

Decision No. 84639

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ARLAND B. JONES,

Complainant,

vs.

SHASTA RETREAT WATER SYSTEM,
HARRY H. GESTER, Owner
P. O. Box 697
Lafayette, California,

Defendant.

Case No. 8936
(Order to Show Cause
filed July 17, 1973)

RAYMOND LINCOLN EBBE,

Complainant,

vs.

SHASTA RETREAT WATER SYSTEM,
HENRY H. GESTER, Owner
P. O. Box 183
Alamo, California 94507,

Defendant.

Case No. 9487
(Filed December 15, 1972)

Investigation on the Commission's
own motion into the practices,
equipment, facilities, plant,
storage, supply, and operations
of Harry H. Gester, an individual,
doing business as Shasta Retreat
Water System.

Case No. 9666
(Filed February 20, 1974)

Chris Stromsness, Attorney at Law, for Raymond Lincoln Ebbe, complainant.
Harry H. Gester, for himself, defendant.
Peter Arth, Jr., and Ira R. Alderson, Jr.,
Attorneys at Law, and Francis S. Ferraro
for the Commission staff.

INTERIM OPINION

Case No. 8936 is a complaint by Arland B. Jones (Jones) against Harry H. Gester (Gester), doing business as Shasta Retreat Water System. The Commission entered Decision No. 77017 in that proceeding on March 31, 1970. Case No. 9487 is a complaint by Raymond Lincoln Ebbe (Ebbe) against Gester. It was filed on December 15, 1972. Gester did not file an answer to the complaint. On February 6, 1973, the Commission entered Decision No. 81032, an interim order in Case No. 9487, which directed Gester to make certain immediate repairs to his water system. On July 17, 1973, the Commission issued an Order to Show Cause to Gester in Case No. 8936 to determine whether he should be held in contempt for failure to comply with the provisions of Decision No. 77017. Cases Nos. 8936 and 9487 were consolidated for hearing because of interrelated subject matter. A duly noticed public hearing was held in the two cases before Examiner Donald B. Jarvis in Dunsmuir on July 26, 1973. The matters were submitted on August 7, 1973.

While Cases Nos. 8936 and 9487 were under submission, extensive floods occurred in northern California. The Commission received information that floods destroyed the intake structure and diverted the source of water supply of Gester's system. On February 20, 1974, the Commission entered Decisions Nos. 82515 and 82516, which vacated the submissions in Cases Nos. 8936 and 9487. The Commission also filed Case No. 9666, an Order Instituting an Investigation on the Commission's Own Motion into Gester's practices, equipment, facilities, plant, storage, supply, and operations. Case No. 9666 was consolidated for hearing with Cases Nos. 8936 and 9487. A further hearing was held in the consolidated matters before Examiner Donald B. Jarvis in Dunsmuir on June 26, 1974 and the matters were submitted on August 5, 1974.

The Contempt Matter

The order in Decision No. 77017 provided in part as follows:

"1. Harry H. Gester, doing business as Shasta Retreat Water System (defendant), on or before August 1, 1970, shall place rock and gravel over the screens on the intake structure of such size and to such depth that the entry of debris into the water system will be prevented and the rock and gravel will not be removed by stream flow action.

"2. On or before June 1, 1970, defendant shall:

"a. Make arrangements for a local maintenance man to (1) inspect the intake facilities not less than once each week and more often during stormy weather, (2) when appropriate, clean debris from the intake facilities and rearrange the rock and gravel to keep the intake screens at maximum efficiency and (3) flush the mains at least once each month and more often during stormy weather.

- "b. Furnish the maintenance man with written instructions covering his job.
- "c. Arrange for telephone messages to be received in the Dunsmuir area to enable customers to notify the maintenance man of service complaints and arrange for a copy of the filed tariffs to be available for public inspection in Dunsmuir or vicinity.
- "d. Inform all customers, in writing, of the name, address, and telephone number of the maintenance man or service representative selected to receive customer service complaints in the Dunsmuir area.
- "e. Defendant shall discontinue his practice of requiring his customers in Dunsmuir to make their service complaints directly to him in Contra Costa County.
- "f. Report to the Commission, in writing, the name, address, and telephone number of the individual selected to place rock and gravel required in ordering paragraphs Nos. 1 and 2a above; furnish a copy of the written instruction required by ordering paragraph No. 2b above; state the date said individual commenced his responsibility; and state the terms of said individual's employment, the name of the party, the local telephone number arranged to receive the messages and the arrangements for the local availability of the filed tariffs as required by ordering paragraph No. 2 above."

The Commission staff (staff) contends that Gester failed to comply with these provisions and is in contempt of the Commission.

Gester is not an attorney and chose not to be represented by counsel during these proceedings. At the commencement of the hearing on July 26, 1973, the examiner explained the hearing procedure to Gester. The examiner also advised Gester of his constitutional rights against self-incrimination, that Gester need not take the witness stand in his own behalf, and that he could assert the privilege if called as a witness by another party. (RT 2-4.) The examiner indicated that if Gester did not testify he could call other witnesses and present evidence in his own behalf and cross-examine witnesses called by other parties. At the time for presentation of the defendant's case, the examiner again explained to Gester the hearing procedure and his constitutional rights. (RT 116-120.) The examiner delineated the difference between facts in evidence and argument:

Examiner Jarvis:

"The question of whether to testify or not is your decision and you are not being compelled to testify by the Commission. You can choose not to testify. You can choose to call witnesses and whether or not you testify, I will hear argument from you.

"But to establish facts, as distinguished from argument, I have to have something in the record of a testimonial or evidentiary or documentary qualification to base the facts upon which the case will be decided.

"In other words, if you argue to me that a fact exists and no witness has testified to it, I can't, from that argument alone, make a finding that the fact exists. I must have some evidence that has come in under oath or supported under oath or through a document that we can receive in evidence, on which to base a finding of fact." (RT 117.)

Gester did not testify at the hearing on July 26, 1973. At the hearing on June 26, 1974, the staff presented some additional evidence on the contempt issue. In addition, evidence was adduced about the present status of the water system. Gester indicated that he would testify about that issue. The examiner again reminded Gester of his constitutional rights. (RT 190-192.) Gester did not testify on direct or cross-examination about any matter relating to the contempt issue and none of his testimony has been considered herein with respect to that issue.

The Commission makes the following findings:

1. Gester's water system serves approximately 75 customers in the Shasta Retreat subdivisions in Siskiyou County. The Commission takes official notice that at all times herein mentioned Gester had authority to charge for water service rates authorized by the Commission.

2. Gester has been the sole owner of the water system since 1967, and from 1964 to 1967 owned the system in partnership with Gael C. Himmah.

3. On March 31, 1970, the Commission entered Decision No. 77017 in Case No. 8936. Ordering Paragraphs 1 and 2 of Decision No. 77017 provide as follows:

"1. Harry H. Gester, doing business as Shasta Retreat Water System (defendant), on or before August 1, 1970, shall place rock and gravel over the screens on the intake structure of such size and to such depth that the entry of debris into the water system will be prevented and the rock and gravel will not be removed by stream flow action.

"2. On or before June 1, 1970, defendant shall;

- "a. Make arrangements for a local maintenance man to (1) inspect the intake facilities not less than once each week and more often during stormy weather, (2) when appropriate, clean debris from the intake facilities and rearrange the rock and gravel to keep the intake screens at maximum efficiency and (3) flush the mains at least once each month and more often during stormy weather.
- "b. Furnish the maintenance man with written instructions covering his job.
- "c. Arrange for telephone messages to be received in the Dunsmuir area to enable customers to notify the maintenance man of service complaints and arrange for a copy of the filed tariffs to be available for public inspection in Dunsmuir or vicinity.
- "d. Inform all customers, in writing, of the name, address, and telephone number of the maintenance man or service representative selected to receive customer service complaints in the Dunsmuir area.
- "e. Defendant shall discontinue his practice of requiring his customers in Dunsmuir to make their service complaints directly to him in Contra Costa County.
- "f. Report to the Commission, in writing, the name, address, and telephone number of the individual selected to place rock and gravel required in ordering paragraphs Nos. 1 and 2a above; furnish a copy of the written instruction required by ordering paragraph No. 2b above; state the date said individual commenced his responsibility; and state the terms of said individual's employment, the name of the party, the local telephone number arranged to receive the messages and the arrangements for the local availability of the filed tariffs as required by ordering paragraph No. 2 above."

4. Gester was served with a copy of Decision No. 77017, and at all times herein mentioned had knowledge of the contents thereof.

5. At some time after the entry of Decision No. 77017, Gester engaged the services of a maintenance man named Mr. Stoffel for a period of time. Stoffel left Gester's employment some time prior to January of 1972.

6. In approximately January of 1972, Mr. Mintner Rudy, in consideration for free water service, agreed to clean the leaves and debris from the intake structure of Gester's system. Rudy did not agree to perform any other duties for Gester. Rudy received no written instructions.

7. Except for the period during which Mr. Stoffel was employed, Gester has not had a local maintenance man carrying out the provisions of Ordering Paragraph 2a of Decision No. 77017.

8. During the period subsequent to the entry of Decision No. 77017 in which there has been no local maintenance man, Gester has failed to comply with Ordering Paragraphs 2b, c, d, e, and f of that decision.

9. At all times since the entry of Decision No. 77017, Gester had the ability to comply with all of the provisions of Ordering Paragraph 2 of that decision.

10. If the screens were not in place over the intake structure of Gester's water system, compliance with Ordering Paragraph 1 of Decision No. 77017 could not be accomplished. On numerous occasions since the entry of Decision No. 77017 one or both of the screens were not in place over the intake structure and no rock or gravel was placed thereon in accordance with Ordering Paragraph 1 to prevent debris from entering the system.

11. In January 1974, floods destroyed Gester's water system diversion dam and intake structure. Gester had the ability to comply with Ordering Paragraph 1 of Decision No. 77017 at all times from the date of entry thereof until January of 1974.

12. Gester is in contempt of the Commission for failing to comply with Ordering Paragraphs 1 and 2 of Decision No. 77017.

In assessing the penalties to be adjudged for the acts of contempt we have looked to the following considerations. Each day Gester failed to comply with the provisions of Decision No. 77017 constituted a separate contempt. (H. J. Heinz Co. v Superior Court (1954) 42 C 2d 164, 175; In re Stafford (1958) 160 CA 2d 110, 113-14; In re Joor (1955) 131 CA 2d 75, 76; Southern Pacific Co. (1968) 68 CPUC 245.) However, the Commission is of the opinion that punishment for two contempts (violations of Ordering Paragraphs 1 and 2) will be sufficient. We have given little credence to alleged facts in statements made by Gester by way of argument, where no evidentiary corroboration of these alleged facts appears in the record. The Commission is also mindful of floods destroying the intake structure which precludes current compliance with Ordering Paragraph 1. The Commission believes that fines, with portions thereof suspended, will be in the interests of justice and promote compliance with its orders. The Commission makes the following additional findings and conclusions.

Additional Findings of Fact

13. Gester should be fined \$200 for his willful contempt of Ordering Paragraph 1 of Decision No. 77017; provided, however, that the payment of \$150 of said fine should be suspended.

14. Gester should be fined \$400 for his willful contempt of Ordering Paragraph 2 of Decision No. 77017; provided, however, that the payment of \$300 of said fine should be suspended.

Conclusions of Law

1. Gester should be punished for contempt for willfully disobeying the terms of Ordering Paragraph 1 of Decision No. 77017 by the payment of a fine of \$200; provided, however, that the payment of \$150 of said fine should be suspended.

2. Gester should be punished for contempt for willfully disobeying the terms of Ordering Paragraph 2 of Decision No. 77017 by the payment of a fine of \$400; provided, however, that the payment of \$300 of said fine should be suspended.

The Ebbe Complaint

The complaint filed by Ebbe on December 15, 1972 alleged that Ebbe owns the property located at 4650 Cave Avenue, Dunsmuir, California; that the property is served by Gester's water system; that since September 19, 1972, there was a break in Gester's water line in front of the property at 4648 Cave Avenue; that the water from the break runs onto Ebbe's property and into his garage; that, because of the low temperatures in the area during wintertime, the water from the break freezes and creates dangerous ice conditions on and adjacent to Ebbe's property; that Gester has not had a resident manager in Dunsmuir since September 19, 1972 and Ebbe was unable to contact any local representative about his complaint; that Ebbe sent a registered letter about his complaint to Gester at Alamo, California; and that nothing was done about the break in the water line and resulting dangerous ice conditions. Ebbe's complaint sought an order (1) requiring Gester to fix the water line break and (2) requiring Gester to retain a resident manager in Dunsmuir at all times.

Gester did not file an answer to the Ebbe complaint. On February 6, 1973, the Commission entered Decision No. 81032, an interim order, which ordered Gester to repair the broken water main within 20 days after service of the order.

The evidence indicates that the water main was timely repaired. The other issue raised by Ebbe's complaint is the request that Gester be required to have a resident manager in Dunsmuir at all times. As indicated in the consideration of the contempt matter, there presently exists a requirement for a resident manager. However, because of the destruction of the system, we will modify those provisions of Decision No. 77017 in the consideration of Case No. 9666. The Commission makes the following additional findings and conclusions.

Additional Findings of Fact

15. Personal service of Decision No. 81032 was made on Gester on February 6, 1973.

16. Gester timely complied with the provisions of Decision No. 81032.

Additional Conclusions of Law

3. The complaint in Case No. 9487 has been satisfied with respect to the repair of the broken water main in front of 4648 Cave Avenue, Dunsmuir, California.

4. The other matters raised by the complaint have been adjudicated in previous decisions of the Commission.

The Commission Investigation

Case No. 9666 is an investigation on the Commission's own motion into the practices, equipment, facilities, plant, storage, supply, and operations of Gester's water system.

The Commission notes that at the hearing on July 26, 1973, extensive evidence was received which indicated that the bacteriological history of the system was poor and that it was subject to potentially dangerous contamination from watershed surface runoff. However, in view of the destruction of the water intake system, it is unnecessary to presently dwell on this point because the question of future water quality will be considered in connection with our orders relating to the system and reestablishing an appropriate source of water supply.

At the hearing on June 26, 1974, evidence was adduced on various alternatives for the system. Appropriate findings relating thereto are hereinafter set forth. At the present state of the record, the Commission cannot enter a final order in these matters. It is necessary to require Gester to pursue various options and report to the Commission the results thereof. Gester is admonished that failure to comply with the provisions of the ensuing order will result in the imposition of sanctions, which may include vacating the suspended portions of the contempt fines. The Commission makes the following additional findings and conclusions.

Additional Findings of Fact

17. Subsequent to the destruction of the diversion dam and intake structure, the system has been receiving water on a temporary basis from Southern Pacific Transportation Company (Southern Pacific).

18. The only other public utility water company in the area, Dunsmuir Water System, has indicated it is not willing to acquire or take over Gester's system. It also indicated that the only basis it would supply water to Gester regularly was on the basis of a domestic user on master meter. This is not a feasible solution to Gester's permanent water supply problems.

19. Southern Pacific has indicated that it is prepared to enter into an agreement with Gester to permit him to take untreated water, on a surplus basis for a nominal amount of money, from Southern Pacific's Black Bear Creek intake; provided Gester cleans the intake and maintains the pipeline from the intake to his water system.

20. Gester has had conferences with representatives of the Small Business Administration concerning the obtaining of a loan to finance the reconstruction and improvement of the water system.

21. In order for Gester to obtain a loan from the Small Business Administration it is necessary for him to furnish preliminary engineering studies and estimates.

22. Gester has never acquired a water supply permit from the Siskiyou County Health Department. General Order No. 103 requires all water utilities to obtain water supply permits as required by the Health and Safety Code. Gester must obtain a water supply permit in connection with any reconstruction of the water system.

23. In order to obtain a water supply permit for the system, using untreated water from the Southern Pacific source on Black Bear Creek, it will be necessary for Gester to install a chlorinator. In order to install a chlorinator it will be necessary for Gester to purchase or lease land upon which to install it.

Additional Conclusions of Law

5. Decision No. 77017 should be modified to reflect the changed conditions of the system as a result of the 1974 floods.

6. Gester should be ordered to employ one or more persons in the Dunsmuir area, at all times, to maintain the water system.

7. Gester should be ordered to arrange for telephone messages to be received in the Dunsmuir area so that customer inquiries and complaints may be made locally. Gester should be ordered to arrange for a copy of his filed tariffs to be available for public inspection in the Dunsmuir area.

8. Gester should be ordered to employ one or more persons in the Dunsmuir area, at all times, to act as a resident manager or managers to handle customer inquiries or service complaints. The person or persons may be the same individual or individuals employed to maintain the system.

9. Gester should be ordered to furnish the Commission with a copy of the agreement between him and Southern Pacific for the use of Southern Pacific's Black Bear Creek water supply intake. If no such agreement has been executed, Gester should be ordered to explain in writing the reasons therefor and the current status of negotiations with Southern Pacific.

10. Gester should be ordered to furnish the Commission copies of documents from the Small Business Administration, and any financial institutions involved, indicating the receipt of a Small Business Administration loan. If no such loan has been granted, Gester should be ordered to explain to the Commission in writing the reasons therefor and the current status of the loan application.

11. Gester should be ordered to furnish the Commission copies of all engineering studies, plans, and estimates in connection with the reconstruction of the water system. If no such plans, studies, or estimates have been made, Gester should be ordered to explain to the Commission in writing the reasons therefor and the current status of any engineering studies, plans, or surveys.

12. Gester should be ordered to furnish the Commission with a copy of a water supply permit for the water system or application therefor. If no permit has been issued and no application therefor has been made, Gester should be ordered to explain to the Commission in writing why he has not applied for a water supply permit.

13. Gester should be ordered to furnish the Commission copies of all documents indicating he has purchased or leased land upon which a chlorinator can be located to be used in connection with the water system. If Gester has not leased or purchased such land, he should be ordered to explain to the Commission in writing the reasons therefor.

INTERIM ORDER

IT IS ORDERED that:

1. Harry H. Gester is in contempt of the Commission for violating Ordering Paragraph 1 of Decision No. 77017, and for his contempt he shall be punished by the payment of a fine in the sum of \$200, payable to the Secretary of the Commission on or before July 31, 1975; provided, however, that the payment of \$150 of said fine is suspended until July 31, 1976, at which time, unless the suspension is sooner vacated, the suspended portion of the fine will be remitted without further action by the Commission.

2. Harry H. Gester is in contempt of the Commission for violating Ordering Paragraph 2 of Decision No. 77017, and for his contempt he shall be punished by the payment of a fine in the sum of \$400, payable to the Secretary of the Commission on or before July 31, 1975; provided, however, that the payment of \$300 of said fine is suspended until July 31, 1976, at which time, unless the suspension is sooner vacated, the suspended portion of the fine will be remitted without further action by the Commission.

3. Ordering Paragraphs 1 and 2 of Decision No. 77017 are hereby deleted.

4. Within thirty days after the effective date of this order, Harry H. Gester shall employ one or more persons in the Dunsmuir area, at all times, to maintain his water system.

5. Within thirty days after the effective date of this order, Harry H. Gester shall employ one or more persons in the Dunsmuir area, at all times, to act as a resident manager or managers to handle customer inquiries or service complaints. The person or persons may be the same individual or individuals employed to maintain the system as provided for in Ordering Paragraph 4 hereof.

6. Within thirty days after the effective date of this order, Harry H. Gester shall arrange for telephone messages to be received in the Dunsmuir area so that customer inquiries and complaints in connection with his water system may be made locally. Gester shall notify all customers of the water system of the name of the individual or individuals to whom inquiries or complaints may be directed and the telephone number at which such person or persons may be reached. If, from time to time, such person or persons change their employment, or the telephone number is changed, Gester shall promptly notify all of his customers of the name or names of the replacement or replacements and any new telephone number or numbers at which they may be contacted.

7. Within thirty days after the effective date of this order, Harry H. Gester shall arrange for a copy of his filed tariffs to be available for inspection in the Dunsmuir area.

8. Within forty-five days after the effective date of this order, Harry H. Gester shall notify the Commission in writing of the following:

- a. The name or names of the person or persons employed in the Dunsmuir area to maintain his water system.
- b. The name or names of the person or persons employed in the Dunsmuir area to act as resident manager or managers.
- c. The telephone number or numbers in the Dunsmuir area at which customer inquiries or complaints in connection with the water system may be made.
- d. Copies of the notice or notices to the customers of the water system informing them of the name or names of the resident manager or managers and the telephone number or numbers at which the manager or managers may be contacted.

9. Within sixty days after the effective date of this order, Harry H. Gester shall file with the Commission a copy of any agreement entered into between him and Southern Pacific Transportation Company providing for Gester's use of Southern Pacific's water supply intake on Black Bear Creek. If no such agreement has been executed, Gester shall, within sixty days of the effective date of this order, file with the Commission in writing an explanation of why no agreement has been executed and the current status of any negotiations with Southern Pacific.

10. Within sixty days after the effective date of this order, Harry H. Gester shall file with the Commission copies of all documents from the Small Business Administration, and any financial institutions involved, indicating that he has been granted a Small Business Administration loan to reconstruct his water system. If required by law, Gester shall file with the Commission an appropriate application for authority to enter into the loan agreement. If no such loan has been granted, Gester shall, within sixty days after the effective date of this order, file with the Commission in writing an explanation of why no such loan has been granted and the current status of the loan application.

11. Within sixty days after the effective date of this order, Harry H. Gester shall file with the Commission a copy of the water supply permit issued by the Siskiyou County Health Department for his water system or a copy of an application which he has filed seeking such a permit. If no water supply permit has been issued and no application seeking such a permit has been filed, Gester shall, within sixty days after the effective date of this order, file with the Commission in writing an explanation of why no such application has been filed.

12. Within sixty days after the effective date of this order, Harry H. Gester shall file with the Commission copies of all documents indicating that he has purchased or leased land upon which a chlorinator can be located to be used in connection with the water system. If no such land has been purchased or leased, Gester shall, within sixty days after the effective date of this order, file with the Commission in writing an explanation of why no purchase or lease has been executed and the status of any negotiations in connection therewith.

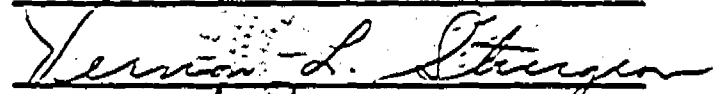

13. The Commission retains jurisdiction to alter, amend, or modify the provisions of this order and to issue such further orders as may be necessary to the disposition of Cases Nos. 8936, 9487, and 9666.

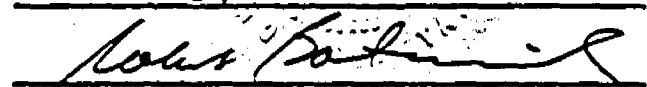
The Secretary is directed to cause a certified copy of this Interim Decision and Order to be served on Harry H. Gester, doing business as Shasta Retreat Water System. Service may be made on the other parties herein by mail.

The effective date of this order shall be the date upon which personal service thereof is made on Harry H. Gester.

Dated at San Francisco, California, this 8th day of JULY, 1975.


President


Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.