

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



July 13, 2010

Draft Resolution No.W-4835
Agenda ID #9614

TO: All Interested Parties

Enclosed is draft Resolution No. W-4835 of the Division of Water and Audits. It will be on the Commission's August 12, 2010 agenda. The Commission may act on this resolution or it may postpone action until later.

When the Commission acts on a draft resolution, it may adopt all or part of it as written, amend, modify or set it aside and prepare a different resolution. Only when the Commission acts does the resolution become binding on the parties.

Parties to this matter may submit comments on this draft resolution. An original and two copies of the comments, with a certificate of service, should be submitted to:

Division of Water and Audits, Third Floor
Attention: James Boothe
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Parties may submit comments on or before August 2, 2010. The date of submission is the date the comments are received by the Division of Water and Audits. Parties must serve a copy of their comments on the service list on the same date that the comments are submitted to the Division of Water and Audits.

Comments shall be limited to five pages in length plus a subject index listing the recommended changes to the draft resolution, a table of authorities and appendix setting forth the proposed findings and ordering paragraphs.

Comments shall focus on the factual, legal, or technical errors in the draft resolution, and shall make specific reference to the record or applicable law. Comments which fail to do so will be accorded no weight and are not to be submitted.

Persons interested in comments of parties may write to James Boothe or telephone him at (415) 703-1748.

/s/ RAMI S. KAHLON

Rami S. Kahlon, Director
Division of Water and Audits

Enclosures: Draft Resolution No. W-4835
Certificate of Service
Service List

WATER/RSK/JB5/jrb

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

DIVISION OF WATER AND AUDITS

RESOLUTION NO. W-4835

Water and Sewer Advisory Branch

August 12, 2010

R E S O L U T I O N

(RES. W-4835), CALIFORNIA WATER SERVICE COMPANY (CAL WATER) ORDER DENYING AUTHORITY TO ESTABLISH A TORT LITIGATION MEMORANDUM ACCOUNT IN THE WRONGFUL DEATH CASE *VICTOR GUERRERO AND HORTENCIA GUERRERO V. CALIFORNIA WATER SERVICE COMPANY*, CASE NO. FCS034481.

SUMMARY

By Advice Letter No. 1968, filed on December 23, 2009, Cal Water seeks authority to establish a Tort Litigation Memorandum Account to record costs associated with the wrongful death complaint brought against it by the parents of a fifteen year old deceased boy. Cal Water requests authority to establish the Tort Litigation Memorandum Account pursuant to the authority granted by the Commission in Resolution W-4094 which authorized all water companies to file water contamination litigation memorandum accounts. This resolution denies Cal Water authority to establish a Tort Litigation Memorandum Account as it is not a compliance filing consistent with Resolution W-4094.

NOTICE AND PROTEST

In accordance with Section 4.3 of General Order (G.O.) 96-B, Advice Letter No. 1968 was sent to Cal Water's G.O. 96-B service list attached to Advice Letter No. 1968. The Division of Water and Audits received no protests to this filing.

BACKGROUND

Cal Water seeks to establish the Tort Litigation Memorandum Account to record various costs associated with a wrongful death case filed on October 14, 2009 in Solano County Superior Court: *Victor Guerrero and Hortencia Guerrero v. California Water Service Company*, Case No. FCS034481. The costs Cal Water proposes to record in the Tort Litigation Memorandum Account include: 1) legal fees and costs; 2) insurance proceeds; 3) a monetary judgment or settlement in favor of Cal Water; and/or 4) a

monetary judgment against Cal Water. Cal Water proposes to seek recovery of costs recorded in the Tort Litigation Memorandum Account in its next general rate case.

The wrongful death complaint (Complaint) relates to the tragic death of Samuel Guerrero, the deceased fifteen year old son of the plaintiffs, who died on December 19, 2008 as the result of E. coli sepsis. The Complaint alleges that as a result of a Cal Water pipe break on or about November 30, 2008 at or near the residence of the deceased there was "the potential to allow sewage, coliform bacteria, or other harmful microorganisms to enter the water supply." (Complaint at p. 2) The Complaint seeks damages for negligence, including negligent failure to maintain the water system and negligent failure to warn, and intentional concealment causes of actions.

Cal Water requests authorization to establish the Tort Litigation Memorandum Account pursuant to the authority granted by the Commission in Resolution W-4094. Resolution W-4094, dated March 26, 1998, authorized all water utilities under Commission jurisdiction to establish memorandum accounts for the litigation expenses as discussed in Resolution W-4094. Resolution W-4094 followed an earlier Resolution W-4089 (January 21, 1998). There the Commission authorized Southern California Water Company (now Golden State Water Company) to establish a memorandum account for litigation expenses associated with a lawsuit on behalf of more than 140 plaintiffs alleging that for a period of more than 20 years Southern California Water Company provided and continued to provide contaminated water from wells located in the area of the San Gabriel Valley that had been designated a federal environmental superfund site.¹

Southern California Water Company and Citizens Utilities Company of California subsequently informed the Commission that additional lawsuits similar to those described in Resolution W-4089 had been filed against the utilities for the contamination of ground water in the Sacramento Valley Basin. The Commission concluded in Resolution W-4094 that "this leads us to believe that water contamination lawsuits of this nature could become widespread throughout the State in the coming years." (Res. W-4094 at p. 1) In authorizing the establishment of memorandum accounts, the

¹ The Commission noted "that this contamination issue is not just SCWC's. Suburban Water Company and San Gabriel Water Company also pump from the Main San Gabriel Water Basin and either have had suits brought against them or expect them to be filed shortly." Due to this fact, the Commission allowed Suburban Water Company and San Gabriel Water Company "to file similar advice letters to establish memorandum accounts for water contamination litigation expenses in the San Gabriel Valley Basin should they become involved in similar litigation." (Res. W-4089 at p. 5)

Commission found “Complaints by numerous plaintiffs have been filed in the Superior Courts of California alleging, among other things, that certain Commission regulated water utilities have provided and continue to provide its [sic] customers with contaminated water.” (Res. W-4094, Finding #1)

The Division of Water and Audits reviewed Advice Letter No. 1968 and determined that Cal Water’s reliance on Resolution W-4094 was misplaced given the differing nature of the Complaint at issue in Advice Letter No. 1968 from those that caused the Commission to issue Resolutions W-4089 and W-4094. On January 28, 2010, the Division of Water and Audits informed Cal Water in writing that Advice Letter No. 1968 was being rejected.² In addition, since Cal Water failed to make any showing that the Tort Litigation Memorandum Account meets any of the criteria as outlined in Resolution W-4276 used by the Commission to establish a memorandum account, Cal Water was provided an opportunity to re-file and provide a showing that the criteria for establishment of the Tort Litigation Memorandum Account are satisfied. Subsequent to the Division of Water and Audits’ rejection letter, the Commission issued Res. W-4824 (April 8, 2010) which provides further guidance on how it applies these criteria in determining whether to authorize a memorandum account. (See Resolution W-4824 at p. 5)

On February 8, 2010, pursuant to General Order 96-B, Rule 7.7.1, Cal Water filed a timely request for Commission review of the Division of Water and Audits disposition of Advice Letter No. 1968. Cal Water argues that the Division of Water and Audits incorrectly chose to narrowly limit the scope of Resolution W-4094 in its review of Advice Letter No. 1968.

DISCUSSION

We affirm the Division of Water and Audits’ determination that Cal Water’s request for a Tort Litigation Memorandum Account is not within the scope of memorandum accounts we authorized in Resolutions W-4089 and W-4094. As such, Cal Water cannot rely on Resolution W-4094 for establishing the Tort Litigation Memorandum Account. If Cal Water wants to substantiate that a tort litigation memorandum account is justified, it should file a Tier 3 advice letter. Cal Water’s filing will need to show that its request is justified consistent with our recent discussion of when memorandum accounts should be authorized. (See Resolution W-4824 at p. 5)

² On January 12, 2010, the Division of Water and Audits suspended Advice Letter No. 1968 so that additional information requested could be reviewed.

Resolution No. W-4094 ordered:

1. All water utilities under Commission jurisdiction are authorized to establish memorandum accounts for the litigation expenses as discussed in this resolution and incurred after March 26, 1998, the effective date of this resolution
...
4. All provisions and conditions in Resolution No. W-4089 will apply in this resolution.

Accordingly we must determine what kind of litigation expenses were discussed in Resolution No. W-4094. Resolution No. W-4094 authorizing the establishment of a memorandum account describes litigation that:

1. involved numerous plaintiffs and
2. the continued alleged provision of contaminated water over a period time.

Because Resolution No. W-4094 expressly relied on extending memorandum treatment previously authorized in Resolution No. W-4089 to other companies, we also look to how the litigation covered by that resolution was described. There we referred to litigation as involving "substantial and unanticipated costs related to a major civil lawsuit filed against [water] company." (Res. W-4094 at p. 1)

Furthermore, the litigation described in Resolution No. W-4089: (1) involved more than 140 plaintiffs and (2) allegations that for more than 20 years the water company has provided and continues to provide contaminated water.

We also stated "that a lawsuit of this magnitude will require additional expenses beyond which [water company] could have anticipated in its last general rate case."

The Complaint which is the precipitating cause for filing Advice Letter No. 1968 is significantly different than the complaints at issue in Resolutions W-4089 and W-4094. Unlike those complaints, this complaint deals with a single family alleging a single incident of water contamination lasting a much shorter period of time arising from an allegation of a water main break. The cost of the present litigation should not approach anywhere near the cost of those previous litigations. The cost of that type of litigation both in terms of size and time was a determining factor in our authorization for water

utilities to establish water contamination litigation memorandum accounts.³ The fact that the present Complaint deals with a water contamination incident is not a sufficient nexus to bring Advice Letter No. 1968 within the umbrella of Resolution W-4094. Because the single-incident litigation at issue here should not involve the kind of litigation expenses discussed in Resolutions W-4094 and W-4089, they do not provide the necessary justification for authorizing the memorandum account requested here.

COMMENTS

Public Utilities Code § 311(g)(1) provides that resolutions must generally be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. This draft resolution was mailed to California Water Service Company on July 13, 2010. Comment was received on _____.

FINDINGS AND CONCLUSIONS

1. California Water Service Company filed Advice Letter No. 1968 on December 23, 2009 requesting authority to establish a Tort Litigation Memorandum Account pursuant to the authority granted in Resolution W-4094.
2. The Division of Water and Audits rejected Advice Letter No. 1968 on January 28, 2010 because it was not a compliance filing consistent with Resolution W-4094.
3. California Water Service Company filed a timely request for Commission review of the Division of Water and Audits' disposition of Advice Letter No. 1968 on February 8, 2010.
4. California Water Service Company filed Advice Letter No. 1968 in response to a wrongful death complaint case, *Victor Guerrero and Hortencia Guerrero v. California Water Service Company*, Case No. FCS034481 (Complaint).
5. The Complaint at issue in Advice Letter No. 1968 involves an individual husband and wife plaintiff.
6. The Complaint at issue in Advice Letter No. 1968 alleges a discrete instance of potential water contamination from a pipe break.
7. Resolutions W-4089 and W-4094 authorized memorandum accounts where there were complaints involving large numbers of plaintiffs alleging both past and continuing contamination of water from ground water sources.

³ See, for example, the discussion in Resolution W-4089 at p. 3 referring to the cost "for the defense of a lawsuit of this magnitude."

8. The Commission in Resolutions W-4089 and W-4094 relied on findings of the presence of large numbers of plaintiffs dealing with long historic and continuing water contamination issues as an indication of the substantial cost of the litigation.
9. The Complaint at issue in Advice Letter No. 1968 is significantly different than the complaints that gave rise to Resolutions W-4089 and W-4094.
10. The Tort Litigation Memorandum Account requested in Advice Letter No. 1968 cannot be established pursuant to Resolution W-4094 as California Water Service Company requests.
11. California Water Service Company did not make any showing in Advice Letter No. 1968 that the Tort Litigation Memorandum Account meets the criteria discussed in Resolution W-4276 (July 12, 2001) for establishing a memorandum account as recently discussed by the Commission in Resolution W-4824 (April 8, 2010).
12. California Water Service Company should be allowed to file a new Tier 3 advice letter in order to make a showing that the Tort Litigation Memorandum Account should be established.

THEREFORE IT IS ORDERED THAT:

1. Advice Letter No. 1968 is rejected without prejudice.
2. Cal. P.U.C. Tariff Sheet Nos. 8150-W and 8151-W submitted with Advice Letter No. 1968 are rejected.
3. This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on August 12, 2010; the following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of draft Resolution No. W-4835 on all parties in these filings or their attorneys as shown on the attached list.

Dated July 13, 2010, at San Francisco, California.

/s/ JOSIE R. BABARAN

Josie R. Babaran

NOTICE

Parties should notify the Division of Water and Audits, Public Utilities Commission, 505 Van Ness Avenue, Room 3106, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the Resolution number of the service list on which your name appears.

SERVICE LIST
DRAFT RESOLUTION NO. W-4835

Darin Duncan
Manager of Rates
California Water Service Company
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