted in paragraph 30 of the McCrea Declaration, water samples from Ponderosa had also tested positive for bacteria on at least two other occasions (in November 1997 and November 1998) after the Figgs brothers resumed control of the system in 1997.

¹⁸ Potanovic described the testing requirements of the Safe Drinking Water Act and Ponderosa's response to them as follows:

"[T]he State Drinking Water Act requires community water systems to monitor bacteriological quality on a monthly basis. That entails submitting water samples to a state-approved laboratory for bacteriological examination monthly, and [relaying] these sample results to the [county] health department. Since this department has assumed responsibilities for Sky Ranch in July, the sampling results have not been forthcoming as required by law." (Tr. 137.)

The failure of the Figgs brothers to pay property taxes on the parcel containing most of Ponderosa's assets (as well as its principal source of supply) is another instance of failure to serve the ratepayers adequately. The taxes that are now past due on this parcel (\$18,149.49) are approximately one and one-half times the annual operating revenue for the system. (Tr. 183.) Moreover, the Tehama County Tax Collector testified that the only property taxes on this parcel that have been paid on time since 1993 were those due on June 30, 1998, and that happened only because timely payment of those taxes was a condition precedent for entering into a five-year payment plan, on which Orville subsequently defaulted. (*Id.* at 194-95.)¹⁹

Not only has Orville been unresponsive to Commission orders and failed to serve Ponderosa's ratepayers adequately, but neither he nor Kevin has any viable plan for operating the system. Orville testified that unless the water system could be sold,²⁰ the best hope lay in filing for bankruptcy under Chapter 13. Orville's plan once that happened would be to pay PG&E as much as possible on the past-due power bill, and to take out a two-year loan to pay the past-due property taxes. (Tr. 183-85.) Kevin also expressed interest in a Chapter 13 Bankruptcy filing. (*Id.* at 149-50.) However, the root cause of Ponderosa's problems (in addition to the brothers' antagonisms) is a lack of

¹⁹ Although the record is not entirely clear on this point, we recognize that in the period from 1993 to 1997, it may not have been the responsibility of the Figgs brothers to pay the property taxes, because for at least part of that time the water system was under the control of the Tehama County Public Administrator. However, the brothers are clearly responsible for the default on the five-year payment plan, and for the failure to pay the property taxes since 1998.

²⁰ At the hearing, Orville testified that a man named Frank Brammedy has expressed interest in buying the system, but as of the date of the hearings he had not made an offer. (Tr. 167, 185.)

adequate revenue, and without a rate increase – which a bankruptcy court cannot grant, and for which Orville has failed to submit the necessary data to the Commission -- it is not apparent how more revenue can be obtained.

In summary, we agree with the Water Division that for Ponderosa, there is "no alternative to requesting that the Superior Court appoint a receiver." (OII, p. 7.) We recognize that the appointment of a receiver has been characterized as a "violent and drastic" remedy, *Bank of Woodland v. Stephens*, 144 Cal. 659, 660 (1904), but in appropriate cases we have sought one. In our recent decision concerning Arrowhead Manor Water Company, for example, we concluded that it was appropriate to seek a receiver under § 855 because the water company had been cited many times by DHS for deficiencies in water quality monitoring, and because the company's long history of failing to make repairs on its system demonstrated an inability to serve ratepayers adequately. *See*, D.02-07-009, *mimeo.* at 14-16, 37-38.²¹

When it enacted § 855 in 1980, the Legislature expressly empowered the Commission to seek a receiver for a water or sewer company upon making any one of the three findings -- inability or unwillingness to provide adequate service to ratepayers, actual or effective abandonment, or unresponsiveness to Commission rules or orders -- that are set forth in the statute. As the discussion above makes clear, we find in this case that Kevin has abandoned the water system, and that Ponderosa under Orville's management has been unable or unwilling to provide adequate service to its ratepayers and has been

²¹ In D.02-07-009, we recognized that the failure to cure the health-related deficiencies cited by DHS was due to Arrowhead's lack of funds, but we nonetheless stated that "financial hardship is not an acceptable reason for noncompliance with health-related requirements." (*Id.* at 45, Finding of Fact 14.)

unresponsive to Commission rules and orders. Thus, we are in the sad and unusual position of having to conclude that all three of the findings set forth in § 855 must be made.

Comments on Proposed Decision

The proposed decision (PD) of the ALJ in this matter was mailed to the parties on August 6, 2002 in accordance with Pub. Util. Code § 311(d) and Rule 77.1 of the Rules of Practice and Procedure. The only comments submitted in response to the PD were those of the Water Division, which identified two small typographical errors that have been corrected in this decision.

Findings of Fact

1. By 2000, the Commission was receiving frequent complaints from Ponderosa's customers about irregular billing.
2. On November 27, 2000, the Director of the Water Division sent a letter to Kevin asking Ponderosa to respond to a customer complaint, and to a citation from DHS for failure to submit certain annual reports.
3. Kevin did not forward the November 27, 2000 letter to Orville.
4. The meters of Ponderosa's customers were not read from February 2001 until November 2001.
5. On March 1, 2001, the Chief of the Water Advisory Branch sent Orville a letter requesting that he resume regular billing of Ponderosa's customers, permit customers suffering financial hardship to pay their bills in installments, and submit a plan by March 20, 2001 for resuming regular billing of the water system's customers.
6. Orville responded to the March 1, 2001 letter in a letter dated April 9, 2001. In his response, Orville stated, among other things, that the October 2000 billing cycle had been missed, and that Ponderosa would offer payment arrangements to those customers who needed them.

7. In a separate letter to the Water Advisory Branch dated April 9, 2001, Orville requested an immediate emergency rate increase of approximately 250 per cent for the purpose of paying Ponderosa's power bill.

8. On May 4, 2001, McCrea wrote to Orville explaining that a GRC would be necessary before Ponderosa could be granted a rate increase, and enclosing a copy of the Informal Rate Change Workbook that simplifies the data compilation needed to process a GRC for a water company like Ponderosa.

9. On May 18, 2001, McCrea personally picked up the Informal Rate Change Workbook from Orville. McCrea told Orville at that time that the workbook was incomplete, and that the missing capital items would need to be supplied before the GRC could be processed by the Water Division.

10. Between May 18 and November 1, 2001, McCrea telephoned Orville about once a month to follow up on McCrea's request for the information on capital items missing from the Informal Rate Change Workbook.

11. During one of the phone calls McCrea made between May 18 and November 1, 2001, he spoke directly with Orville, who assured him that he understood what data McCrea wanted, but would need to conduct additional research to obtain it.

12. From May 18, 2001 to the present time, Orville has not furnished McCrea or anyone else at the Commission with the data missing from the Informal Rate Change Workbook.

13. At no time did McCrea or his supervisor, Art Jarrett, promise Orville that a GRC for Ponderosa could be processed without the missing data.

14. Ponderosa has not been granted a rate increase since 1982.

15. Ponderosa's annual operating revenue of approximately \$12, 700 is insufficient to pay the PG&E bills, water testing bills and other expenses that must be incurred to provide adequate water service to Ponderosa's customers.

16. On November 1, 2001, Orville contacted the Water Division to inform them that PG&E was threatening to cut off Ponderosa's power later in the day, due to non-payment of Ponderosa's power bill.

17. Later on November 1, 2001, PG&E did cut off Ponderosa's power, and some of Ponderosa's customers went without water as a result.

18. Still later on November 1, 2001, PG&E turned Ponderosa's power back on at the request of the Director of the Energy Division, but only after Orville had agreed by telephone to the installment plan for paying the past-due amounts that is attached as Exhibit 9 to the McCrea Declaration.

19. Although the payment schedule required Ponderosa to pay PG&E \$12,100 for past due bills by February 25, 2002, and to pay all new bills when due, Orville paid PG&E only \$9,155 by February 25, 2002.

20. Commission Exhibit 4 from the order-to-show-cause hearing accurately represents all of the amounts paid to PG&E by Ponderosa, and billed by PG&E to Ponderosa, from February 9, 2001 to March 28, 2002 inclusive.

21. On the closing date of the order-to-show-cause hearing, Ponderosa still owed PG&E approximately \$6,000.

22. Ponderosa's failure to honor the November 1, 2001 payment agreement with PG&E has left its customers vulnerable to another power cut-off by PG&E.

23. The testing of a water system for bacteria is a basic measure of the potability of the system's water, and intrinsically important for the protection of public health.

24. Bacteriological tests were not conducted on Ponderosa's water from November 2001 through March 2002.

25. Ponderosa still has not paid several bills from laboratories for water tests.

26. When four Ponderosa water samples were collected by the Tehama EHD on April 23, 2002, one of the samples came back positive for bacteria.

27. The property taxes on the parcel containing about two-third's of Ponderosa's assets, including its principal source of supply, APN 13-220-351 (the Parcel), first became delinquent on June 30, 1993.

28. No further property taxes were paid on the Parcel until June 30, 1998.

29. On June 30, 1998, Orville entered into a payment plan with the Tehama County Tax Collector whereby the past-due property taxes on the Parcel were to be paid with interest over five years, and all new taxes were to be paid promptly.

30. After paying 20 percent of the amount of past-due property taxes on June 30, 1998, Orville defaulted on the payment plan concerning the Parcel that he had entered into with the Tehama County Tax Collector.

31. The Tehama County Tax Collector placed the Parcel on the list of properties to be sold at auction on May 24, 2001 to satisfy unpaid taxes.

32. When she learned that the Parcel contained most of Ponderosa's assets, and that a buyer might soon be found for the water system, the Tehama County Tax Collector removed the Parcel from the list of properties to be sold at the May 24, 2001 auction.

33. The Parcel was again placed by the Tehama County Tax Collector on the list of property to be sold at auction on May 17, 2002 to satisfy unpaid taxes, but was removed from said list on or about May 16, 2002.

34. Because of the personal antagonism between them, Orville and Kevin refuse to work together to manage Ponderosa.

35. Orville does not have a viable plan for operating Ponderosa with the existing revenues.

36. Kevin does not have a viable plan for operating Ponderosa with the existing revenues, and it is unlikely that he could gain access to Ponderosa's books and records without a lawsuit.

Conclusions of Law

1. Ponderosa has been under Orville's management and control since July 2000, when Kevin abandoned the water system.
2. Ponderosa's failure since 2000 to bill all of its customers on a regular basis has created financial hardship for some customers, and is inconsistent with the requirements of section VII.2. of GO 103.
3. Orville's inability at the hearing to produce his responses to the customer complaints set forth in Commission Exhibits 6, 7 and 8 suggests a violation of section I.8. of GO 103.
4. Orville's failure since May 18, 2001 to provide the Water Division with the capital expenditure data missing from Ponderosa's Informal Rate Change Workbook, which data was needed to process a GRC and thereby increase rates, constitutes an unwillingness or inability to serve Ponderosa's ratepayers adequately.
5. Under the unusual circumstances of this case, Orville's failure to provide the Water Division with the capital expenditure data necessary to process a GRC, which led to the November 1, 2001 power cut-off by PG&E, constitutes a violation of section II.2.a. of GO 103.
6. Orville's failure to honor his November 1, 2001 payment agreement with PG&E, which has left Ponderosa's ratepayers vulnerable to another power cut-off, constitutes an unwillingness or inability to serve Ponderosa's ratepayers adequately.
7. Ponderosa's failure to conduct required bacteriological testing from November 2001 to March 2002 constitutes an unwillingness or inability to serve Ponderosa's ratepayers adequately.
8. Ponderosa's failure to conduct required bacteriological testing from November 2001 to March 2002 constitutes a violation of section II.1.a. of GO 103.

9. The failure of the Figgs brothers to pay property taxes on the Parcel constitutes an unwillingness or inability to serve Ponderosa's ratepayers adequately.

10. The violations of GO 103 identified in these Conclusions of Law constitute unresponsiveness to the rules or orders of the Commission within the meaning of Section 855 of the Public Utilities Code.

11. The respondents have failed to show cause why the Commission should not seek the appointment of a receiver pursuant to Pub. Util. Code § 855 to take possession of and operate Ponderosa.

12. This order should be effective immediately because of the public interest in ensuring the safe and reliable operation of Ponderosa.

O R D E R

IT IS ORDERED that:

1. In accordance with Public Utilities Code Section 855, the Commission's General Counsel is directed to petition the Superior Court of Tehama County to appoint a receiver to assume possession of and operate the Ponderosa Sky Ranch Water Company.

2. The Responsive Declaration Opposing Order to Show Cause submitted by Orville A. Figgs on April 26, 2002 and filed on May 1, 2002 is admitted into the record.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.