Decision No. R10-0359

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09R-848W

IN THE MATTER OF THE PROPOSED RULES REGULATING FINING OF WATER AND COMBINED WATER AND SEWER UTILITIES, 4 CODE OF COLORADO REGULATIONS 723-3 UNDER HOUSE BILL 08-1227.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE KEN F. KIRKPATRICK ADOPTING RULES

Mailed Date: April 16, 2010

I. STATEMENT

1. The Colorado Public Utilities Commission (Commission) issued its Notice of Proposed Rulemaking (NOPR) regarding its Rules Regulating Water and Combined Water and Sewer Utilities, 4 *Code of Colorado Regulations* 723-5 in Decision No. C09-1305.

2. The NOPR proposed changes to the Commission's rules necessitated by the passage of House Bill 08-1227 (the bill).

3. The bill adds, *inter alia*, § 40-7-113.5 and § 40-7-116.5, C.R.S. The bill became effective on July 1, 2008.

4. The bill's amendment of Article 7 of Title 40 of the *Colorado Revised Statutes* applies to water and combined water and sewer utilities. Under the bill, the Commission was granted authority to issue civil penalties to certain public utility service providers including electric, gas, water, water and sewer, and telecommunications service providers.

5. The Commission's existing rules for water utilities were established in Docket No. 06R-501W and are proposed to be modified in Docket No. 09R-130W to accommodate

other changes necessitated by House Bill 08-1227 relating to water and combined water and sewer companies.

6. The basis and purpose of the proposed amendments is to revise the current water rules to add rules regarding fining of water and combined water and sewer utilities.

7. The statutory authority for the proposed rules is found in §§ 40-2-108, 40-3-102, 40-3-103, 40-3-104.4, 40-4-101, 40-4-108, 40-4-109, 40-7-113.5, and 40-7-116.5, C.R.S.

8. New rules have been added to establish the fining process and to list the finable rules.

9. Rule 5009 is added to define civil penalty, civil penalty assessment, civil penalty assessment notice (CPAN), and intentional violation as used in the proposed fining rules.

10. Rule 5010 is added to identify regulated water and water and sewer utility violations, civil enforcement, and enhancement of civil penalties.

11. Rule 5420 is added to list the violations and fine amounts...

12. The matter was set for a hearing on February 4, 2010 in a Commission Hearing Room in Denver, Colorado.[1] At the assigned time and place the undersigned Administrative Law Judge (ALJ) called the matter for hearing. At the conclusion of the hearing the ALJ extended the comment period until February 19, 2010.

13. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the proceeding along with a written recommended decision.

[1] A joint hearing was held in Dockets Nos. 09R-847G (fining of gas utilities); 09R-846E (fining of electric utilities); 09R-848W (fining of water and combined water and sewer utilities); and 09R-845T (fining of telecommunications utilities). While the hearing record is common to all four proceedings, each docket has an individual record which includes filings unique to that docket.

II. DISCUSSION

A. Intent, Safe Harbor, and Right to Cure

14. Section 40-7-113.5, C.R.S., authorizes the Commission to assess civil penalties and is at the base of this rulemaking. Subsection (a) of that section provides that a public utility furnishing water or water and sewer service "that **intentionally** violates any provision of articles 1 to 7…of this title or of any rule or order of the commission pursuant to such articles, which provision is applicable to such utility, may be assessed a civil penalty of not more than two thousand dollars; except [exceptions not relevant]" [emphasis added]. Commenters noted that the proposed rules do not capture the intent element from the statute. They proposed adding such an element, and that suggestion will be adopted.

15. Some commenters proffered a definition of intent from Decision No. R07-678 and suggest that the rules incorporate a version of it. That Decision dealt with the Commission's fining authority in the transportation area, which arises from § 40-7-113, C.R.S., some portions of which contain language very similar to that in § 40-7-113.5, C.R.S.[2] However, the definition suggested will not be adopted. That definition focuses too much on awareness and knowledge. It seems to suggest that a person must have actual, subjective knowledge of a rule before the person can intentionally violate the rule. This is not the case. All persons are charged with knowledge of the Commission's Rules. It is not a defense to an allegation that someone violated a rule that the person had not read the rule and was unaware of it. Intent describes the mental state that accompanies an action. As stated in the Colorado Criminal Code, "A person acts 'intentionally' or 'with intent' when his conscious objective is to cause the specific result

[2] *See, e.g.*, § 40-7-113(1)(g), C.R.S.

proscribed by the statute defining the offense."[3] This definition of intent with slight modification will be adopted in the Rules.

16. Several commenters suggested that the Commission include a "safe harbor" provision in the fining rules. Such a provision would be intended to prevent the imposition of significant civil penalties where there exists a good faith difference of opinion concerning the meaning of the Public Utilities Law or a Commission rule or order.

17. At hearing, several commenters agreed with a suggestion from the ALJ that the addition of the intent element accomplishes much of what a safe harbor provision is intended to accomplish. The ALJ does not believe that an additional safeguard such as a safe harbor provision is warranted. First, there is no mention of any such provision in the statute; the Commission would be creating it out of thin air. Second, the ALJ is not convinced that there are sufficient circumstances falling into the "intentional, but in good faith" category that such a provision presupposes to warrant the defense. Finally, if such a circumstance did present itself, it would be a factor to be considered as set out in Rule 1302(b) of the Commission's Rules of Practice and Procedure. Rule 1302(b) sets forth factors to guide the Commission in its imposition of a civil penalty, which include:

> (I) The nature, circumstances, and gravity of the violation; (II) The degree of the respondent's culpability; (III) The respondent's history of prior offenses; (IV) The respondent's ability to pay; (V) **Any good faith efforts by the respondent to achieve compliance and to prevent future similar violations;** (VI) The effect on the respondent's ability to continue in business; (VII) The size of the business of the respondent; and (VIII) Such other factors as equity and fairness may require. [Emphasis added.]

The combination of this Rule and the intent requirement provide sufficient protection to the utility, and no safe harbor provision is adopted.

[3] Section 18-1-501(5), C.R.S.

18. In a similar vein, some commenters have requested that a right to cure be added to the proposed rules, or alternatively, that the Commission use all of the procedures outlined in Rule 1302(h) of the Rules of Practice and Procedure. This procedure would allow a utility a period of time, perhaps 30 days after receipt of a notice of a proposed formal complaint or fine, to cure the alleged violations. However, the Commission has seldom used the procedure under Rule 1302(h), and its implementation has proved to be troublesome.[4] That may perhaps be due to the broader scope of remedies available under complaints issued under Rule 1302(h). The fining rules should provide an enforcement mechanism that is procedurally fair and more streamlined, especially given its limited range of remedies.

B. Procedural Guidance in Rules

19. Many comments noted the lack of procedural guidelines contained in the rules. For example, Proposed Rule 5010 refers generally to the requirements of § 40-7-116.5, C.R.S., but it does not explicitly mention the utility's rights to notice, hearing, and having the violations proven against it by a preponderance of the evidence, which are set forth in §§ 40-7-116.5(1)(a) and (d), C.R.S. Commenters differ in the degree to which they would like to see procedural guidelines incorporated into the Rules. This is an ongoing issue that the Commission faces in many rulemakings, namely, to what extent should statutory language be repeated in the Commission's rules implementing those statutory provisions. One commenter argued that since the fining rules are totally new, rather than a modification of existing rules, more explication in the rules is warranted. The ALJ has attempted to pick a middle ground that references these rights but does not unnecessarily expand the rules.

[4] *See* Docket No. 10F-011G, a complaint under Rule 1302(h), where the Respondent filed, among other pleadings, a motion for extension of time to file for rehearing, reargument, or reconsideration of the Commission Order initiating the complaint. The fining rules are intended to avoid those types of procedural complications.

C. Grouping of Violations by Fine Amount

20. Commenters almost unanimously disliked the aggregation of all violations into one group, with the fine amount being stated only as up to the maximum of $2000. Some commenters suggested that this did not comport with the statutory charge to the Commission in § 40-7-113.5(2)(a), C.R.S., to adopt rules "…specifying the particular violations, and the amount of the civil penalties to be assessed for each violation…" The ALJ agrees that it is better to have a graduated schedule of fines, with the more serious violations being subject to larger penalties. The rules adopted place the finable rules in four categories, with maximum fines of $2000, $1000, $500, and $100 in each of the respective categories.

D. Finable Rules

21. Commenters complained that the list of finable rules was faulty in that it listed too many rules that did not appear to impose mandatory duties on utilities, or it included inappropriate portions of rules, such as those listing the content of applications. The ALJ agrees that finable rules should contain a mandatory duty.[5] He has generally attempted to go one level down in the numbering system of the rules in determining which of the proposed rules would stay in and which would be deleted. In narrowing down the list of finable rules, the undersigned has utilized the following principles (not without some exceptions):

- There should be no fines for incomplete applications. That can be addressed through other means, such as deeming the application incomplete or denying the application.
- Rules that are definitions have been eliminated.
- Rules that are essentially affirmative defenses have been eliminated.
- Rules that do not impose a mandatory duty have been eliminated. This includes several rules that were written in the passive voice.

[5] This includes conditional, mandatory duties where a utility may not have to act, but once it chooses to act it must comply with the mandate.

- Rules that were addressed to jurisdictional entities that are not public utilities were eliminated. Some rules that cover both utilities and non-utilities remain, but only the utility is subject to fines.

E. Staff Manual

22. Commission Staff (Staff) testified at the hearing that it was in the process of preparing a document that it would use for internal guidance in issuing CPANs. The document may contain ministerial business rules, such as what the CPAN actually looks like, how long it is, where the signature blocks are located, and similar details. No commenters expressed serious interest in these types of business rules. However, the manual may also contain guidelines such as whether a warning violation will be issued before an actual CPAN is served on a utility. Several commenters expressed strong interest in these types of provisions. Some suggested that such a Staff manual constituted rulemaking.

23. The ALJ disagrees with the suggestion that such a manual constitutes rulemaking. The rules as adopted in this proceeding clearly state to whom they apply, what conduct is subject to fines, and what the maximum fines can be. The factors to be evaluated when determining the amount of a fine are also set out in Commission Rules.[6] This is not a situation where a decision by the Commission to assess a penalty would be based on any criteria outside of the rules. The manual may help Staff determine when and if to initiate a proceeding by serving a CPAN. But the manual would not, indeed, could not, be used in making the ultimate determination of whether there had been a rule violation subject to a civil penalty and what such a penalty should be.

[6] *See* the discussion above of Rule 1302(b) of the Commission's Rules of Practice and Procedure.

F. Repeat Violations

24. Section 40-7-113.5(3), C.R.S., states, "If any public utility receives a second civil penalty assessment for a violation of the same statute, rule, or order within one year after the first violation, the civil penalty assessed for the second violation shall be no greater than twice the amount specified by rule for such violation." Similarly, § 40-7-113.5(4), C.R.S., states, "If any public utility receives more than two civil penalty assessments for violation of the same statute, rule, or order within one year, the civil penalty assessed for each such subsequent violation shall be no greater than three times the amount specified by rule for such violation."

25. The proposed rules as noticed were somewhat unclear as to how these provisions would be implemented. The ALJ has adopted suggested language from one of the commenters to clarify how these provisions will be utilized.

G. Assessment Notice vs. Assessment

26. Some comments appeared to confuse the roles of the Staff[7] in issuing a CPAN, and the role of the Commission in assessing a civil penalty. When Staff issues a CPAN under the proposed rules, it is simply a notice that Staff is seeking a penalty because it reasonably believes that it can prove by a preponderance of the evidence that the respondent utility violated the stated rule or requirement. If the utility does nothing, the CPAN "constitutes a complaint to appear before the commission."[8] The CPAN is merely an allegation or group of allegations that the utility did not comply with certain Commission Rules or requirements. At hearing, if Staff proves its case by a preponderance of the evidence, the Commission would make a finding to

[7] Section 40-7-116.5, C.R.S., authorizes "The director of the commission or his or her designee..." to issue the notices.

[8] Section 40-7-116.5(1)(d), C.R.S.

that effect and could then assess the utility a civil penalty, in accordance with the factors mentioned above.

27. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following Order.

III. ORDER

A. The Commission Orders That:

1. The Rules attached to this Order as Appendix A are adopted.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

KEN F. KIRKPATRICK

Administrative Law Judge

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Decision No. C10-0699

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09R-848W

IN THE MATTER OF THE PROPOSED RULES REGULATING FINING OF WATER AND COMBINED WATER AND SEWER UTILITIES, 4 CODE OF COLORADO REGULATIONS 723-5 UNDER HOUSE BILL 08-1227.

ORDER LIFTING STAY AND ADOPTING RULES

Mailed Date: July 7, 2010
Adopted Date: June 23, 2010

I. BY THE COMMISSION

A. Statement

1. The Commission initiated this proceeding on November 20, 2009 by issuing a Notice of Proposed Rulemaking (NOPR) regarding its Rules Regulating Water and Combined Water and Sewer Utilities, 4 *Code of Colorado Regulations* (CCR) 723-5. By Decision No. C09-1305, we stated that the basis and purpose of the rulemaking proceeding was to make changes to the Commission's rules necessitated by the passage of House Bill 08-1227 (the bill). The bill adds, *inter alia,* § 40-7-113.5 and § 40-7-116.5, C.R.S. giving the Commission the statutory authority for the proposed rules.

2. We assigned this proceeding to an Administrative Law Judge (ALJ) and scheduled a hearing by Decision No. C09-1305. The hearing took place on February 4, 2010.

3. No written comments were offered in this proceeding. The hearing in this matter was held simultaneously with the hearings for the proposed fining rules in the telecommunications, electric, and gas industries, Docket Nos. 09R-845T, 09R-846E, and 09R-847G respectively. Oral comments were provided during this hearing by the

telecommunications, electric, and gas industries. No oral comments were provided by any water or combined water and sewer providers.

4. ALJ Ken F. Kirkpatrick issued his Recommended Decision Adopting Rules on April 16, 2010 (Decision No. R10-0359 or Recommended Decision).

5. We stayed the Recommended Decision and set a deadline for the filing of exceptions by Decision No. C10-0435, mailed on May 5, 2010.

6. No exceptions to the Recommended Decision were filed in this matter.

7. In our review of the rules adopted by the Recommended Decision in this matter in conjunction with the rules adopted by the recommended decisions in Docket Nos. 09R-845T, 09R-846E, and 09R-847G, we are making minor changes to these rules on our own motion to ensure consistency of the fining rules across the telecommunications, electric, gas, and water and combined water and sewer rules.

8. Rule 5009 adds the definitions for civil penalty, civil penalty assessment, civil penalty assessment notice, and intentional violation. We have revised the definitions for civil penalty, civil penalty assessment, and civil penalty assessment notice to match the definitions in the rules adopted by the recommended decision in Docket 09R-847G regarding the fining rules for gas utilities.

9. We have also reformatted the tables of finable offenses to make them consistent with the tables adopted by the recommended decision in Docket No. 09R-846E regarding the fining rules for electric industry.

II. ORDER

A. The Commission Orders That:

1. The stay of Decision No. C10-0435 is hereby vacated.

2. The Commission adopts a modification to the rules attached to Recommended Decision R10-0359 consistent with the above discussion. The Commission adopts the rules attached to this Order as Attachment A.

3. The rules shall be effective 20 days after the publication in the Colorado Register by the Office of the Secretary of State. (The rules shall be effective August 30, 2010 if published in the August 10, 2010 edition of the *Colorado Register* by the Office of the Secretary of State.)

4. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules.

5. A copy of the rules adopted by the Order shall be filed with the Office of the Secretary of State for publication in the Colorado Register. The rules shall be submitted to the appropriate committee of the Colorado General Assembly if the General Assembly is in session at the time this Order becomes effective, or for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.

6. The 20-day time period provided by § 40-6-114(1), C.R.S. to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

7. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING June 23, 2010.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners

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