

ORIGINAL

Decision 93498 SEP 1 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Robert F. Popp for an exemption to the building moratorium, Tulare County.

Application 59158
(Filed September 24, 1979)

John T. Begley, Audley R. Campbell,
J. C. Evans, Carlos B. Morrison,
and Bertha Hutchins,

Complainants,

vs.

Case 10763
(Filed July 26, 1979)

Gerald Wedel, doing business as
Pine Mountain Water Company,

Defendant.

Pine Mountain Ranch Property
Owners Association,

Complainant,

vs.

Case 10775
(Filed August 24, 1979)

Gerald Wedel, doing business as
Pine Mountain Water Company,

Defendant.

John P. Moran, Attorney at Law, for Gerald Wedel,
defendant and respondent.
Alvin S. Pak, Attorney at Law, for the Commission
staff.

O P I N I O N

Procedure

In Decision (D.) 92643, dated January 21, 1981, we issued an order to show cause (OSC) and notice of hearing to Gerald Wedel.

(Wedel), doing business at Pine Mountain Water Company, that he appear and show cause why he should not be found in contempt of Ordering Paragraph 6 of D.91806, dated May 20, 1980, which provides that:

"6. PM (Pine Mountain) shall install an additional storage tank with a capacity of at least 64,000 gallons as expeditiously as possible, but not later than ninety days after the effective date of this order."

The order was effective on May 20, 1980.

D.92643 was issued in conjunction with the affidavit of Senior Utilities Engineer Robert M. Mann that no 64,000-gallon storage tank was in evidence upon his personal inspection of the Pine Mountain (PM) service area on November 10, 1980. D.92643 and the supporting affidavit were served upon Wedel and the matter was heard before Administrative Law Judge (ALJ) Orville I. Wright in Bakersfield, California, on March 25, 1981.

At the hearing, staff counsel moved to amend the OSC (D.92643) and its supporting affidavit to add a second count of contempt, namely, Wedel's alleged failure to comply with Ordering Paragraph 7 of D.91806, dated May 20, 1980, which provides that:

"7. PM (Pine Mountain) shall file an as-built system map prepared in compliance with Section I.10.a of General Order No. 103 within one hundred eighty days after the effective date of this order."

In moving to amend, staff relies upon Section 1211.5 (b), Code of Civil Procedure, which provides that:

"§ 1211.5. Rules to Construe, Amend, and Review Affidavit or Statement of Facts.

"At all stages of all proceedings, the affidavit or statement of facts, as the case may be, required by Section 1211 shall be construed, amended, and reviewed according to the following rules."

* * *

"(b) The court may order or permit amendment of such affidavit or statement for any defect or insufficiency at any stage of the proceedings, and the trial of the person accused of contempt shall continue as if the affidavit or statement had been originally filed as amended, unless substantial rights of such person accused would be prejudiced thereby, in which event a reasonable postponement not longer than the ends of justice require, may be granted."

Staff's motion was tentatively granted by the ALJ, and the record was developed accordingly. At the end of Wedel's evidentiary presentation with respect to the first count, staff counsel reminded counsel for Wedel that a defense to the second count should also be presented. Wedel therefore presented his defense to the second count in full. No request for a continuance was made nor did Wedel argue that he was prejudiced by having to present his defense at that time. Our review of that record persuades us that no substantial rights of Wedel were or will be prejudiced if we grant the motion as Wedel made his defense of the additional count at the hearing. The ALJ's ruling on the motion is affirmed.

Issues

The only issue to be determined with respect to each of the contempts charged is whether the evidence convinces us beyond any reasonable doubt that Wedel had the ability to comply with D.91806 in the following particulars:

- a. Install an additional 64,000-gallon storage tank, and
- b. File an as-built system map prepared in compliance with General Order 103.

All other issues in the proceeding have been resolved by stipulation of counsel.

Storage Tank

Wedel's testimony on the storage tank issue is that he sought estimates of the cost of purchasing and installing an additional 64,000-gallon tank on or about May 20, 1980, the date of D.91806. Those estimates indicated an installed cost of from \$20,000 to \$30,000. Wedel testified he did not have \$20,000 between the date of the order and the day of the hearing, nor could he borrow that amount. Only in December 1980 did Wedel have cash in excess of \$20,000. He received \$72,000 by reason of the sale of certain real property and promptly applied it to current and delinquent obligations.

The ALJ took notice that Wedel was found to have the financial ability to operate the water system in D.89266, dated August 22, 1978, in A.57439, and that Exhibit E in that proceeding showed sufficient financial strength to install the storage tank at issue here. However, that finding and financial statement are insufficient to prove the alleged contempt as the requirement to build was there predicated on the number of customers being 50 or more, a figure not then reached.

It was not until May 20, 1980 that D.91806 unqualifiedly ordered construction of the additional 64,000-gallon storage tank (with no condition about the number of customers). Thus, there must be evidence on or beyond that date to show that the order and the ability to comply with the order coexisted if contempt is to be proven. (See Mossman v Superior Court, (1972) 22 CA 3d 706; Sorell v Superior Court (1967) 248 CA 2d 157.)

It is clear beyond any reasonable doubt that the order to construct the tank and the financial ability to do so came together in December 1980 when Wedel held some \$72,000 in cash. His election to satisfy other obligations with those funds rather than to apply them in part to his utility obligations does not detract from his proven ability to perform.

We find Wedel to be in contempt of Ordering Paragraph 6 of D.91806.

As-built Map

Staff testified and Wedel admits that the as-built map required by D.91806 had not been filed as of the date of hearing.

Wedel asserts that he does not have the ability to comply because the only complete map is in the possession of a third person whose whereabouts is unknown. Wedel has prepared a partial map, lacking the location of three valves or more, which he seeks out from time to time when he is on the property. In response to the question when a complete map could be prepared and filed, Wedel testified it would be "hard" to "right now to come out and say I can do it in a week or 10 days or what." (Tr. 168.)

In our view of the record, the evidence falls far short of establishing that Wedel could not prepare and file the requested map. At most, the defense shows only some degree of inconvenience to Wedel in complying with the order.

We find Wedel to be in contempt of Ordering Paragraph 7 of D.91806.

Sanctions

At the hearing, Wedel produced Duane T. Call, a civil engineer, who had made an evaluation of the water requirements of Pine Mountain Water Company and recommended a plan of improvements (Exhibit 11) to meet those requirements. In brief, the proposal calls for placement of a 33,000-gallon storage tank in lieu of the 64,000-gallon unit required by D.91806, plus development of an additional source of water supply equaling 35 gallons per minute.

This plan was sponsored by Wedel, and concurred in by staff as appropriate improvements to the water system. Wedel testified that he owned a 33,000-gallon tank and could finance the installation of it together with the recommended additional water source.

In final summation, staff suggested the civil engineer's plan as an alternative to the continuation of the existing order and as a partial purging of the fines it recommended being imposed. We find merit in the staff position and will offer it to Wedel, in harmony with Section 1708 of the Public Utilities Code, as a method of purging the two contempts of which we find him guilty.

We impose a fine of \$500 for each contempt - \$1,000 together.

Findings of Fact

1. D.91806, dated May 20, 1980, required Wedel to install an additional 64,000-gallon storage tank and to prepare and file an as-built map with the Commission (Ordering Paragraphs 6 and 7).
2. Wedel had knowledge of the decision.
3. Wedel did not comply with Ordering Paragraphs 6 and 7 of D.91806.
4. The cost of complying with Ordering Paragraph 6 of D.91806 is from \$20,000 to \$30,000.
5. Wedel received funds in excess of \$30,000 in December 1980.
6. Wedel's defense of inability to comply with the order to prepare and file an as-built map is that his efforts to date have been unsuccessful.
7. Wedel, having knowledge of the order and the ability to comply, did not obey it as to Ordering Paragraphs 6 and 7.

Conclusion of Law

Wedel is in contempt of the Commission for failing to obey Ordering Paragraphs 6 and 7 of D.91806, dated May 20, 1980, and each of them.

O R D E R

IT IS ORDERED that:

1. Gerald Wedel (Wedel) shall pay a \$500 fine for each of the two contempt within 30 days after the effective date of this order.

2. Wedel may purge himself of these contempt^{and related fines by complying with subparagraphs (a) and (b).} by filing within 30 days after the effective date of this order^{file} a formal application, in proper form with our Docket Office, seeking Commission approval to implement system improvements to Pine Mountain Water Company as set forth in Exhibit 11 of this proceeding (which would modify D. 91086). Such application shall clearly set forth Wedel's financial ability to perform and shall comply with Section 1708 of the Public Utilities Code.

(b) This order becomes effective 30 days from today.

Dated SEP 1 1981, at San Francisco, California.

[Signature]
President
[Signature]
[Signature]
[Signature]
Commissioners

Complete the designated improvements within 180 days after a decision is issued in the application referred to in subparagraph (a).