

Decision 15-01-053

January 29, 2015

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the Town of Apple Valley
for Rehearing of Resolution W-4998.

Application 14-09-007
(Filed September 10, 2014)

**ORDER VACATING DECISION (D.) 14-11-022, MODIFYING
RESOLUTION W-4998 AND DENYING REHEARING
OF RESOLUTION W-4998, AS MODIFIED**

I. INTRODUCTION

In this Order, we dispose of the Applications for Rehearing of Decision (D.) 14-11-022 (or “Decision”) and Resolution W-4998, filed by the Town of Apple Valley (“Town”).

In D.14-11-022, we dismissed the Application for Rehearing of Resolution W-4998, filed by Town as untimely. We took that step because Town’s Application was date stamped September 10, 2014, two days after the statutory deadline for filing.

(D.14-11-022, at p. 2)¹

Town filed a timely Application for Rehearing of D.14-11-022. Town contends that it did timely file its Application for Rehearing of Resolution W-4998, but

¹ Resolution W-4998 involved a transfer of ownership under Public Utility Code sections 851-854 and 2718-2720, thus it was subject to a 10 day deadline for filing applications for rehearing pursuant to section 1731. In pertinent part, section 1731 states:

- (b) After any order or decision has been made by the commission, any party to the action or proceeding...may apply for a rehearing...within 30 days after the date of issuance or *within 10 days after the date of the issuance* in the case of an order issued pursuant to either Article 5 (commencing with Section 816) or Article 6 (commencing with Section 851) of Chapter 4 relating to security transactions and the transfer or encumbrance of utility property.

(Pub. Util., Code, § 1731, subd. (b) (emphasis added).)

an inadvertent processing error caused it to be date stamped incorrectly. Thus, Town argues the Commission should have considered the merits of its challenge. A Response was filed by Apple Valley Rancheros Water Company (“AVR”).

We have carefully considered the arguments raised in the Application for Rehearing, and agree that under our Rules of Practice and Procedure, Town’s Application for Rehearing of Resolution W-4998 should have been date stamped as timely filed. Therefore, we will vacate D.14-11-022 and now consider the merits of the Application for Rehearing of Resolution W-4998. We are of the opinion that while Resolution W-4998 should be modified to supplement our basis for finding the transfer of ownership to be exempt from CEQA, good cause has not been established to grant rehearing. Accordingly, we deny the Application for Rehearing of Resolution W-4998, as modified, because no legal error has been shown.

II. DISCUSSION

A. Application for Rehearing of D.14-11-022

There is no dispute that the September 10th date stamp on Town’s Application for Rehearing of Resolution W-4998 rendered it untimely. However, Town contends that it did timely submit the Application by the September 8th deadline, and the Commission’s own rules indicate it should have been considered filed as of that date. (D.14-11-022 Rhg. App., at pp. 1-3, citing Commission Rule of Practice and Procedure 1.14.)²

To support its claim, Town submits various electronic communications it received from the Commission’s Docket Office. (D.14-11-022 Rhg. App., Attachments A-C.) Those communications show: (1) on September 8th Town first submitted its Application for Rehearing of Resolution W-4998; (2) on September 10th the Docket Office notified Town of a caption error, and directed Town to resubmit the pleading

² All subsequent rule references are to the Commission’s Rules of Practice and Procedure, unless otherwise noted.

pursuant to Rule 1.14; and (3) on September 10th Town resubmitted the corrected pleading.

Rule 1.14 governs the Review and Filing of Tendered Documents generally. Rule 1.14(c) allows the Commission to reject documents not complying with applicable filing requirements.³

Rule 1.14(d) goes on to provide that if defects are cured within seven days of the date for filing, the resubmission will be considered filed as of the date first tendered. Accordingly, we agree that the resubmission appears to have been inadvertently treated as a new filing. It should have been date stamped as of September 8th (not September 10th) and treated as timely filed.

To remedy this inadvertent processing error, we vacate D.14-11-022 and now consider the merits of the Application for Rehearing of Resolution W-4998 as discussed below.

B. Application for Rehearing of Resolution W-4998

In Resolution W-4998, we granted conditional authority to the Court-appointed receiver of Yermo to sell, and AVR to buy, the public utility assets of Yermo.⁴ In doing so, we determined that the transfer of ownership was exempt from CEQA review. We also approved an interim rate plan for water service in the Yermo service area for 2014-2017.

³ Commission Rule of Practice and Procedure 1.14.(c); Cal. Code of Regs., tit. 20, § 1.14, subd. (c).

⁴ Resolution W-4998 set two conditions for approval: (1) AVR must obtain a permit to operate the Yermo water system from the State Water Resources Control Board as required by California Health and Safety Code section 11652(a); and (2) AVR must obtain an order approving the transfer from the San Bernardino Superior Court because that Court had appointed the receiver. (Resolution W-4998, at pp. 1, 12-13.)

Yermo serves approximately 250 metered customers near or within the township of Yermo in San Bernadino County.⁵ AVR is a Class A Commission-jurisdictional water utility providing service to approximately 22,000 connections in and near the town of Apple Valley in San Bernadino County.

Town's Application for Rehearing of W-4998 alleges that we erred in not requiring CEQA of the proposed transaction. In Town's view, CEQA review was warranted because the transfer involves: (1) improper piecemealing; (2) an expansion of AVR's service area; (3) significant infrastructure and capital improvements; and (4) a change in operations. AVR filed a Response.

C. Alleged Piecemealing

To contend that the transfer involves improper piecemealing, Town relies on *Bozung v. Local Agency Formation Commission of Ventura County (Bozung v. LAFCO)* (1975) 13 Cal.3d 263, 277-278, 283-284. (Resolution W-4998 Rhg. App., at p. 3.)

We are aware that *Bozung v. LAFCO* requires agencies to consider the whole of any proposed action. (*Id.* at pp. 277-278.) Here, Town argues the whole of the action will include an expansion of AVR's service territory, the completion of capital infrastructure projects that will have a significant physical effect on the environment, and a change in Yermo operations. Thus, in Town's view we were required to subject those activities to CEQA review.

⁵ Town attempts to create ambiguity by suggesting it is unclear how many customers Yermo actually serves. (Resolution W-4998 Rhg. App., at p. 3, fn. 2.) It bases this allegation on a 2009 Commission decision which stated Yermo served approximately 350 metered customers. (*Investigation on the Commission's Own Motion into the Operations and Practices of the Yermo Water Co., and its Owner/Operator, Donald Walker; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Petition the San Bernadino County Superior Court for a Receiver to Assume Possession and Operation of the Yermo Water Co. Pursuant to the California Public Utilities Code Section 855* [D.09-05-022] (2009) __ Cal.P.U.C.3d __, at p. 3 (slip op.)). In D.09-05-022, the Commission based its statement on the information it had available at that time. Resolution W-4998 was based on current information, and Town offers no facts or evidence to show the current estimate was wrong. (See AL 189-W, at p. 2.)

For the reasons discussed below, we reject Town's allegations. We find no factual basis to conclude improper piecemealing will occur.

D. Alleged Expansion of AVR's Service Territory

Town contends that AVR's service territory will be expanded, resulting in direct impacts to the environment such as: (a) impacts to wells "should pumping increase;" (b) increased population and growth; and (c) increased energy demands impacting greenhouse gas ("GHG") emissions.⁶ (Resolution W-4998 Rhg. App., at pp. 3-4.)

Town offers no facts to support a conclusion that the transfer will result in an expansion of service territory subject to CEQA review. It is true that AVR's individual service area will be greater to the extent it absorbs the Yermo system. However, there will be no expansion of the *total* service territory as it currently exists on a combined basis (Yermo and AVR together).⁷

Further CEQA requires that parties demonstrate an action will have a significant effect on the environment based upon substantial evidence.⁸ Public controversy, argument, speculation, unsubstantiated opinion or narrative is not considered substantial evidence triggering CEQA.⁹ Town does not offer any substantial evidence

⁶ Town references the San Bernadino Climate Action Plan stating that GHG emissions must be considered in light of that Plan. There appear to be three different San Bernadino climate-related documents: Green County San Bernadino [located at: <http://www.greencountysb.com/default.htm>]; 2010 Sustainability Action Plan [located at: <http://longrandesbplanning.org/programs/climateactionstrategy/docs/sustainable%20Action%20Plan-small.pdf>]; and San Bernadino County Regional GHG Reduction Plan [located at: http://www.sanbag.ca.gov/plamming2/greenhousegas/Final_SBCReduction.pdf]. Town does not specify which Plan it believes is relevant, or how the approved transaction will conflict with any provision of any Plan.

⁷ See Resolution W-4998, at p. 4; AL 189-W, at pp. 5, 15.

⁸ See e.g., *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1019-1020; *Citizens' Committee to Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, 1171-1172.

⁹ *Friends of Davis v. City of Davis*, *supra*, 83 Cal.App.4th at pp. 1019-1020. Further, economic or social changes are not, in themselves, regarded as a significant change in the environment unless they are associated with a physical change. (*Id.*) Town does not show how any physical change will occur. Thus, even if there will be population growth, it would not, in itself, trigger CEQA.

there will be population growth or any other general growth. Thus, we reject its argument as speculation and opinion.

We also reject Town's claim that there will be impacts to wells, since Town concedes that would occur only "should pumping increase." AVR did not propose, nor did Resolution W-4998 approve, any change in operations.¹⁰ Thus, Town fails to establish any grounds which would have triggered CEQA review.

E. Infrastructure and Capital Improvements

Resolution W-4998 found that the proposed transfer would not involve new construction, a change in the source of water supply, or any change in Yermo's operation. Accordingly, the Resolution found the transaction was exempt from environmental review under CEQA Guidelines Section 15061(b)(3) because it could be seen with certainty that transaction will not have a significant effect on the environment.¹¹

Town argues AVR will undertake infrastructure and capital improvements that will have dire effects on the physical environment. Town lists impacts to: air quality; traffic; noise; water quality; agricultural use; and desert habitat. (Resolution W-4998 Rhg. App., at pp. 4-5.)

In Resolution W-4998, we approved \$732,000 in rate recovery for AVR to undertake emergency short-term repairs and system upgrades to address service quality deficiencies.¹² AVR's proposed Initial Capital Improvement Plan showed that the approved rate recovery will allow it to:

¹⁰ Resolution W-4998, at p. 11; AL 189-W, at p. 15.

¹¹ Resolution W-4998, at pp. 11-2, citing also Cal. Code of Regs., tit. 14, § 15061(b)(3). The Resolution's conclusion was consistent with CEQA exemptions granted in other change in ownership approvals. (See e.g., Resolution W-4864, issued January 14, 2011, at p. 5 (slip op.) [Involving an approved transfer of ownership of Yermo that did not come to fruition]; Resolution W-4923 (2012) 2012 Cal. PUC LEXIS 670, *7-*8; and *Joint Application of Central Water System, a Sole Proprietorship, for Authority to Sell and Plainview Mutual Water Company, A Nonprofit Mutual Benefit Corporation, for Authority to Buy the Central Water System in Tulare County* [D.12-04-020] (2012) __ Cal. P.U.C.3d __, 2012 Cal. PUC LEXIS 160, *8-*9.

¹² Resolution W-4998, at p. 19 [Findings and Conclusions Number 20]; AL 189-W, at pp. 6-7, 10.

- Abandon inactive wells;
- Install generator transfer switches and quick connects at two existing well sites;
- Install improved controls and compressors at three existing wells;
- Replace three existing chlorination systems;
- Replace pressure tanks at two existing well sites;
- Install remote monitoring and alarm systems at three existing sites;
- Purchase a spare submersible pump;
- Replace a 4-inch pipeline with 8 inch pipe;
- Create a system map;
- Re-fence two well sites; and
- Install 4,600 feet of pipeline to interconnect two of the three water companies that comprise the Yermo water system.¹³

While we were correct in finding there was no possibility the transfer will have a significant effect on the environment, we point out that other CEQA exemptions also applied to support our finding that this matter was exempt from review. Applicable CEQA Guidelines include: Sections 15301, 15302, and 15373.¹⁴

Specifically, Section 15301 provides an exemption for existing facilities. It applies to exempt the operation, repair, maintenance, permitting, leasing, licensing or minor alteration of such facilities, including:

- (b) Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewage, or other public utility services;
- (d) Restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety....

¹³ AL 189-W, Exhibit E. The Yermo is a consolidation of three Commission-certificated water utilities: Yermo; Marine Water Company (“Marine”); and Hel-Bro Water Company (“Hel-Bro”). (See AL 189-W, at pp. 2-3; Resolution W-4998, at p. 2.) Marine and Hel-Bro are interconnected with each other, but Yermo is not interconnected with the other two systems. (AL 189-W, at pp. 2-3, Exhibit E, subpart a.) The interconnecting pipeline is necessary to bring Yermo in compliance with Department of Public Health regulations which require water systems to have two sources of water supply. (*Id.*)

¹⁴ AL 189-W did discuss longer-term capital projects that may total as much as \$7,000,000 and implicate the need for CEQA. However, Resolution W-4998 did not approve any such projects, or rate recovery for such projects. Further, whether projects come to fruition will depend on AVR’s ability to obtain grant funding. (AL-189-W, at pp. 7-8.) Thus, currently such projects are too speculative and uncertain to trigger CEQA review.

(Cal Code of Regs., tit. 14, § 15301, subs. (b) & (d).)

Section 15302 provides an exemption for the replacement and reconstruction of existing facilities if the activity is located on the same site and will have substantially the same purpose and capacity. It includes:

- (c) Replacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity.

(Cal. Code of Regs., tit. 14, § 15302, subd. (c).)

Section 15273 provides an exemption for rates, tools, fares, and charges. In pertinent part Section 15237 states:

- (a) CEQA does not apply to the...approval of rates, tolls, fares, or other charges by public agencies which the public agency finds are for the purpose of:
 - (4) Obtaining funds for capital projects, necessary to maintain service within existing service areas, or...

(Cal. Code of Regs., tit. 14, § 15273, subd. (a)(4).)

Because Resolution W-4998 would benefit from mentioning the above CEQA Guidelines, we will modify Resolution W-4998 as set forth in the below Ordering Paragraphs.

F. Alleged Change in Operations

Resolution W-4998 found that it was reasonable to approve the transfer of ownership because AVR will be able to provide the Yermo system with needed operational and maintenance services. It will also be able to collect water samples as required by the State Water Resources Control Board, respond to emergencies, and prepare reports to governmental agencies regarding the operation of the [Yermo] water system.¹⁵

¹⁵ Resolution W-4998, at p. 7.

Based on that statement, Town argues “it can be assumed” there will be changes in Yermo’s operations that will impact: water resources; water supply; desert habitat; air quality; and water quality. (Resolution W-4998 Rhg. App., at pp. 5-6.)

As noted above, assumptions, opinion or speculation do not trigger CEQA review.¹⁶ More importantly, Town allegations ignore the facts presented in this case. AVR did not propose any change in the way the Yermo assets will be utilized. Nor did it propose a change in Yermo operations, or a change in the water supply.¹⁷ The approved transaction merely allows AVR to undertake the obligations already required under Yermo’s Certificate of Public Convenience and Necessity (“CPCN”) to comply with existing rules, regulations, and requirements.¹⁸

It is true that Yermo’s owner failed to comply with existing requirements for adequate operation and maintenance of the water system,¹⁹ and AVR is expected to now provide the operational and maintenance support to already required and expected of the Yermo system. However, Town presents no legal authority that shows bringing a system into compliance automatically triggers CEQA review. Nor does it present facts or evidence to show that any of the contemplated activities will have a significant effect on the environment. Thus, we reject Town’s argument.

III. CONCLUSION

For the reasons stated above, we vacate D.14-11-022; modify Resolution W-4998 to clarify the grounds for finding the transfer of ownership to be exempt from CEQA; and deny the Application for Rehearing of Resolution W-4998, as modified, because no legal error was shown.

¹⁶ See *ante*, fn. 11.

¹⁷ See e.g., Resolution W-4998, at pp. 4, 11; AL 189-W, at pp. 2, 4-5, 15.

¹⁸ See e.g., AL 189-W, at pp. 14-15.

¹⁹ Resolution W-4998, at p. 2. Those failures led the Commission to seek appointment of a receiver to oversee the system. (See Resolution W-4998, at p. 2. See also D.09-05-022, *supra*.)

THEREFORE, IT IS ORDERED that:

1. D.14-11-022 is vacated.
2. Resolution W-4998 is modified as follows:
 - a. The third paragraph on page 11 of Resolution W-4998, is modified to state:

This application involves a proposed change in control in operation of existing water facilities. The proposed transfer does not involve new construction, a change in the source of water supply, or any other changes in the operation of the Yermo water system. In addition, AVR's proposed short-term emergency facilities replacements and upgrades are all exempt from CEQA review under CEQA Guidelines Sections 15301(b) & (d), 15302(c), and/or 15273(a)(4). Accordingly, there is no possibility that the transaction may have any significant effect on the environment.
 - b. Resolution W-4998, at page 18, Findings and Conclusions Number 12 is modified to state:

The transfer of control and operation of Yermo is exempt from CEQA under CEQA Guidelines Sections 15301(b) & (d), 15302(c), 15273(a)(4), and 15601(b)(3).
3. Rehearing of Resolution W-4998, as modified, is denied.
4. This proceeding, A.14-09-007, is closed.

This order is effective today.

Dated January 29, 2015, at San Francisco, California.

MICHAEL PICKER
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
LIANE RANDOLPH
Commissioners