

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**3-22-17
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March 22, 2017

TO PARTIES OF RECORD IN CASE 16-10-005:

This proceeding was filed on October 6, 2016, and is assigned to Commissioner Clifford Rechtschaffen and Administrative Law Judge (ALJ) Eric Wildgrube. This is the decision of the Presiding Officer, ALJ Wildgrube.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 14.4 of the Commission's Rules of Practice and Procedure at www.cpuc.ca.gov.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ KAREN V. CLOPTONKaren V. Clopton, Chief
Administrative Law Judge

KVC:lil

Attachment

Decision PRESIDING OFFICER'S DECISION (Mailed 3/22/2017)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Charles Paul Varvayanis,

Complainant,

vs.

Odd Fellows Sierra Recreation Association,

Defendant.

Case 16-10-005
(Filed October 6, 2016)

Charles Paul Varvayanis, Complainant.

Timothy T. Trujillo, Attorney at Law, for

Odd Fellows Sierra Recreation Association,
Defendant.

**PRESIDING OFFICER'S DECISION DISMISSING
THE COMPLAINT OF CHARLES PAUL VARVAYANIS**

Summary

This Decision orders reissuance of two refund payments and otherwise denies the relief requested and dismisses the complaint filed by Charles Paul Varvayanis against Odd Fellows Sierra Recreation Association.

This proceeding is closed.

1. Background

On October 6, 2016, Charles Paul Varvayanis, Complainant, filed a Complaint against Odd Fellows Sierra Recreation Association (Odd Fellows), Defendant, concerning a refund ordered by Commission Decision (D.) 16-01-047.

Complainant owns property within the Sierra Park subdivision in Long Barn, California. Odd Fellows provides services to the subdivision including: maintenance and repair of the streets and roads; garbage disposal; use of Park access gate; use of lake and recreation facilities and maintenance and repair of such improvements; pine needle disposal; services of an onsite caretaker; and certain other services. During fiscal year 2012 (beginning July 1, 2012) Odd Fellows also provided water service.

Case (C.) 12-03-017, filed March 2012, alleged Odd Fellows was improperly providing public utility service at unreasonable rates and was operating without Commission authority. Subsequently, Odd Fellows, along with the newly created Sierra Park Water Company, Inc. (Water Company), filed Application (A.) 13-09-023 for a Certificate of Public Convenience and Necessity (CPCN) for the Water Company to offer retail water service in place of Odd Fellows.¹ Odd Fellows and Water Company were each conditionally granted a CPCN by D.16-01-047, subject to the transfer of critical assets and rights from Odd Fellows necessary for Water Company to have a reasonable opportunity to operate successfully and independently.

On June 6, 2012, Complainant was billed by Odd Fellows \$1,024 for services for each of four lots for fiscal year 2012.² The billing was for all services, including water. Following a prehearing conference in C.12-03-017, Odd Fellows determined the expense for water service for fiscal year 2012 would be \$571.60

¹ When it was filed, A.13-09-023 proposed the creation of two new entities: Water Company and another unrelated Service Company.

² Exhibits CV-1, CV-2, CV-3, and CV-4, Odd Fellows Invoices #379, #380, #381, and #382, respectively, dated June 6, 2012.

per lot.³ Therefore, on December 12, 2012, Odd Fellows invoiced Complainant \$571.60 for water service only, for each of his four lots.⁴

Odd Fellows then recognized Complainant's three separate lots that previously had been legally merged (#09.006, #09.007A, #09-014) as one lot for billing purposes (under lot #09.007A) for fiscal year 2012. After crediting claimant's accounts \$1,024 for each of the two subsumed lots, complainant owed, for fiscal year 2012, for each of his remaining two lots (lot #09.007A and lot #24.041), \$571.60 for water service and \$452.40 for other services.

On March 14, 2013, Complainant paid \$571.60 for water for lot #24.041. On March 19, 2013, Complainant paid \$571.60 for water for lot #09.007A.⁵

On April 4, 2013, Complainant paid \$452.40 for the other services provided by Odd Fellows for lot #09.007A. On April 5, 2013, Complainant paid \$452.40 for the other services provided by Odd Fellows for lot #24.041.⁶ On April 9, 2014, Complainant paid \$453.42 for legal fees relating to each of his two lots.⁷

³ ALJ-1, *Report of the Odd Fellows Sierra Recreation Association*, filed on December 7, 2012 in C-12.03.017.

⁴ OF-5, OF-6, OF-7, and OF-8, Odd Fellows Invoices #599, #600, #601, and #602, respectively, dated December 12, 2012.

⁵ CV-5, Front and reverse of Check no. 0000008082, dated March 14, 2013, payable to Odd Fellows, for account: 24982 Jordan Way West-Varvayanis, in the amount of \$571.60; and, CV-6, Front and reverse of Check no. 0000008083, dated March 19, 2013, payable to Odd Fellows, for account: 25431 Wheeler Road-Varvayanis, in the amount of \$571.60; each drawn on the account of Charles P. Varvayanis and Pat Jones.

⁶ CV-7, Front and reverse of Check no. 0000008105, dated April 4, 2013, payable to Odd Fellows, for account: 25431 Wheeler Road-Varvayanis, in the amount of \$452.40; and, CV-8, Front and reverse of Check no. 0000008106, dated April 5, 2013, payable to Odd Fellows, for account: 24982 Jordan Way West-Varvayanis, in the amount of \$452.40; each drawn on the account of Charles P. Varvayanis and Pat Jones.

⁷ CV-9, Odd Fellows receipt dated 4/9/2014.

Among other things, D.16-01-047 ordered Water Company and Odd Fellows to refund amounts received in excess of reasonable rates (Ordering Paragraphs 3.a and 3.b, respectively). The text of D.16-01-047 stated that, if ratepayers did not pay the actual rates charged by Odd Fellows and/or the Water Company, they would not be entitled to a refund. However, the Ordering Paragraphs of D.16-01-047 are ambiguous on this issue. In an attempt to clarify D.16-01-047, Petitions to Modify filed by Water Company and Odd Fellows were granted and D.16-08-006 was issued. Ordering Paragraph 3.b. of D.16-08-006, regarding Odd Fellows, provides:

b. Ordering Paragraph 3.b of Decision 16-01-047 is modified as follows:

Odd Fellows must make a refund to all customers who made payments in excess of reasonable rates only, of up to \$109,432, as its adjusted share prior to spinning-off Water Company. Odd Fellows must make the refund over five years (for a total of twenty payments) by the dates set forth in Ordering Paragraph 3.a above. Odd Fellows may prepay all or any portion of the refund payments then due in full at any time. Additionally, Odd Fellows must refund to the Water Company no later than June 30, 2016, \$1,200 to reflect the \$600 per year it received from the Water Company for the use of easements on six miles of pipe for Fiscal Years 2013 and 2014, and any monies received from Water Company for the six miles of pipe easements for Fiscal Year 2015.

Odd Fellows has calculated refunds for customers, including Complainant, who paid in full for water for fiscal year 2012. As set forth above, on December 12, 2012, Complainant was invoiced \$571.60 for each of his lots for water for fiscal year 2012. The Commission's Water Division then backcasted

rates for 2012 of \$514 per connection and D.16-01-047 determined this to be reasonable. The Complainant has agreed with this determination.⁸

Consistent with D.16-01-047, Odd Fellows determined Complainant “made payments in excess of reasonable rates” and was therefore owed a refund. His refund was calculated to be \$57.60 (the invoiced amount of \$571.60 less the reasonable rate \$514) per lot or \$2.88 per quarter over five years.⁹

Therefore, on or about March 25, 2016, Odd Fellows' agent sent Complainant an initial refund of \$2.88 for each of his two lots. Complainant received these refunds.¹⁰

On or about June 24, 2016, Odd Fellows' agent sent Complainant a second refund of \$2.88 for each of his two lots. Complaint alleges this set of refunds was not received.

On or about July 15, 2016, Complainant informed Mr. Del Wallis, President of Odd Fellows, that he had not received the June 24, 2016 refund checks from Odd Fellows in the amount of \$2.88 each and asked Odd Fellows to reissue these checks to Complainant. Odd Fellows' agent subsequently informed Complainant that the refund checks would be reissued if Complainant paid stop payment fees of \$24 per check. Complainant has refused and continues to report that the two June 24, 2016 checks for \$2.88 each have not been received.

⁸ Prehearing Conference Transcript, December 16, 2016, 5:23-6:7.

⁹ CV-10, Transmittal note to Sierra Park Property Owners for 1st of 20 quarterly refunds in the amount of \$2.88.

¹⁰ CV-14, Odd Fellows Check no. 3122, and CV-15, Odd Fellows Check no. 3123, each payable to Varvayanis, dated March 25, 2016, in the amount of \$2.88.

On or about September 28, 2016, Odd Fellows' agent sent Complainant a third refund of \$2.88 for each of his two lots. Complainant received these refunds.

We note that Complainant states he has “intimate knowledge of the water system, Odd Fellows’ operations and costs having held a seat on the Odd Fellows Board of Directors for six years and having served as Odd Fellows’ President and Director of the Water System.”¹¹

2. The Complaint

The Complainant by his Complaint alleges three causes of action against Odd Fellows: for a refund of \$311 per lot; for two refund checks which were not received of \$2.88 each, totaling \$5.76; and concerning stop payment fees (which have not been paid) of \$24 each which have been demanded by Odd Fellows for reissuance of the two refund checks which were not received.

3. Jurisdiction of the Commission

Odd Fellows in its *Motion to Dismiss* asserts it is not subject to the jurisdiction of the Commission because Odd Fellows is not a public utility under Public Utilities Code Sections (Pub. Util. Code §§) 2704 and 2706(b) and that pursuant to Rule 4.1(a)(1) of the Commission’s Rules of Practice and Procedure (Rules), Varvayanis does not have the right to file this Complaint against Odd Fellows. Odd Fellows’ assertions are not supported by any facts or argument.

The Commission issued D.16-01-047 in consolidated proceedings A.13-09-023 and C.12-03-017 on January 29, 2016. Odd Fellows, as an applicant in A.13-09-023, conceded to the jurisdiction of the Commission. D.16-01-047

¹¹ Complainant’s Opposition to the Motion to Dismiss, 2:23-25.

recognized Odd Fellows is subject to the jurisdiction of the Commission.¹²

D.16-01-047 conditionally granted Odd Fellows a CPCN pending the transfer to Water Company of the assets used to provide water service,¹³ thereby asserting the continuing jurisdiction of the Commission. To date, Odd Fellows has not completed the transfer of assets in compliance with Ordering Paragraph 2 of D.16-01-047. Odd Fellows then, on June 29, 2016, filed a petition to modify D.16-01-047, again recognizing the jurisdiction of the Commission. That petition to modify was granted by D.16-08-006. For each of these reasons, Odd Fellows remains subject to the continuing jurisdiction of this Commission.

4. Standard for Summary Dismissal

Odd Fellows has moved to summarily dismiss the Complaint.

The Commission has employed two standards to evaluate a motion to dismiss a complaint.¹⁴

One is akin to the standard for a motion to dismiss in civil court; the other is akin to the standard for a motion for summary judgment in court. The first asks “whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law.” (*citations*) The second requires “that the moving party must prevail based solely on the undisputed facts and matters of law.”¹⁵

Pub. Util. Code § 1702 requires a complaint set forth an “act or thing done or omitted to be done by any public utility . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.”

¹² D.16-01-047 at 32, Finding of Fact 1.

¹³ *Id.*, at 36, Ordering Paragraph 2.

¹⁴ D.13-01-002 at 3.

¹⁵ D.04-05-006; D.13-01-002 at 3.

With these standards in mind, we examine the parties' assertions and arguments to determine whether the issues raised in the Complaint state a cause of action under any law or order or rule of the Commission. If not, the case may be summarily dismissed.

4.1. First Cause of Action

Varvayanis alleges as a First Cause of Action against Odd Fellows "Fraudulent Representation of CPUC [Commission] Ordered Refund Due Ratepayers." The Cause of Action alleges Odd Fellows notified Complainant he would be refunded \$57.60 per lot based on that being the refund amount ordered by the Commission. Complainant further alleges that \$57.60 is not the correct refund amount. Complainant's allegations however, are contrary to fact: the correct refund amount for individuals who paid \$571.60 to Odd Fellows for water service for fiscal year 2012 is \$57.60.

Complainant's allegations are based on Ordering Paragraph 3.b. of D.16-01-047 and Ordering Paragraph 3.b. of D.16-08-006. Ordering Paragraph 3.b. of D.16-08-006 (modifying Ordering Paragraph 3.b. of D.16-01-047) states, in relevant part, "Odd Fellows must make a refund to all customers who made payments in excess of reasonable rates only, of up to \$109,432...." Based on the stated maximum refund amount of \$109,432, Complainant alleges he is entitled to a refund of \$311.33 (not \$57.60) per lot.

The maximum refund amount of \$109,432 identified by Ordering Paragraph 3.b. is based on an amount identified by the Commission Water Division's report which was attached to D.16-01-047. The Water Division report identifies a total refund amount of \$109,432; however, that amount was based on an assumption, due to Odd Fellows' poor record keeping, that Odd Fellows' customers had been assessed and paid the amount of \$825 per improved lot for

water service for fiscal year 2012. The Commission in its decisions did not make a finding of the actual amount paid by Odd Fellows customers. Indeed D.16-08-006 modified Ordering Paragraph 3.b. to order Odd Fellows “make a refund to all customers who made payments in excess of reasonable rates only...,” intending that Odd Fellows’ customers would receive refunds only up to the amount the customer actually paid in excess of reasonable rates.

D.16-08-006 was issued to avoid the possibility that a customer (such as Varvayanis) would be paid a “refund” of more than the customer had actually paid.

The parties agree, and it is not disputed, the Commission previously determined reasonable rates for fiscal year 2012 are \$514 per connection.¹⁶ Furthermore, it is indisputable that the amount paid for water service for fiscal year 2012 is \$571.60 and that Varvayanis paid that amount.

Any amount paid by Complainant to Odd Fellows for fiscal year 2012 in excess of \$571.60 is for other services provided by Odd Fellows. Consequently, any dispute concerning any amount paid in excess of \$571.60 for fiscal year 2012 is beyond the jurisdiction of this Commission as it concerns activities unrelated to the delivery of water.

A complaint must allege a violation of a law or rule or order of the Commission. (*See* Pub. Util. Code § 1702.) The Complainant has not. Based on the indisputable facts in this case, Odd Fellows’ issuance of refunds to Varvayanis complies with D.16-01-047 and D.16-08-006, and the Complainant has not alleged a violation of the Ordering Paragraphs. Therefore, Odd Fellows

¹⁶ Prehearing Conference Transcript, December 16, 2016, 5:23-6:7.

is entitled to judgment as a matter of law and the first cause of action of the complaint must be dismissed with prejudice for failure to state a claim upon which relief can be granted.

4.2. Second Cause of Action

Complainant alleges as a Second Cause of Action against Odd Fellows “Fraudulent Withholding of CPUC Ordered Refund Payment.” Complainant by this cause of action seeks payment, without stop payment fees, of the two June 2016 refund payments which he did not receive.

Complainant seeks reissuance of two checks for \$2.88 each, totaling \$5.76. There is no dispute: despite issuing the checks in June 2016, now in 2017, over six months later, the Complainant alleges the checks have not been received and the parties agree the checks have not been cashed.

California Commercial Code Section [4404](#) provides,

A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date, but it may charge its customer’s account for a payment made thereafter in good faith.

The Commission’s interest in equity and fairness and the conservation of the Commission’s own resources requires a reasonable end to this dispute and that the two checks, one each in the amount of \$2.88 for lot #09.007A and lot #24.041, for payments issued in June 2016, be reissued to Complainant, without assessment of stop payment or other fees, within fifteen days of the date of this decision. If the checks initially issued to Complainant by Odd Fellows in June 2016, are subsequently paid by Odd Fellows’ bank to Complainant, Complainant shall immediately restore any such funds to Odd Fellows.

4.3. Third Cause of Action

Complainant alleges as a Third Cause of Action against Odd Fellows “Fraudulent Demand for Fees Not Authorized by the Tariff Book.” Complainant by this cause of action complains of Odd Fellows’ demand for stop payment fees for reissuance of the two June 2016 refund payments which he did not receive.

Complainant alleges Odd Fellows’ demand for stop payments fees is “not authorized by tariff.” Odd Fellows however, is not subject to a tariff. Therefore, Odd Fellows is entitled to judgment as a matter of law and the third cause of action must be dismissed with prejudice for failure to state a claim upon which relief can be granted.

5. Categorization

The Commission in the Instruction to Answer, issued on October 12, 2016, determined that the category of the proceeding is adjudicatory and that hearings are necessary.

The categorization of this proceeding remains adjudicatory. There are no disputed issues of material fact and no evidentiary hearings are necessary.

6. Assignment of Proceeding

Clifford Rechtschaffen is the assigned Commissioner. Eric Wildgrube is the assigned ALJ and Presiding Officer.

Findings of Fact

1. Complainant owns property within the Sierra Park subdivision in Long Barn, California.
2. Odd Fellows provides services to the Sierra Park subdivision including the Complainant’s property. The services include: maintenance and repair of the streets and roads; garbage disposal; use of Park access gate; use of lake and recreation facilities and maintenance and repair of such improvements; pine

needle disposal; services of an onsite caretaker; and certain other non-regulated services.

3. During fiscal year 2012 (beginning July 1, 2012) Odd Fellows provided water service to the Sierra Park subdivision including the Complainant's property.

4. Odd Fellows and Water Company were each conditionally granted, by D.16-01-047, a CPCN to provide water services, subject to the transfer of critical assets and rights from Odd Fellows necessary for Water Company to have a reasonable opportunity to operate successfully and independently.

5. The transfer of assets from Odd Fellows to Water Company has not been completed.

6. On June 6, 2012, Complainant was billed by Odd Fellows \$1,024 for services for each of four lots for fiscal year 2012. The billing was for all services, including water.

7. Odd Fellows subsequently determined the expense for water service for fiscal year 2012 would be \$571.60 per lot.

8. On December 12, 2012, Odd Fellows invoiced Complainant \$571.60 for water service only for each of his four lots.

9. Odd Fellows then recognized Complainant's three separate lots that had been previously legally merged (#09.006, #09.007A, #09-014) as one lot for billing purposes (under lot #09.007A) for fiscal year 2012.

10. After crediting complainant's accounts \$1,024 for each of the two subsumed lots, complainant owed, for fiscal year 2012, for each of his remaining two lots (lot #09.007A and lot #24.041), \$571.60 for water service and \$452.40 for other services.

11. On March 14, 2013, Complainant paid \$571.60 for water services provided to lot #24.041. On March 19, 2013, Complainant paid \$571.60 for water services provided to lot #09.007A.

12. On April 4, 2013, Complainant paid \$452.40 for the other non-regulated services provided by Odd Fellows for lot #09.007A.

13. On April 5, 2013, Complainant paid \$452.40 for the other non-regulated services provided by Odd Fellows for lot #24.041.

14. On April 9, 2014, Complainant paid \$453.42 for legal fees relating to lot #09.007A and lot #24.041.

15. The Commission's Water Division backcast rates for fiscal year 2012 and a rate of \$514 per connection, which D.16-01-047 determined to be reasonable.

16. Odd Fellows determined that Complainant "made payments in excess of reasonable rates" and was therefore owed a refund.

17. Complainant's refund was determined to be \$57.60 (the invoiced amount of \$571.60 less the reasonable rate \$514) per lot or \$2.88 per quarter over five years.

18. On or about March 25, 2016, Odd Fellows' agent sent Complainant an initial refund of \$2.88 each for lot #09.007A and lot #24.041. Complainant received these refunds.

19. On or about June 24, 2016, Odd Fellows' agent sent Complainant a second refund of \$2.88 each for lot #09.007A and lot #24.041. Complainant did not receive this set of refunds.

20. On or about September 28, 2016, Odd Fellows' agent sent Complainant a third refund of \$2.88 each for lot #09.007A and lot #24.041. Complainant received these refunds.

21. Odd Fellows' agent subsequently informed Complainant that refund checks for the June 24, 2016 refunds would be reissued if Complainant paid stop payment fees of \$24 per check.

22. Complainant has refused to pay stop payment fees and continues to report that the two June 24, 2016 checks for \$2.88 each have not been received.

Conclusions of Law

1. Odd Fellows remains subject to the jurisdiction of this Commission.
2. Odd Fellows is a public utility under Pub. Util. Code §§ 2704 and 2706(b).
3. Pub. Util. Code §§ 1702 requires Complainant allege a violation of a specific standard contained in a statute, rule, or order of the Commission.
4. Complainant has not and cannot allege facts establishing a violation by Odd Fellows of a Commission Ordering Paragraph 3.b. of D.16-01-047 and Ordering Paragraph 3.b. of D.16-08-006.
5. Odd Fellows is entitled to judgment as a matter of law and the first cause of action of the complaint should be dismissed.
6. The Commission's interest in equity and fairness and the conservation of the Commission's own resources requires a reasonable end to this dispute and that the two checks, one each in the amount of \$2.88 for lot #09.007A and lot #24.041, for payments issued in June 2016, be reissued to Complainant, without assessment of stop payment or other fees, within fifteen days of the date of this decision.
7. Odd Fellows is not subject to a tariff.
8. Complainant has not and cannot allege facts supporting the third cause of action for violation of a tariff. Odd Fellows is entitled to judgment as a matter of law and the third cause of action of the complaint should be dismissed.
9. All rulings of the assigned Commissioner and ALJ should be affirmed.

10. C.16-10-005 should be closed.

O R D E R

IT IS ORDERED that:

1. Odd Fellows Sierra Recreation Association shall issue Complainant Charles Paul Varvayanis a second refund of \$2.88 for each of his two lots as payment for and replacement of checks previously issued in June 2016.
2. If the checks initially issued by Odd Fellows Sierra Recreation Association in June 2016 to Complainant Charles Paul Varvayanis are subsequently paid by Odd Fellows Sierra Recreation Association's bank to Complainant Charles Paul Varvayanis, Complainant Charles Paul Varvayanis shall immediately restore any such funds to Odd Fellows Sierra Recreation Association.
3. Complainant Charles Paul Varvayanis complaint against Odd Fellows Sierra Recreation Association is dismissed with prejudice for failure to state a claim for which relief may be granted.
4. Case 16-10-005 is closed.

This order is effective today.

Dated _____, at San Francisco, California.