

DW 99-119

LOV WATER COMPANY

Deficiencies and Appropriateness of Fines

Order Denying Motion For Rehearing

O R D E R N O. 23,543

August 11, 2000

APPEARANCES: Devine, Millimet & Branch, by Fred Coolbroth, Esq. for LOV Water Company; and Lynmarie Cusack, Esq. on behalf of the Staff of the New Hampshire Public Utilities Commission.

I. INTRODUCTION AND BACKGROUND

On June 5, 2000 the New Hampshire Public Utilities Commission (Commission) issued Order No. 23,502 in which LOV Water Company (Company) was ordered to pay a fine of \$7,300 with \$4,300 of the fine to be held in abeyance for one year from the date of the order. The Commission imposed the fine after finding that the Company failed to comply with Order No. 23,371 which required the Company to install a pump station by a certain date and file weekly reports with the Commission regarding the progress of the pump station.

Before reaching the conclusion to assess the \$7,300 fine, the Commission held a hearing on April 3, 2000. During that hearing the Company presented evidence which sought to "demonstrate to the Commission the steps which the Company took in an attempt to comply with the Commission's order, the roadblocks which the Company encountered, in terms of

permitting problems, and the steps that the Company has taken since that time to resolve those permitting issues."

(Transcript, dated April 3, 2000; pp. 5-6). The Company argued it tried in good faith to comply with Order No. 23,371 but due to permitting and weather problems was unable to meet the deadline. *Id.*, pp. 44-45.

On cross-examination the Company's representative admitted that despite the New Hampshire PUC Staff's (Staff) offer to assist in any way to speed the installation process including assistance with permitting the Company did not seek such assistance. *Id.* at p. 54. The Company also admitted that it did not file the weekly reports which it was required by Order No. 23,371 to file. *Id.* at p. 28.

In Order No. 23,502 the Commission noted that the Company failed to request an extension or notify the Commission that it had permitting problems until after the previously established pump installation deadline had passed. Ultimately, the Commission rejected the Company's arguments regarding its "good faith efforts" to install the pump station.

On June 30, 2000, the Company filed a Motion for Rehearing with respect to Order No. 23,502. The Company asserted the June 5, 2000 Order was unlawful and unreasonable,

arguing that: the Order was based on the premise that installation should have occurred before the installation was approved; and that the Order imposes penalties on the Company for an inability to carry out an order which it legally could not perform.

Staff responded to the Company's Motion by an Objection dated July 5, 2000. Staff contended that the Company failed to provide good reason for the Commission to grant a rehearing as is required by RSA 541:3. Staff indicated that the Company presented the same arguments regarding weather and permitting at the April hearing, yet the Commission did not adopt the Company's rationale. Staff pointed out that the Commission's decision was premised on the fact Mr. Sands admitted that he had not filed the required weekly reports with the Commission and that the Company failed to ask for an extension of time to complete the facility; thus, there was nothing unlawful or unreasonable in the decision to impose the fine.

II. COMMISSION ANALYSIS

After a review of the Company's allegations regarding the soundness of Order No. 23,502 we are not convinced that such rehearing should be granted. The Company alleges four reasons that the subject Order is unreasonable

and unlawful. Yet, it fails to support those allegations with any factual assertion different than what was argued at the April 3, 2000 hearing or with any legal precedent substantiating its position.

The Company contends that fining it for an inability to complete the pump station due to adverse weather conditions when the approval to build the station only came in December, 1999 and because it was prevented from completing the station due to permitting problems is unreasonable and unlawful. We find these arguments unpersuasive. We are not required to grant a rehearing so that a party has a second chance to present evidence that it could have presented earlier.

Concord Natural Gas Corp., 68 NH PUC 68, 80 (1983). Here, we have already rejected the Company's arguments on these points. We found, in Order No. 23,502, that the Company failed to comply with Order No. 23,371 as the Company failed to supply the Commission with weekly reports on the status of the pump house. In that Order, the Commission acknowledged that some reports were filed, but that there was no consistency in meeting the obligation. The Order also noted that the Commission could not condone the Company's lack of responsiveness to our Staff and the needs of its customers. In addition, we noted that while the Commission is not

insensitive to problems utilities may face complying with Commission imposed deadlines, the Company never requested an extension to fulfill its obligations.

In this instance, the Company not only failed to fulfill its service obligations, it acted in complete disregard of the Commission's authority. While the Company believed there were mitigating circumstances at play that caused the deadline to be missed, these do not override the Company's obligation to either comply with this Commission's orders or to ask for adequate relief therefrom.

The Company asserts two additional reasons the subject Order was unlawful and unreasonable, which we find equally unpersuasive. First, the Company contends it could not have commenced installation of the pump station before it was approved by this Commission. The Company was not barred from installing the pump station before receiving approval of the Settlement Agreement. Indeed, the Company should have proceeded to correct the customers' pressure problems without the need for a Commission investigation and later enforcement actions. Also, the Company, by its own conduct, is estopped from arguing this point. As pointed out in Staff's response to the Company's motion for rehearing, the Company "without waiting for the Settlement Order, commenced some of the

requirements of the agreement; i.e. rebating the customers and finding and repairing leaks." The Company cannot on one hand argue it failed to do one action because the Agreement was not approved, yet complete other actions prior to gaining the Commission's approval. Moreover, had the Company believed the time frame for completing the pump station as ordered in Order No. 23,371 was unreasonable, it had every opportunity to ask for a rehearing of that Order. It never did so.

Finally, the Company argues that the Order is unreasonable and unlawful because RSA 365:43 directs that fines and penalties are only recoverable in an action brought by the Attorney General in the name of the State. The Company cites no precedent for this claim. As Staff described in its response at Paragraph 10, the Commission has the authority without the Attorney General's intervention to impose fines under RSA 374:17 and 365:41. There otherwise would be no merit in the recognition that this Commission is vested with important judicial powers over public utilities, one being the assessment of penalties for violations of a Commission order. *See Re Boston & Maine Corp.*, 109 NH 324 (1969).

The Company also complained that it is unlawful and unreasonable to require it to complete something it was legally not able to do. While this argument is plausible on

its face, it is again something we rejected earlier. The Company failed to notify this Commission of problems it had with permitting until after the deadline. Had the Company been proactive in taking care of its business it might not have found itself facing fines.

Based upon the foregoing, it is hereby

ORDERED, that LOV Water Company's Motion for Rehearing is DENIED.

By order of the Public Utilities Commission of New Hampshire this eleventh day of August, 2000.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary