

PUBLIC UTILITIES COMMISSION505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102

May 14, 2024

Proposed Resolution W-5274

Agenda ID: 22603

To: All Interested Persons

Enclosed is Proposed Resolution W-5274 of the Water Division, which denies Havasu Water Company's request for correction under Rule 16.5 of the Commission's Rules of Practice and Procedure and Petition for Modification of Resolution W-5059 pursuant to Public Utilities Code section 1708. Proposed Resolution W-5274 is scheduled to appear on the June 20, 2024 Commission Meeting Agenda (ID# 22603).

The Commission may act on this resolution or it may postpone action until later. When the Commission acts on a proposed resolution, the Commission may adopt all or part of the proposed resolution, as written, or amend or modify the proposed resolution; or the Commission may set the proposed resolution aside and prepare a different resolution. Only when the Commission acts does the resolution become binding.

Interested persons may submit comments on Proposed Resolution W-5274 via email to Water.Division@cpuc.ca.gov on or before **June 6, 2024**. Please reference **"Proposed Resolution W-5274" in the subject line**.

Interested persons must also serve a copy of their comments on the utility on the same date that the comments are submitted to the Water Division. If email is unavailable, please submit comments to:

California Public Utilities Commission
Water Division
505 Van Ness Avenue
San Francisco, CA 94102

Comments should focus on factual, legal, technical errors, or policy issues in the proposed resolution.

Persons interested in receiving comments submitted may contact the Water Division at Water.Division@cpuc.ca.gov or (415) 703-1133. Please reference "Proposed Resolution W-5274."

/s/ TERENCE SHIA

Terence Shia, Director
Water Division

Enclosures: Proposed Resolution W-5274
Certificate of Service
Service List

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Agenda ID #22603

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

WATER DIVISION

RESOLUTION W-5274
June 20, 2024

RESOLUTION

(RES. W-5274) HAVASU WATER COMPANY. ORDER DENYING REQUEST FOR CORRECTION UNDER RULE 16.5 AND PETITION FOR MODIFICATION OF RESOLUTION W-5059 PURSUANT TO PUBLIC UTILITIES CODE SECTION 1708.

SUMMARY

On March 2, 2023, Havasu Water Company (HWC) requested via email that the Commission's Executive Director's office issue a correction of Resolution (Res.) W-5059 pursuant to Rule 16.5 of the Commission's Rules of Practice and Procedure (Rules). Subsequently, HWC filed a Petition for Modification (PFM) of Res. W-5059 dated July 19, 2023. In both instances, HWC requests removal of a statement in Res. W-5059, and all subsequent references to this statement, indicating that HWC's easement for a supply line across Chemehuevi Indian Tribe (CIT) lands expired in 2006 and has not been re-negotiated.¹ Despite a recent court ruling that the HWC is trespassing on CIT tribal lands because the easement terms have not been re-negotiated, HWC erroneously contends that a 1985 Commission decision extended the easement and removal of the subsequent statements will reinstate the prior decision.

Pursuant to Public Utilities (Pub. Util.) Code § 1708, the Commission may alter, amend, or rescind any decision or order so long as the Commission gives notice to affected parties and an opportunity to be heard on the matter. This Resolution denies both the Request for Correction of Res. W-5059 pursuant to Rule 16.5 and the Petition for Modification of Res. W-5059 pursuant to Rule 16.4.

¹ PFM of Res. W-5059 at 1. Attached as Appendix A.

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BACKGROUND

HWC is a Class D² investor-owned water utility with 211 metered service connections. HWC's service area is located in the unincorporated community of Havasu Lake in San Bernardino County. The sole source of water for the system is Lake Havasu,³ which HWC accesses via a supply line. The supply line crosses CIT tribal lands via an easement that expired in 2006. The easement was established on June 22, 1976 as part of a settlement agreement between HWC and the United States Department of the Interior acting on behalf of the CIT ("1976 Settlement Agreement").⁴ The 1976 Settlement Agreement included a *Grant of Easement for Right-of-Way*, which provided for Commission action to extend the temporal term of the easement via the following terms.

This easement is subject to any prior valid existing right or adverse claim and is for a period of 30 years, so long as said easement shall be actually used for the purpose above specified; provided, however, that in the event the Public Utilities Commission of the State of California or any other governmental agency having jurisdiction over the operations of [HWC] requires this easement to have a longer term for the purpose of providing sufficient access to the Colorado River, [the United States] agrees to extend the term of this easement for such longer term as may be required by the California Public Utilities Commission or such other governmental agency⁵

On October 22, 1984, HWC filed Application 84-10-060 with the Commission seeking to extend service to new customers. In Decision (D.) 85-04-056 ("1985 Decision"), which followed, staff referenced the 1976 Settlement Agreement and recommended "that the termination date be extended to such a time as the easement is no longer necessary for providing public utility water service."⁶ The 1985 Decision was approved by the

² As defined by GO 96-B Water Industry Rules Section 1.2, Class D investor-owned water utilities are those with less than 500 service connections.

³ HWC pays the City of Needles, which is designated as the agency for maintaining water allocations from the Lower Colorado River on behalf of the United States Bureau of Reclamation, for water usage on an annual basis.

⁴ The 1976 Settlement Agreement resulted from litigation brought by HWC challenging the legality of a 1974 Secretarial Order issued by the Department of Interior that provided clarification of the CIT land grant. 1976 Settlement Agreement at 1-2. Attached as Appendix B.

⁵ 1976 Settlement Agreement, Exhibit A at 4 of 6.

⁶ D. 85-04-056 at 7. Attached as Appendix C.

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Commission on April 17, 1985. Ordering paragraph 4 stated “[t]he termination date of the contract with the Chemehuevi Indians to use the easement to cross their lands shall be extended to such a time as the easement is no longer necessary for providing public utility water service.”⁷ Application 84-10-060 did not specifically request extension of the easement and there is no record that the CIT or United States received notice of either the application or 1985 Decision.⁸

HWC filed Advice Letter (AL) 43 on September 8, 2014, and supplemental AL 43-A on March 19, 2015, requesting a general rate increase. The Commission issued Res. W-5059⁹ on September 18, 2015, authorizing a general rate increase to HWC. HWC did not seek rehearing of Res. W-5059. Notably, the Commission stated in Res. W-5059 that HWC pumps water from Lake Havasu “through land owned by the Chemehuevi Indian Tribe to HWC’s water treatment plant.”¹⁰ The resolution also acknowledged the efforts of CIT to re-negotiate the terms of the easement following its expiration in 2006 and the Commission ordered a mediator to work with HWC and CIT to resolve the easement matter.¹¹ That mediation was unsuccessful: In March 2020, CIT filed a complaint against HWC in the U.S. District Court for the Central District of California, alleging trespass and other claims.¹²¹³

On October 22, 2021, HWC filed AL 48 requesting another general rate increase. The Commission denied HWC’s requested relief in Res. W-5250 and HWC did not file an

⁷ *Id.* at 11.

⁸ Despite efforts to locate the service list for D. 85-04-056 or the underlying Application 84-10-060 (filed October 22, 1984), the documents are not in the Commission’s records. CIT has stated that it never was served the application or 1985 Decision.

⁹ Resolution W-5059 (issued September 18, 2015) is available at <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M154/K463/154463260.pdf>

¹⁰ Res. W-5059 at 2.

¹¹ *Ibid.*

¹² First Amended Complaint, *Chemehuevi Indian Tribe v. Havasu Water Co.*, No. 5:20-cv-00471-GW-KK (C.D. Cal. July 29, 2020). This complaint was appended to Res. W-5250 as Appendix 1 and is incorporated by reference.

¹³ Of note, in the First Amended Complaint, CIT details a San Bernadino County Resolution No. 81-134, enacted on May 1, 1984 at the request of the county Sheriff on HWC’s behalf, which purported to extend the easement into “perpetuity”. See First Amended Complaint at 8-9. The CIT argued the San Bernadino Resolution was not valid because HWC never applied to the Secretary for an extension of the 1976 Easement as required by applicable federal law. Neither the CIT nor current HWC representatives appeared to have knowledge of the 1985 Decision until it was discussed in Res. W-5250, adopted by the commission on January 27, 2022. HWC requested judicial notice of Res. W-5250, which included a copy of D. 85-04-056, on February 14, 2022.

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application for rehearing of this resolution. With regard to the issue at hand, Res. W-5250 states that HWC pumps water from Lake Havasu “pursuant to an easement granted by the United States Department of the Interior and [the CIT].”¹⁴ The resolution also discusses 1) CIT’s federal complaint; 2) the origins of the easement established in the 1976 Settlement Agreement; and 3) prior Commission actions, including the 1985 Decision, which extended the term of the easement¹⁵ but was later superseded in Res. W-5059, which found that the easement expired in 2006.¹⁶

On July 28, 2022, the district court granted partial summary judgment in the CIT’s favor and denied HWC’s counter motion for summary judgment.¹⁷ The ruling provides, in relevant part:

The Court is inclined at this point to conclude that the undisputed facts indicate both that (1) the 1985 Decision was not a proper extension under the terms of the 1976 Easement because it complied neither with the terms of the 1976 Agreement nor federal law, 25 U.S.C. §§ 323-325, by failing to noticing the United States and the Tribe of the consideration for the extension and (2) even if there were any facts to indicate that the federal government or the Tribe was noticed prior to the 1985 Decision,¹⁸ the CPUC has since recognized *twice* that the 1976 Easement expired at the end of the original term on June 22, 2006.¹⁹

In subsequent rulings, the court directed the parties to pursue settlement on the limited issue of determining the amount of damages HWC owes to CIT for HWC’s ongoing trespass. To date, a settlement on damages had not been reached and the matter is scheduled for trial in Fall 2024.

Following the court’s July 2022 ruling, HWC submitted a letter to the Commission’s Executive Director’s office, dated March 2, 2023, requesting correction of Resolution W-5059 pursuant to Rule 16.5. Subsequently, HWC submitted a Petition for Modification

¹⁴ Res. W- 5250 at 2, available at <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M447/K221/447221107.PDF>

¹⁵ Decision 85-04-056 at 11.

¹⁶ Res. W- 5250 at 2-4.

¹⁷ *Chemehuevi Indian Tribe v. Havasu Water Co. et al.*, No. EDCV 20-471-GW-KKx, at 23 (C.D. Cal. July 28, 2022). Attached as Appendix D.

¹⁸ The court discusses that D.85-04-056 details appearances by several HWC staff members and Commission staff, but there is no appearance by representatives of the CIT or United States. *Id.* at 4.

¹⁹ *Chemehuevi Indian Tribe v. Havasu Water Co. et al.*, No. EDCV 20-471-GW-KKx, at 18(C.D. Cal July 28, 2022).

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(PFM) of Res. W-5059, dated July 19, 2023.²⁰ Those two requests—the Request for Correction and the PFM—are the subject of this Resolution.

The Request for Correction and PFM both requested the Commission delete the following statements from Res. W-5059, and all subsequent references to this statement in any other Resolution or Decision of the Commission: “HWC’s easement for the supply line expired in 2006. Following, the expiration of the contract in 2006... HWC and the Chemehuevi Indian Tribe (CIT) have not yet negotiated a settlement.”²¹

HWC argues that despite the Commission’s acknowledgment in both Res. W-5059 and Res. W-5250 that the easement expired in 2006 by the terms of the 1976 Settlement Agreement, the Commission is bound by the prior 1985 Decision.²²

On October 18, 2023, before the Commission ruled on either the Request for Correction or the PFM, HWC filed a petition for Writ of Mandate with the California Supreme Court (Case No. S282329) to compel the Commission to rule on the PFM. On January 10, 2024, the California Supreme Court summarily denied HWC’s petition.

On January 1, 2024, the federal Environmental Protection Agency (EPA) assumed regulatory oversight of the public water system (PWS) owned by HWC from the State Water Resources Control Board’s Division of Drinking Water.²³ The EPA informed HWC²⁴ of the change in a November 2, 2023 letter, which stated:

In coordination with the State Board, the EPA recently confirmed that the Havasu Water Company lies wholly within the boundaries of the Chemehuevi Indian Tribe Reservation. Therefore, EPA is affirming its role as regulator of the Havasu Water Company PWS under the [Safe Drinking Water Act].

²⁰ PFM at 1 citing Res. W-5059 at 2.

²¹ PFM at 1.

²² PFM at 2-3. In the Request for Correction, HWC erroneously claims the 1985 Decision is a final adjudication of the facts that is binding on the courts and cannot be changed by the Commission without a new public evidentiary hearing specifically on the 1985 Decision, at 3.

²³ The Commission’s Water Division staff is coordinating with EPA staff in its monitoring and enforcement efforts.

²⁴ HWC challenged the EPA determination in a letter dated November 6, 2023, arguing that HWC PWS is not located on tribal land. EPA staff clarified the legal basis for jurisdiction in a November 16, 2023 letter citing *Chemehuevi Indian Tribe v. McMahan*, in which the court stated, “[w]e therefore conclude that Section 36 is within the Chemehuevi Reservation and hence “Indian country” under 18 U.S.C. § 1151(a).” 934 F.3d 1076, 1082 (9th Cir. 2019). The HWC PWS is located in Section 36.

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NOTICE AND PROTESTS

Commission Rule of Practice and Procedure 16.5 requires that HWC's letter requesting correction be sent to "all parties to the proceeding." Service of the PFM is required on the same persons served under the resolution at issue in accordance with General Order 96-B, General Rule 8.2 and Rule 1.9 and 1.10 of the Rules of Practice and Procedure.

HWC failed to serve the PFM on any of the entities on the Res. W-5059 service list. HWC also failed to serve the PFM on the CIT. Water Division provided the PFM and Request for Correction to the CIT.

DISCUSSION

Pursuant to Pub. Util. Code § 1708, the Commission has the discretion to "rescind, alter, or amend any order or decision made by it."²⁵ The Commission may do so "at any time, upon notice to the parties, and with opportunity to be heard...."²⁶ Pub. Util. Code § 1708 also provides that "[a]ny order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision."²⁷

HWC's request to modify Res. W-5059 to reflect the position adopted in the 1985 Decision was filed more than one year after the Commission issued it²⁸. In Res. W-5059, adopted on September 17, 2015, the Commission acknowledged and affirmed that the easement expired by its terms in 2006. Moreover, in Res. W-5250, adopted on January 27, 2022, the Commission affirmed Res. W-5059, again concluding that the easement expired by its terms in 2006 and that the 1985 Decision was superseded by Res. W-5059. HWC never sought rehearing of either resolution.

HWC provided the following justification for late filing of the PFM:

This petition for modification is being made now, because until the erroneous statement in Res. W-5059 was mistakenly adopted by the Central Dist. of California on July 28, 2022, contrary to administrative procedure law, HWC had no notice that an erroneous statement in a

²⁵ PU Code § 1708; *see also* Rule 16.4 of the Commission's Rules of Practice and Procedure.

²⁶ PU Code § 1708.

²⁷ *Ibid.*

²⁸ Commission Rule 16.4(d) requires PFM's to be filed within one year of the effective date of the decision to be modified. If filed after one year a justification for late filing is required.

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Resolution of an Advice Letter in a 2015 General Rate Case, could be used to change the outcome of the 1985 ratemaking Decision 85-04-056, without notice and a proper public evidentiary hearing.²⁹

This justification is not tenable. The easement's status has been the subject of controversy for years. So, it should not take uncommon foresight to suppose that two separate resolutions, both stating plainly that the easement had expired, might affect HWC's legal position. Nor is a subsequent lawsuit concerning a controversial subject the sort of changed circumstance that might warrant modifying a final Commission order after the rehearing period has lapsed. Nor, finally, can HWC complain that it lacked notice and the opportunity to be heard on the matter: HWC filed the advice letters that were the subject of both resolutions and, therefore, HWC received actual notice of both resolutions, the right to file comments before the Commission's vote, and the right to apply for rehearing after that vote. HWC simply slept on those rights. The Commission declines to upset two final orders (and the federal court orders relying on them) to support such stale demands.³⁰

Because the Commission may alter, amend, or rescind any decision or order following notice and an opportunity to be heard, HWC's Request for Correction of Res. W-5059 pursuant to Rule 16.5 and the Petition for Modification of Res. W-5059 should be denied.³¹

Finally, we note that HWC has continually failed to serve CIT as required by Rules 1.9 and 1.10 of the Rules of Practice and Procedure and/or GO 96-B, General Rules 7.2 and 8.2., and Water Industry Rule 4.1(2), (3). HWC is hereby on notice that the Commission will not consider future advice letters, filings, or other requests that are not properly served on all parties and interested entities, particularly CIT.

COMMENTS

Public Utilities Code section 311(g)(1) provides that resolutions generally must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission.

²⁹ PFM at 9.

³⁰ See, e.g., Cal. Civ. Code, § 3527 ("The law helps the vigilant, before those who sleep on their rights.").

³¹ PU Code § 1708.

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Accordingly, the draft resolution was mailed to the service list and made available for public comment on May 17, 2024.

FINDINGS

1. Havasu Water Company (HWC) is a Class D water utility, which provides domestic water service to 211 metered service connections in the unincorporated community of Havasu Lake in San Bernardino County.
2. HWC requested that the Commission's Executive Director's office issue a correction of Resolution (Res.) W-5059 pursuant to Rule 16.5 of the Commission's Rules of Practice and Procedure via an email dated March 2, 2023.
3. HWC submitted a Petition for Modification of Res. W-5059 dated July 19, 2023.
4. Pursuant to Public Utilities Code § 1708, the Commission may modify any decision or order, and any order modifying a prior order or decision has the same effect as the original order or decision.
5. Res. W-5059 is a final order of the Commission that was issued on September 18, 2015. HWC did not file for rehearing.
6. HWC filed Advice Letter 43, which was the subject of Res. W-5059, and was provided notice and an opportunity to be heard.
7. HWC has not provided a valid justification for failing to timely apply for rehearing of Res. W-5059.
8. Havasu Water Company's request for correction of Commission Resolution W-5059 pursuant to Rule 16.5 and Petition for Modification of Resolution W-5059 should be denied.

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THEREFORE, IT IS ORDERED THAT:

1. Havasu Water Company's Request for correction of Resolution W-5059 and Petition for Modification of Resolution W-5059 are denied.

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 June 20, 2024; the following Commissioners voting favorably thereon:

Rachel Peterson
Executive Director

ALICE REYNOLDS
President
DARCIE HOUCK
JOHN REYNOLDS
KAREN DOUGLAS
MATTHEW BAKER
Commissioners

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CERTIFICATE OF SERVICE

I certify that I have, by either electronic mail or postal mail, this day, served a true copy of Proposed Resolution No. W-5274 on all parties in these filings or their attorneys as shown on the attached lists.

Dated May 14, 2024, at San Francisco, California.

/s/ LEVI GOLDMAN

Levi Goldman

Parties should notify the Water Division,
Third Floor, California Public Utilities
Commission, 505 Van Ness Avenue, San
Francisco, CA 94102, of any change of address
to ensure that they continue to receive
documents. You must indicate the Resolution
number on which your name appears.

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Havasu Water Company
148821 HAVASU LAKE RD., HAVASU LAKE, CA 92363

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