

Decision 82 06 015 JUN 2 - 1982

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Bryan G. Smillie and Viola E. Smillie,)
)
 Complainants,)
)
 vs.)
)
 Apple Valley Water Resources,)
)
 Defendant.)

Case 10864
 (Filed May 13, 1980;
 Petition for Modification
 filed September 28, 1981)

ORDER ON PETITION FOR
 MODIFICATION OF DECISION 93480

Background

Keefner Enterprises, Inc. (defendant), doing business as Apple Valley Water Resources West, is a public utility water company. In Decision (D.) 93480 dated September 1, 1981 we ordered:

- *1. Within 60 days after the effective date of this order Keefner Enterprises, Inc., doing business as Apple Valley Water Resources West (defendant), shall prepare and file a 30-month improvement plan designed to bring its water system up to GO 103 standards.
- *2. Defendant shall include the following requirements in its improvement plan:

- "a. Defendant shall secure a water supply meeting the quality and quantity requirements of the County Department of Environmental Health Services (HD) by contracting with another utility, by purchasing a well, or by commencing construction of a new well within 60 days after the effective date of this order.
 - "b. Defendant shall complete additions to water supply, booster capacity, and storage within 180 days after the effective date of this order.
 - "c. Defendant shall complete any other improvements within 30 months after the effective date of this order.
- "3. Within 70 days after the effective date of this order defendant shall file a copy of its improvement plan with HD, reapply for a water supply permit, and request that the County lift the building moratorium in its service area.
- "4. Within 10 days after the building moratorium is lifted, defendant shall mail notice of the fact to complainants and to any other person who had asked for water service to a lot within defendant's service area. The notice shall state that those persons may contact defendant to arrange for a meter and service connection. Defendant shall concurrently mail a copy of the notice and a list of the persons served to the Commission's Hydraulic Branch.
- "5. Defendant shall file completed annual reports from the time it commenced operations to date within 90 days after the effective date of this order.

"6. Defendant shall acquire title to San Bernardino County Assessor Parcel 030-054-05, water rights, by bidding for those rights at the next tax delinquency sale and/or through a quiet title action.

"7. Defendant shall not impose a connection charge upon its customers."

A petition filed by Apple Valley Water Resources Co., Inc. (petitioner), a California corporation, requests modifications of D.93480. Both petitioner and defendant are entirely owned by Eugene F. Keefner. Petitioner, which is not a party to this proceeding, requests the Commission to substitute it for defendant to carry out the Commission's orders. The petition also requests (1) deletion of the specific system improvement scheduling in Ordering Subparagraphs 2(b) and 2(c) of D.93480, and (2) an extension of time to comply with Ordering Paragraphs 1 and 2(a) of D.93480.

Petitioner claims that defendant had to be reorganized "before any serious indebtedness (sic) is incurred." The petition provides no details on the need for a utility reorganization. No application seeking authorization for a reorganization and/or transfer of control of defendant has been filed with or approved by this Commission.^{1/} Under Public Utilities (PU) Code Section 851 et seq., any transfer of control of defendant or transfer of used and useful utility properties would be void. Furthermore, any new issuance of securities or long-term debt by defendant or by a successor corporation without Commission approval would be void under PU Code Section 818.

^{1/} A staff letter dated October 5, 1981 was sent to Keefner, president of petitioner, advising him to file an application requesting Commission authorization for the title change.

Keefner created petitioner and carried out the unlawful transfer of control and/or reorganization of defendant. These acts occurred after D.93480 put Keefner on notice that he personally could be subject to sanctions under PU Code §§ 2100 et seq. if defendant failed to comply with the Commission's orders on a timely basis (see page 12 of D.93480). The petition appears to be a device to eliminate Keefner's personal liability for failing to comply with D.93480. Keefner has employed a variety of dilatory acts and/or illegal acts to avoid complying with Commission orders.

Instead of complying with the order requiring defendant to acquire title to the water rights parcel, Keefner used Apple Valley Water Resources Co., Inc. (West) (petitioner-West) to purchase the water rights and land parcels formerly owned by Aztec Water Company, Inc. (Aztec).

Due to Keefner's failure to prepare, file, and implement the required improvement plan, additional time is needed to bring the system up to General Order (GO) 103 standards. His compliance would have resulted in the lifting of the building moratorium in defendant's service area.

Instead of filing defendant's required 1981 annual report, based on the operations of the former Aztec system, Keefner filed a complete annual report for petitioner-West.^{2/} That report shows that Keefner owns 100% of petitioner's common stock and that 10% long-term debt was issued to defendant. The annual report also summarizes utility plant by accounts. The annual report does not contain a utility plant acquisition adjustment to reflect the purchase of the system at less than net book values. Keefner has apparently reconstructed the system's plant records.

^{2/} Keefner also filed an unauthorized 1981 annual report for Apple Valley Water Resources Co., Inc. (East) which should have been filed by defendant doing business as Apple Valley Water Resources (East).

So that we may address the merits of the petition, we will treat it as a petition of Eugene F. Keefner, defendant's system operator and owner, on behalf of defendant. Otherwise, we would dismiss the petition because petitioner has no standing in this case.

Summary

This decision extends the time for compliance with Ordering Paragraphs 1, 2, and 3 of D.93480 by substituting today's date for the effective date of D.93480. However, this order does not delete the specific system improvement scheduling or modify the requirements of the improvement plan contained in Ordering Paragraph 2 of D.93480.

Defendant and/or Keefner are ordered to promptly resolve the issues involving the unauthorized transfer of control of the water utility and/or title to property which is used and useful in the utility's operations.

Defendant will be ordered to file completed 1977 through 1980 annual reports within 30 days after the effective date of this order. In addition, defendant should refile its 1981 annual reports in its own name.

Ordering Paragraph 4 of D.93480 will be modified to require defendant to provide additional public notice after the building moratorium is lifted.

Keefner's Argument on Additional
Supply and System Improvements

In the petition Keefner contends that (1) his utility has an adequate supply and adequate storage for the 49 existing customers it serves; (2) he could not obtain an emergency, standby, or alternate source of supply from Apple Valley Ranchos Water Company (Ranchos);^{3/} (3) there is no evidence of any restriction of water use by his customers; (4) water mains front all properties in the service area; and (5) there is no evidence of requests from any property owners for water service. He states that the Commission has not specified what other improvements are needed on the system. He argues against the requirement for obtaining a new well because the order in D.87811 (which authorized defendant's acquisition of the system) did not require a new well or an additional water supply. He reiterates his contention that no utility investment could be expected until the utility acquires the system's land and water rights parcels.

^{3/} The petition contains a copy of an April 23, 1981 letter from Ranchos to Keefner. Ranchos states that it does not wish to install a metered tie between the two systems for emergency purposes. However, it would work with the Apple Valley Fire Protection District to transport water to relieve an emergency in case of a severe outage on defendant's system.

Keefner's Testimony on Water Supply
and System Improvements

The following excerpts from Keefner's testimony provide a differing perspective on water supply and system improvements from that contained in the petition:

"EXAMINATION

"BY ALJ LEVANDER:

"Q Have you contacted the Environmental Improvement Agency as to whether or not the connection you have with the Apple Valley Ranchos Water Company would meet their secondary source of supply requirements?

"A Every application that I have made when I had duress of service has been met with a negative interest by the Apple Valley Ranchos Water Company. They don't want to talk to me about tying into such a bad system.

"Q Do you have a connection to their system?

"A No, not knowingly.

"Q What is their objection to tying into your system?

"A Well, the Aztec Water Company is a bad name out there, they are worried about maybe getting problems from me as quality, quantity, disruption of service that could result of tying into me.

"I am sure that's what their justification is. . . ." (RT 65.)

* * *

"DIRECT EXAMINATION

"BY MR. BRICCA:

"Q Do you think the record indicates clearly what the objections of the county are to giving you a permit?

"A Yes.

"Q On the record we indicated that -- you indicated that objection was on the basis of -- I forget what the basis was now.

"A Lack of secondary --

"ALJ LEVANDER: Lack of secondary supply?

"THE WITNESS: Well, that is not the only one. The county -- the Environmental Health Agency indicates that the system is leaky, it is without quality and quantity substance, and it has no secondary supply; it needs additional boost capacity and other causes that wouldn't be material, I guess.

"MR. BRICCA: Q And did they specifically restrict you from hooking up additional customers?

"A What the Environmental Protection Agency is looking for is Eugene Keefner's plan to upgrade the system. That's what they really want to see. They want to see a tank upon the hill, and they want to see a booster pump, and secondary supply, and they want to see a nonleaking water pipe system, and we are talking about real investment of money. . . ."
(RT 67.)

Keefner testified that HD is aware that two wells located on the same lot supply the system. He claims that he does not know why HD will not treat the wells as the two needed sources of supply.^{4/}

Discussion

Water Supply and System
Improvements

We conclude that it would be necessary to adequately test the two wells separately and in combination to determine the extent of interference between the two wells, to determine whether defendant's wells should be treated as one or two sources of supply, and to determine the adequacy of its water supply.

Potential customers are unable to obtain service from defendant because Keefner, operating through a succession of entities controlled by him, has failed to act since he acquired control of the system in 1977.

The extent of system improvements needed has not been established because defendant has yet to produce or implement the engineering plan it was initially ordered to file over four years ago. ✓

Defendant and/or Keefner has not met the burden of proving the adequacy of water supplies, storage, booster capacity, and other facilities. After the engineering study containing the 30-month improvement plan and scheduling for implementation has been filed, the Commission staff and HD will review it for adequacy. The Commission will not entertain requests to modify a plan or defer its implementation until it receives the plan and the rationale for the proposed changes. We will also require evidence of efforts made in good faith to implement the plan.

^{4/} Section VIII, Fire Protection Standards, was added to GO 103 by D.84334 dated April 15, 1975 in C.9263. Paragraph 5 of that section states:

- "5. Source of Supply. Each separately operated water system shall have not less than two independent sources of supply."

Title Issues

The petition alleges that (1) the County Treasurer-Tax Collector requested the utility to surrender a parcel of utility property it had acquired in 1981; and (2) the County Treasurer-Tax Collector planned to offer the utility land and water rights parcels^{5/} at a public sale in 1982. Defendant reconveyed utility land Parcel 440-022-10 to the County without the necessary Commission approval.

We take official notice that the County Treasurer-Tax Collector sold the utility land and water rights parcels to "Apple Valley Water Resources Co., Inc. (West)" on February 4, 1982.

Within the next 45 days, defendant will be required to file either an application, as described below, or certified copies of documents from the County Recorder showing that title to Parcels 040-005-22 (utility plant), 440-022-10 (land), and 030-054-05 (water rights) is vested with defendant.

Requirements of Application

Applications to transfer or encumber utility property must comply with Article 9 of the Commission's Rules of Practice and Procedure (Rules). Applications by a utility to issue stock or evidences of indebtedness, or to assume liabilities must comply with Article 8 of the Rules. The parties are placed on notice that in any such application the buyer or transferee must agree to assume the obligations placed on defendant by D.93480 and must be capitalized adequately to carry out those duties. In addition, the parties must demonstrate that the transaction would not be adverse to the public interest.

^{5/} Parcels 440-022-10 and 030-054-05.

Alter Ego Relationships

Keefner owns and fully controls both defendant and petitioner. His actions in acquiring utility property and in filing annual reports demonstrate that he is the alter ego of defendant and of petitioner. Due to the alter ego relationships, a lawful transfer of control over defendant's utility operations and/or utility plant to petitioner should not be the vehicle to relieve Keefner of his personal responsibility for timely compliance with the Commission's orders. Therefore, we place Keefner and petitioner on notice that even if an application is filed and the Commission authorizes the sale and/or transfer of the utility to petitioner, we would look to petitioner and to Keefner to meet the requirements of this order. If those requirements are not met on a timely basis, we may seek sanctions against Keefner and petitioner.

Notice Requirements

Ordering Paragraph 4 of D.93480 requires defendant to mail notices of the lifting of the building moratorium to persons who had asked for water service within its service area.

At the hearing, Keefner's reply to the question of whether other people would want to get hooked up to defendant's system was:

"I have a ton of applications in my file saying that when we can build, what's happening to the water company? What is the latest status, real estate men representing multiple pieces of property that they want to develop the use of. So, yeah, you are going to open the floodgates."
(RT 80.)

Despite that testimony, in the petition Keefner contends that there is no evidence of requests for service from property owners within defendant's service area.

Keefner's argument indicates his unwillingness to advise potential customers of the lifting of the building moratorium. Therefore, Ordering Paragraph 4 of D.93480 will be modified to expand the notice requirement. Defendant will also be ordered to publish notice of the lifting of the building moratorium in a local newspaper of general circulation and to send similar notices to its customers.

Findings of Fact

1. Defendant is a public utility water corporation.
2. Defendant has failed to comply with Ordering Paragraphs 1, 2, 3, 5, and 6 of D.93480, including the requirement that it prepare and file a 30-month improvement plan designed to bring its water system up to GO 103 standards.
3. Petitioner, a California corporation which is not a party to this proceeding, seeks to have the Commission substitute it for defendant to carry out the Commission's orders.
4. Both defendant and petitioner are wholly owned by and controlled by Keefner.
5. Petitioner filed 1981 annual reports which should have been filed by defendant.
6. Defendant filed no application for a utility reorganization and/or transfer of control to petitioner. Keefner, petitioner's president, did not respond to a letter from the Commission staff advising him to file such an application.

7. The petition seeks to delete the specific system improvement scheduling contained in Ordering Subparagraphs 2(b) and 2(c) of D.93480 and to further delay compliance with Ordering Paragraphs 1 and 2(a) of that decision.

8. Defendant reconveyed Parcel 440-022-10 which is used and useful in its operations to County without Commission approval.

9. Keefner used petitioner to acquire Parcels 440-022-10 and 040-005-22 which are used and useful in defendant's operations. Defendant was ordered to acquire title to Parcel 040-005-22.

10. County issued a building moratorium preventing new construction in defendant's service area.

11. County will not lift the building moratorium until defendant has submitted a satisfactory water system improvement plan prepared by an engineer, including scheduling for completion of the improvements.

12. The purported reorganization of defendant occurred after issuance of D.93480. That decision placed defendant and Keefner on notice that failure to comply with the Commission's orders on a timely basis may result in the imposition of sanctions against defendant and Keefner under PU Code §§ 2100 et seq.

Conclusions of Law

1. Keefner is the alter ego of both defendant and petitioner.

2. Keefner has employed a variety of dilatory acts and/or illegal acts to avoid complying with Commission orders.

3. Additional time is required to comply with Ordering Paragraphs 1, 2, and 3 of D.93480. Today's date should be substituted for the effective date of D.93480 to provide that additional time. Defendant should be ordered to prepare, file, and implement an improvement plan to bring the system up to GO 103 standards and to cause the removal of the building moratorium within its service area through compliance with Ordering Paragraphs 1, 2, and 3 of D.93480.

4. Keefner permitted petitioner to acquire title to defendant's used and useful utility property in violation of Ordering Paragraph 6 of D.93480 and of the PU Code.

5. Defendant and petitioner should either file an application meeting the requirements described on page 10 of this decision or file certified copies of documents from the County Recorder of San Bernardino County showing that title to Assessor's Parcels 040-005-22, 440-022-10, and 030-054-05 is now vested with defendant. If the Commission authorizes defendant to transfer control of its operations and/or its assets to petitioner, then petitioner will be required to comply with the provisions of D.93480 as modified in this decision.

6. A transfer of control of defendant or of its assets to a company controlled by Keefner will not relieve Keefner from his personal responsibility for compliance with this decision.

7. When the building moratorium is lifted, defendant should comply with Ordering Paragraph 4 of D.93480 as modified by the following order.

8. Defendant should file completed annual reports from the time it commenced operations through 1980 and should refile its 1981 annual reports in its own name within 30 days from today.

O R D E R

IT IS ORDERED that:

1. Keefner Enterprises, Inc. (defendant), doing business as Apple Valley Water Resources West, shall comply with Ordering Paragraphs 1, 2, and 3 of Decision (D.) 93480 with the following modification: Today's date is substituted for the effective date of D.93480 for compliance with those ordering paragraphs.

2. Ordering Paragraph 4 of D.93480 is revised as follows:

Within 10 days after the building moratorium is lifted, defendant shall mail notice of the fact to its customers, complainants, and to any other person who had asked for water service to a lot within defendant's service area. The notice shall state that those persons may contact defendant to arrange for a meter and service connection. Defendant shall concurrently mail a copy of the notice and a list of the persons served to the Commission's Hydraulic Branch. Defendant shall publish notice of the lifting of the building moratorium in a local newspaper of general circulation and shall mail a certified copy of the published notice to the Commission within 25 days after the lifting of the building moratorium.

3. Ordering Paragraph 5 of D.93480 is revised as follows:

Defendant shall file completed annual reports for 1977 to 1980, inclusive, and shall refile its 1981 annual reports in its own name within 30 days after the effective date of this order.

4. Ordering Paragraph 6 of D.93480 is revised as follows:

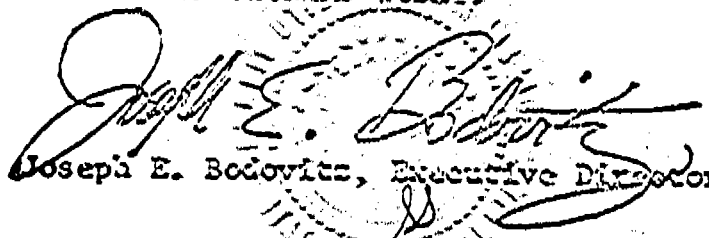
Within 45 days after the effective date of this order, defendant and Apple Valley Water Resources Co., Inc. shall either file an application, as described on page 10 of this decision, or file a certified copy of documentation from the County Recorder of San Bernardino County showing that title to Assessor's Parcels 040-005-22, 440-022-10, and 030-054-05 is now vested with defendant.

This order is effective today.

Dated JUN 2 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bodovitz, Executive Director

Keefner testified that HD is aware that two wells located on the same lot supply the system. He claims that he does not know why HD will not treat the wells as the two needed sources of supply.^{4/}

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Defendant and/or Keefner has not met the burden of proving the adequacy of water supplies, storage, booster capacity, and other facilities. After the engineering study containing the 30-month improvement plan and scheduling for implementation has been filed, the Commission staff and HD will review it for adequacy. The Commission will not entertain requests to modify a plan or defer its implementation until it receives the plan and the rationale for the proposed changes. We will also require evidence of efforts made in good faith to implement the plan.

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- "5. Source of Supply. Each separately operated water system shall have not less than two independent sources of supply."