

Decision 09-05-022

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations and Practices of the Yermo Water Co. (U-354-W), and its Owner/Operator, Donald Walker; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Petition the San Bernardino 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.

Investigation 08-04-032
(Filed April 29, 2008)

Donald Walker, for Yermo Water Company and Donald Walker, respondent.

Yermo Community Service District, by Robert W. Smith, interested party.

Cleveland W. Lee, Attorney at Law, for the California Public Utilities Commission, Division of Water and Audits.

TABLE OF CONTENTS

Title	Page
DECISION AUTHORIZING SUPERIOR COURT ACTION FOR APPOINTMENT OF A RECEIVER FOR YERMO WATER COMPANY	2
1. Summary	2
2. Background.....	2
3. Investigation	4
4. Evidentiary Hearing.....	6
4.1. Actual or Effective Abandoned Water System	7
4.1.1. Resolution W-3812	7
4.1.2. Out-Of-State Operations.....	8
4.1.3. State Certified Operator	9
4.1.4. Attempt to Sell Without Commission Authority	10
4.2. Unresponsive to Rules and Orders.....	12
4.2.1. CDPH Violations.....	13
4.2.2. General Order 103 Violations.....	14
4.2.3. Tariffs	15
4.3. Inability to Adequately Serve Customers.....	18
5. Discussion	20
6. Fines and Penalties	22
7. Categorization and Need for Hearing.....	23
8. Assignment of Proceeding	23
Findings of Fact	24
ORDER	27
Appendix A	
Appendix B	
Appendix C	

DECISION AUTHORIZING SUPERIOR COURT ACTION FOR APPOINTMENT OF A RECEIVER FOR YERMO WATER COMPANY

1. Summary

This decision authorizes and directs the Commission's Legal Division to commence proceedings in the Superior Court of San Bernardino County for appointment of a receiver to take possession of and operate Yermo Water Company (Yermo), pursuant to Pub. Util. Code § 855. The Commission's Division of Water and Audits shall audit Yermo's 2003 through 2008 user fee calculations and payments. The Division of Water and Audits shall also audit the water company's purchase power billing procedures.

2. Background

Yermo Water Company (Yermo) is a consolidation of three certificated water utilities located ten miles north of Barstow in San Bernardino County near and within the Township of Yermo. These utilities consisted of Yermo, Marine Water Company (Marine) and Hel-Bro Water Company (Hel-Bro).

Yermo became a certificated public utility in 1948 pursuant to Decision (D.) 42197. Marine and Hel-Bro became certificated public utilities in 1963 pursuant to D.64988 and D.65089, respectively. On July 26, 1966, the owners of Yermo acquired Marine and Hel-Bro pursuant to D.71016 and D.71017, respectively. Yermo was subsequently authorized to consolidate Marine and Hel-Bro into Yermo's certificate of public convenience and necessity on December 12, 1983 pursuant to Resolution W-3149. The water systems of Marine and Hel-Bro are adjacent to each other and were subsequently interconnected to each other. The initial water system of Yermo has not been interconnected to the Marine and Hel-Bro interconnected water system.

Donald Walker, the current owner of Yermo, and William Ruff, Jr. were authorized to acquire Yermo through the purchase of all outstanding stock of Marine and Hel-Bro on August 21, 1985, pursuant to D.85-08-082. Walker subsequently acquired Ruff's interest in Yermo and was declared the sole owner of Yermo in Resolution W-3812, dated November 23, 1993. Walker is presently the sole owner of Yermo.

Yermo provides public utility water service to approximately 350 metered customers in Tracts 6593 and 6598 located near the Township of Yermo, and Tracts 2459 and 2195 in the Township of Yermo. A majority of the customers receiving water service from Yermo are single family residents, the number of which has not significantly changed since 1993.¹ Yermo supplies water to its customers from wells located to or in close proximity to its service area. It has two stand-alone pressure zones. A Main Zone encompasses the original Yermo service territory and a Hel-Bro Zone encompasses both the Marine and Hel-Bro service territories.

Prior to the filing of this investigation, Yermo's most recent rate increase was granted in 1993. Pursuant to Resolution W-3812, dated November 23, 1993, Yermo was authorized a 13.4% rate of return for its 1993 test year resulting in a revenue requirement increase of 137% or \$76,019.² However, the Commission found Yermo's water system to be antiquated with most of its pipes over 50

¹ Yermo's 2007 Annual Report to the Commission shows that it has 346 service connections, four of which are business connections and 46 inactive residential customers.

² Yermo filed a rate increase request in the latter part of 2008 just prior to an evidentiary hearing in this matter. An interim rate increase based on the last Commission Price Index was authorized February 24, 2009 to become effective March 12, 2009.

years old and in constant need of repair, resulting in numerous customer complaints. Many parts of the water system were found to be badly in need of replacement or upgrading.

Other than some main and service replacements in 1986 and 1987, Resolution W-3812 found that there had been no other replacements since then.³

As part of that revenue requirement increase Yermo was required to:

(1) maintain a customer complaint log and comply with General Order (G.O.) 103 with respect to customer complaints, (2) file a plan of action with the Commission's Water Utilities Branch no later than the end of February 1994 detailing the repair work, system upgrading, new personnel hired and/or equipment purchases to be made as a result of the rate increase, and (3) file a report with the Water Utilities Branch showing the progress completed on its plan of action commencing July 1, 1994 and once every six months thereafter.

3. Investigation

This investigation into the operations and practices of Yermo and its owner Walker (Respondents) was opened on April 24, 2008 because of Commission concerns that Respondents (1) have actually or effectively abandoned the Yermo water system, (2) have been and/or are unresponsive to the rules and orders of the Commission and California Department of Public Health (CDPH)⁴ requirements, and (3) have been unable or unwilling to adequately serve customers. Further, Division of Water and Audits⁵ records show that unresolved customer complaints have included inadequate water

³ Resolution W-3812 (1993), *mimeo.* at 2 and 3.

⁴ CDPH was formerly known as the California Department of Health Services.

⁵ Division of Water and Audits was previously known as the Water Division.

pressure, malodorous and potentially unsafe water supplies, service interruptions, contamination, inadequate fire protection equipment, and other operational problems which imperil the health and safety of Yermo's customers.⁶

This investigation was issued with an order for Respondents (Yermo and Walker) to show why the Commission should not begin proceedings for appointment of a receiver to operate the Yermo water system. The order was based on Section 855 of the Public Utilities Code⁷ which states:

Whenever the commission determines, after notice and hearing, that any water or sewer system corporation is unable or unwilling to adequately serve its ratepayers or has been actually or effectively abandoned by its owners, or is unresponsive to the rules or orders of the commission, the commission may petition the superior court for the county within which the corporation has its principal office or place of business for the appointment of a receiver to assume possession of its property and to operate its system upon such terms and conditions as the court shall prescribe. The court may require, as a condition to the appointment of such receiver, that a sufficient bond be given by the receiver and conditioned upon compliance with the orders of the court and the commission, and protection of all property rights involved. The court shall provide for disposition of the facilities and system in like manner as any other receivership proceeding in this state.

The investigation also ordered Respondents to submit in writing to the Water Division Director no later than May 23, 2008: (a) verification of any and all financial data stated in Yermo's Annual Reports for the period 2003 through

⁶ Investigation 08-04-032, *mimeo.* at 2.

⁷ All statutory references are to the Public Utilities Code.

2005;⁸ (b) a listing, for all customers, of the name, billing address, classification, type of service, and date and amount of last billing;⁹ and (c) a copy of Yermo's customer complaint log and complaint data required by G.O. 103 for the period 2002 through 2007.¹⁰

At a June 11, 2008 Prehearing Conference (PHC) in San Francisco, Respondents were ordered to make a compliance filing with the Commission's Docket Office by July 28, 2008 explaining the status of Yermo's Public Utilities Commission reimbursement fees (user fees) and to submit Yermo's 2007 Annual Report to the Commission. Respondents were also ordered to explain why Yermo is not being operated by a State certified water operator and to identify when such a person would begin operating the water system.

4. Evidentiary Hearing

An evidentiary hearing was set for November 4, 2008 in San Francisco. That evidentiary hearing was rescheduled at the request of the Division of Water and Audits to December 4, 2008 and again at the request of Respondents to January 13, 2009. Respondents did not provide any direct testimony. Cross examination of Respondents was undertaken by the Division of Water and Audits. The Division of Water and Audits also provided direct testimony.

⁸ Although G.O. 104 requires Respondent to submit an Annual Report on or before March 31 of the following year signed by the owner under penalty of perjury, this information, except for Yermo's 2007 Annual Report, was subsequently submitted to the Commission in July of 2008. The 2007 Annual Report was submitted in October of 2008.

⁹ This information was subsequently submitted to the Commission on July 28, 2008.

¹⁰ This information was subsequently submitted to the Commission on July 28, 2008.

4.1. Actual or Effective Abandoned Water System

Actions that could support a finding that Respondents have actually or effectively abandoned the water system were identified in the investigation, including that Respondents have, among other matters, not complied with Resolution W-3812, moved the water operations out-of-state, not employed a State certificated water operator for several years, and attempted to sell the water system without Commission authority.

4.1.1. Resolution W-3812

Yermo was authorized a general rate increase in 1993, pursuant to Resolution W-3812, dated November 23, 1993. The Commission found in that proceeding that the water system was antiquated and in constant need of repair. Therefore, Yermo was required as part of that general rate increase to file a plan of action with the Water Utilities Branch within 90 days after the effective date of that resolution. The plan of action was to detail the repair work, system upgrading, new personnel hired and/or equipment purchases to be made as a result of the general rate increase. Then commencing July 1, 1994 and every six months thereafter, until relieved by the Water Utilities Branch, Yermo was required to file a report with the Water Utilities Branch showing the progress completed on the plan of action and the remainder work to be completed.

Respondent Walker testified that he was not sure if he had filed the required plan of action.¹¹ At that time, he was selling cars in Barstow and running a lake by the name of Lake Tami. His manager running the water company at that time was to submit the updated reports. Walker subsequently recalled signing a plan of action and believed that it was submitted to the San

¹¹ Reporter's Transcript, Volume 1, *mimeo.* at 17.

Bernardino office of the Public Utilities Commission.¹² Walker then acknowledged that the required follow-up reports were not prepared or sent, explaining “*we were very busy*” and “*I don’t know.*”¹³

To the extent that Respondents may have prepared a plan of action there is no evidence that such a plan was implemented for water utility improvements because Yermo’s utility plant investment has substantially decreased in the past 14 years, since 1993. Yermo’s 1993 average utility plant investment of \$367,810 reported in Resolution W-3812 has decreased by \$266,600 to a level of \$101,210 in 2007. The only capital improvement reported in Yermo’s 2003 through 2007 Annual Reports was \$2,000 of equipment and tools in 2007. The Commission has yet to receive a copy of Respondents’ plan of action and periodic updates.

4.1.2. Out-Of-State Operations

Respondent Walker moved out-of-state to Florida in 2002 and continued to manage the water company from Florida. In 2006 he closed the Yermo business office and relocated all financial matters including bookkeeping and billing of the water company to Florida. He recently reopened a business office in Yermo and moved some cash, receivable and payable aspects of the water company back to Yermo. The billing functions continue to be handled out of Florida.¹⁴

Pub. Util. Code § 791 requires Yermo to have an office in a county of this State in which its property or some portion thereof is located and to keep in that office all the books, accounts, papers, and records required by the Commission to be kept within this State. Section 791 requires that no such books, accounts,

¹² The Commission’s Water Utilities Branch has never been located in San Bernardino.

¹³ Reporter’s Transcript, Volume 1, *mimeo.* at 20.

¹⁴ *Id.* at 9 and 41.

papers, or records be removed from the State at any time except upon such conditions as the Commission prescribes. Respondents have not obtained Commission authority to close the California office or to take and maintain books, accounts, papers and records office out of California.

4.1.3. State Certified Operator

Respondent Walker acknowledged at the PHC that Yermo does not have a State certified water operator to run the water system.¹⁵ Subsequently, Respondent Walker stated in an August 27, 2008 filed response to an ALJ inquiry explaining why he does not have a certificated operator that Water Well Service is state certified and has been serving as a consultant to Yermo since Respondent purchased the water system in 1983.

Respondent Walker subsequently testified on January 13, 2009 that at the end of July 2008, he still did not have a State certified operator.¹⁶ However, approximately two months prior to the January evidentiary hearing he hired a State certified operator to supervise the water operations on a part-time basis. This part-time person is paid \$100 a month to oversee periodic water sampling.¹⁷ Respondents do not have a full time State certified water operator.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 37, 60, and 61.

4.1.4. Attempt to Sell Without Commission Authority

Respondent Walker's attempt to sell the water system in 2004 was another issue identified in the investigation as to Respondents' unresponsiveness to Commission rules and orders, specifically Pub. Util. Code § 851. That code section precludes the sale of a water system without prior Commission authority.

Respondent Walker has tried to sell the water system for the past ten years, and would definitely like to sell it but has not been able to do so because the water system does not make enough money to keep it going.¹⁸ Although Respondent Walker let potential buyers manage the water system under his control in both 2002 and 2004, those potential buyers did not purchase the water system.¹⁹ In both instances Respondent Walker was aware that Commission and CDPH approval was necessary if the water system was to be sold.²⁰ There is no evidence that a sale of the water system took place in either of these incidents.

However, Yermo's late-filed annual reports identified recent changes in Walker's legal ownership of Yermo that took place without Commission authorization. Walker reported in Respondents' 2003 Annual Report that he was the president of Yermo, a California corporation incorporated on January 1, 1992. Walker then reported in Yermo's 2005 Annual Report that he was the owner of Yermo as an unincorporated entity. Finally, Walker reported in Yermo's 2006 Annual Report that he was the president of Yermo, a Florida Corporation

¹⁸ *Id.* at 26 and 36.

¹⁹ *Id.* at 24 and 27.

²⁰ *Id.* at 25 and 27.

incorporated on January 1, 2006.²¹ These changes in the ownership of Yermo raise a cloud over the true legal entity of Yermo and who owns Yermo.

Although Florida authorized that entity to issue up to 100 shares of stock, it is not known who owns the issued and outstanding shares of stock. This recent Florida incorporation of Yermo is impacted by Pub. Util. Code §§ 818, 825, and 851. Pub. Util. Code § 818 prohibits a public utility from issuing stock without first having secured from this Commission an order authorizing the issuance of stock. Pub. Util. Code § 825 provides for any issuance of stock without an order of authorization from the Commission to be void. Respondents have not requested and this Commission has not approved this change in ownership of Yermo. Therefore, the 2006 incorporation of Yermo as a Florida corporation is voided.

This leaves an issue of whether Yermo is an incorporated or unincorporated California company as authorized by the Commission. By Resolution W-3149, dated November 22, 1983, the owners prior to Walker and Ruff were authorized to combine the accounting records of California corporations Marine and Hel-Bro to operate those water systems under the name of Yermo Water Company, Inc., a California corporation. Hence, Yermo, a California corporation, was owned by California corporations Marine and Hel-Bro. Yermo was subsequently acquired by Walker and partner Ruff in 1985, pursuant to D.85-08-082. That acquisition involved Walker and Ruff acquiring

²¹ The Florida Department of State Divisions of Corporations web site www.sunbiz.org/search.html shows that Walker incorporated Yermo in Florida effective January 1, 2006. See Appendix C.

all of the outstanding *capital stock* of two California corporations, Marine and Hel-Bro, operating as Yermo, a California corporation. Therefore, Yermo consisted of three (Yermo, Hel-Bro, and Marine) California corporations in 1985. Subsequently, by D.86-05-026, dated May 7, 1986, Marine and Hel-Bro were merged with Hel-Bro becoming the surviving corporation leaving two active corporations, Hel-Bro and Yermo owned by Walker and Ruff. By Resolution W-3812, dated November 23, 1993, Walker became the sole shareholder of the surviving California corporations Yermo and Hel-Bro. Therefore, Yermo should consist of two California corporations, Yermo and its parent company, Hel-Bro.

However, the California Secretary of State's corporation web site www.sos.ca.gov/business, reports that both Marine and Hel-Bro are suspended corporations and have lost all rights and power of a California corporation for failure to meet statutory filing requirements of either the Secretary of State's office or the Franchise Tax Board. Yermo, as a California corporation, is not currently listed on the California Secretary of State's corporation web site.

Respondents' recent changes in the legal ownership of Yermo are in violation of Pub. Util. Code §§ 818, 825, and 851. Clear title of Yermo and its public utility water properties, including well sites, needs to be established because of Respondents' recent unauthorized changes in the legal ownership of Yermo.

4.2. Unresponsive to Rules and Orders

Actions supporting a finding that Respondents have been unresponsive to rules and orders were identified in the investigation because Respondents have consistently violated CDPH rules and G.O. 103, and failed to comply with and update tariffs and various other Commission orders, some of which are

addressed above regarding actual or effective abandonment of the water system and below regarding Respondents' inability to adequately serve customers.

4.2.1. CDPH Violations

Respondents have a history of CDPH violations. Approximately a half dozen of those citations covering a ten-year period from 1997 to 2007 were identified in the investigation. These citations were for, among other matters, failure to notify customers that Yermo had violated bacteriological quality standards; failure to comply with prior citations, primary drinking water standards for total coliform and requirements for monitoring lead and copper tap water, having qualified personnel to run the water system, having a certified distribution operator, maintaining records of source production records and well pump tests, and preparing a Technical Managerial and Financial Capacity assessment including a five-year budget projection and capital improvement plan; and overdue or omitted sampling results for all wells. CDPH also required Respondents twice to impose a "Boil Water Advisory" notice, the first from July 3, 2006 to August 10, 2006 and the second from July 19, 2007 to August 14, 2007.²²

Respondent Walker asserted at the PHC and testified at the evidentiary hearing that all CDPH violations were resolved.²³ Contrary to that assertion and testimony, a January 8, 2009 citation issued to Respondents subsequent to the PHC and prior to the evidentiary hearing substantiates otherwise. This citation

²² A Boil Water Advisory recommends that water users boil tap water or use bottled water for drinking and cooking purposes as a safety precaution.

²³ Reporter's Transcript, Prehearing Conference, *mimeo.* at 6 and Reporter's Transcript, Volume 1, *mimeo.* at 13, respectively.

was for failure to comply with CDPH Directives 3 and 8 of an October 2, 2006 citation and Directive 1 of an April 27, 2007 violation. Specifically, Respondents have not complied with the required utilization of distribution operators that have been certified by the CDPH, not completed lead and cooper monitoring, are in violation of CDPH's waterworks standard, and have not paid a \$2,500 civil penalty assessed on April 20, 2007.²⁴ This new citation increased the unpaid civil penalty to \$43,800 for Respondents' failure to satisfy the original civil penalty. Additional penalties may be imposed if Respondents fail to comply within 30 days of receipt of the citation.

A CDPH cover letter to the January 8, 2009 citation identified CDPH's primary concerns of Yermo to be the lack of direct and continuous management over the water system and the lack of a certified distribution operator. Absent immediate attention and response to this latest citation, the CDPH intends to request that a court appointed receiver be directed to oversee the water system's operations in order to achieve compliance.²⁵ Contrary to Respondents' assertion, CDPH violations are still outstanding.

4.2.2. General Order 103 Violations

G.O. 103 sets forth the minimum standards and rules for water service. It requires that any utility supplying water for human consumption shall hold or make application for a permit as provided by the Health and Safety Code of the State of California, and shall comply with the laws and regulations of the state or local Department of Public Health. Therefore, Respondents remain in violation

²⁴ Exhibit 3.

²⁵ *Id.*

of G.O. 103 until such time that all CDPH and Commission violations have been resolved.

4.2.3. Tariffs

Respondents' unresponsiveness to Commission rules and orders included their inability to understand and implement tariffs, which set forth authorized procedures and charges for providing public utility service.

4.2.3.1. Public Utilities Reimbursement Fee

One such failure to comply with tariff provisions was a failure to pay annual Public Utilities Reimbursement Fee (user fee) since 2003. Respondent Walker asserted at the PHC that he was not delinquent in submitting his user fees to the Commission.²⁶ In response to that assertion, the assigned ALJ ordered Respondent Walker to file with the Commission's Docket Office by July 28, 2008 an explanation of Yermo's user fees, paid and unpaid to date. Although Respondent Walker provided his response by letter to the ALJ on July 23, 2008 he did not file that response with the Docket Office as instructed. Hence, the ALJ issued a July 30, 2008 ruling instructing that response to be filed with the Docket Office by August 18, 2008.

The Docket Office rejected Respondent Walker's subsequent August 18, 2008 filing because that filing, among other things, did not include an original certificate of service as required by the Commission's Rules of Practice and Procedure. It was finally accepted for filing on August 27, 2008, a month late. Respondent Walker again stated that he was current with user fee payments and

²⁶ *Id.* at 5.

included an August 4, 2008 copy of a \$521 past due CDPH small water system annual fee payment to substantiate that he was current.²⁷

The ALJ issued a September 10, 2008 ruling for additional user fee information to be filed with the Docket Office by October 2, 2008 because the response did not address the Commission's user fees. This time, Respondents were instructed to review their Tariff Schedule No. UF of Tariff Sheet 104-W, dated April 29, 1998 before responding to specific user fee questions set forth in that ALJ Ruling.

Respondents filed an October 14, 2008 late-filed response stating that: "We have tried to find a copy of the Schedule UF, reimbursement fee surcharge. We have visited your web-site and asked for help, as we have no copy or information concerning that particular Schedule and do not know how to figure the fees due until we have a copy of the Schedule." Respondents further explained that: "[Yermo] has not billed, collected, or applied these fees as we were not aware they were to be billed to the customers and our software system is being upgraded to provide for this charge which will be added to the October, 2008 billings and continue thereafter." Respondents, not aware that the required surcharge rate for the user fee increased to 1.5% from 1.4% effective July 1, 2007 stated that Yermo "will immediately file an updated Schedule UF as soon as we get a copy of the form needed to do so."²⁸

As detailed in Yermo's Tariff Schedule No. 1 for metered service signed by Respondent Walker, effective December 6, 1993, all customer bills are subject to

²⁷ See Appendix B.

²⁸ An updated user fee tariff to reflect the 1.5% surcharge was subsequently filed on February 24, 2009 with a July 1, 2007 effective date.

the user fee set forth in Schedule UF.²⁹ Attached to Schedule No. 1 is Schedule UF, dated April 29, 1998, which provides for a 1.4% surcharge to be added to all customers bills to be paid to the Commission pursuant to Pub. Util. Code §§ 401-442.

Respondent Walker also testified that Yermo's customers have not been billed user fees.³⁰ The Commission subsequently received 2003 through 2007 past due user fee payments on October 24, 2008. However, there appears to be a discrepancy in how the payments were calculated. User fee payments for the 2003, 2004, and 2006 years were based on the gross revenue amount reported in the respective annual reports, consisting of cash actually received and billed but not yet received from customers. For 2005, the user fee rate was applied on \$57,838 of gross revenues instead of the \$86,422 amount reported in Yermo's Annual Report. This difference in the 2005 payment from other years may have resulted from excluding customers' receivables in the 2005 calculation while including customers' receivables in the calculation for the other years.³¹ Respondent Walker acknowledged that Yermo's 2005 Annual Report does not report any customer receivables for that year, an indication that either all customers have paid their water bills or that revenue are not properly reported in the Annual Report.³² Although Respondents are now current with user fee payments, those payments may not have been properly calculated. The Commission's Division of Water and Audits should audit Yermo's 2003 through

²⁹ See Appendix A.

³⁰ Reporter's Transcript, Volume 1, *mimeo.* at 41.

³¹ *Id.* at 44.

³² *Id.*

2008 user fee calculation and payments. Respondents should also update Yermo's user fee tariff to reflect the current 1.5% user fee rate.

4.2.3.2. Purchased Power Balancing Account

A tariff provision not specifically identified in the investigation was a purchased power balancing account. Special Condition 1 of Yermo's Tariff Schedule No. 1 for metered services provides for a balancing account and requires a \$0.38 per hundred cubic feet (Ccf) purchased power surcharge to be added to the quantity rate of each customer's water usage.³³ Irrespective of this tariff provision, Yermo does not maintain a purchased power balancing account.³⁴ The Division of Water and Audits should audit Respondents' billing procedures to determine whether the purchased power surcharge has been billed and, if so, offset that revenue against Yermo's purchased power costs and require Yermo to record on its accounting records any balance in a purchased power balancing account.

4.3. Inability to Adequately Serve Customers

Another shortcoming supporting a finding that Respondents are unable to adequately serve customers was identified in the investigation in that Respondents have failed to maintain complaint logs as required by G.O. 103 and failed to address customer complaints.

At a July 27, 2006 local public meeting organized by the Yermo Community Services District (YCSD) attended by approximately 90 of Yermo's customers, complaints were voiced on the quality of Yermo's water, water outages, malodorous and bad tasting water, broken water meters, inadequate

³³ See Appendix A.

³⁴ Reporter's Transcript, Volume 1, *mimeo.* at 40.

water pressure, distribution system leaks, poor service, lack of response to customer complaints, and operation of the water system by an out-of-state owner.³⁵

Complaints similar to those expressed at the YCSD meeting were expressed at a prior June 29, 1993 general rate case public meeting attended by 120 to 150 customers, almost half of the utility's customers.³⁶ Those complaints and the existence of an antiquated water system contributed to the Commission requiring Yermo to maintain a customer complaint log and to file a plan of action with periodic updates detailing necessary repair work and system upgrades.³⁷

Although Ordering Paragraph 6 of the order instituting this investigation required Respondents to submit to the Director of the Water Division a copy of Yermo's 2002 through 2007 customer complaint logs no later than May 23, 2008, those logs were not submitted until three months later, in August of 2008.

If a customer wants to contact the water company to lodge a complaint that customer can either call the Commission or Yermo. If a customer calls Yermo, depending on which number is called, that customer reaches either a local office, the cell phone of a local full-time employee or Respondent Walker located in Florida.³⁸ There is no assurance that the complaints will be logged. The local full-time employee tries to keep a log of customer complaints but does

³⁵ Investigation 08-04-032, *mimeo.* at 7.

³⁶ Resolution No. W-3812, *mimeo.* at Appendix E.

³⁷ The plan of action and periodic updates have yet to be received by the Commission as addressed in our prior Resolution W-3812 discussion.

³⁸ Reporter's Transcript, Volume 1, *mimeo.* at 64.

not keep a pen and a log list with him.³⁹ Respondents do not maintain an accurate customer complaint log.

5. Discussion

The inability of Respondents to operate Yermo adequately has been a Commission and CDPH concern since at least 1993. Respondents made no direct showing at the evidentiary hearing to substantiate that the Commission should not petition the San Bernardino County Superior Court to appoint a receiver to assume possession and operate Yermo. Based on the Division of Water and Audits' cross examination of Respondents and its direct testimony as discussed in the body of this order, Respondents have consistently violated and remain in violation of Commission and CDPH orders. These violations include failure to respond to Commission and CDPH orders, ignoring the need for capital improvements, moving the business office out-of-state, the lack of a certified water operator, nonpayment of a \$43,800 CDPH penalty, not correcting outstanding CDPH violations, G.O. 103 noncompliance, noncompliance with Yermo's own tariffs, delinquent user fee billings and payments, outdated user fee tariff, delinquent filing of Annual Reports, not maintaining a purchased power balancing account, and not maintaining accurate customer complaint logs.

A contributing factor to these violations is Respondent Walker's limited water business experience and knowledge. Respondent Walker's only water experience prior to acquiring Yermo was in constructing wells and a lake outside of the CDPH jurisdiction.⁴⁰ Respondent Walker does not have a civil engineering background and does not have a certified state water operator's license. Prior to

³⁹ *Id.* at 63.

⁴⁰ Reporter's Transcript, Volume 1, *mimeo.* at 3 through 5.

purchasing Yermo he was in the car business and in a flea market swap business in Las Vegas. Respondent Walker still has car dealerships in Georgia and Florida and continues to operate Yermo from Florida. Respondents are not and have not been familiar with Commission or CDPH rules for the past 22 years.⁴¹

Because of the pervasive and persistent violations of Commission and CDPH orders, and Respondent Walker's limited water business experience and knowledge, we conclude that Respondents are unable or unwilling to adequately serve Yermo's ratepayers.

Although Respondents have been trying to sell Yermo for the past ten years they have been unsuccessful in finding a buyer.⁴² Capital investments to Yermo have been almost nonexistent, with total utility plant decreasing from \$367,810 in 1993 to \$101,210 at the end of 2007. Total utility plant net of accumulated depreciation at year end 2007 was approximately \$23,000. Yermo has also been operating at a loss since at least 2003. Lack of operating and capital funds is due in part to Respondents' failure to provide water service pursuant to authorized tariffs and failure to seek periodic rate increases since 1993.

Respondent Walker seeks to continue operating Yermo for six months to a year after his pending rate increase is granted to make the water system more saleable. However, Respondent Walker has been unable to demonstrate to the Commission that he is capable of operating the water system, or that he is familiar with the Commission and CDPH rules. The need to protect the public

⁴¹ Reporter's Transcript, Volume 1, *mimeo.* at 39.

⁴² *Id.*, *mimeo.* at 26.

health of Yermo's customers precludes us from permitting Respondents to continue operating the water system even for a limited period of time.

YCSD has expressed an interest in acquiring Yermo but it has been unable to obtain sufficient information from Respondents. Hence, YCSD wants the Commission to: (1) retain jurisdiction over Yermo until YCSD completes its application for re-acquisition of the water powers necessary to take control of Yermo, (2) order Respondents to furnish essential information for YCSD to move forward with purchase of the water system and, (3) establish the estimated cost of Yermo.

Even if we had the authority to require Respondents to provide YCSD all the information that it has requested there is no assurance that YCSD would receive the information. The Commission is still waiting to receive Resolution W-3812 information which it required Respondents to submit 14 years ago. Further, absent Respondents' agreement, the Commission does not have authority to establish a cost for Yermo.⁴³ YCSD may pursue its interest in acquiring Yermo through the Superior Court of San Bernardino.

Respondents have not substantiated that they are able or willing to adequately serve Yermo's customers or are responsive to the rules and orders of the Commission and CDPH. Pursuant to Pub. Util. Code § 855, the Commission's Legal Division is directed to immediately start proceedings in the Superior Court of San Bernardino County for appointment of a receiver to take possession of and operate Yermo.

6. Fines and Penalties

⁴³ Pub. Util. Code § 1405.1.

The Division of Water and Audits recommended that \$7,500 in penalties should be assessed against respondents for their failure to comply with various Commission and CDPH rules, as detailed in Exhibit 2, pages 33 and 34.

Commission D.98-12-075 set forth five factors to be considered in assessing a penalty. Those factors involve an analysis of: 1) the severity of offense; 2) the conduct of the utility; 3) the financial resources of the utility; 4) the totality of circumstances; and 5) the role of precedent.⁴⁴

The record regarding the severity of the offenses, conduct of the utility, and totality of circumstances would support a penalty. However, it is difficult to justify a penalty based on the financial resources factor. That is because financial resources of the violator are considered to determine the size of a penalty that would deter Respondents from future violations without becoming excessive. As reported in Respondents' annual reports for the past five years, Respondents have operated at a loss in each of those years. Any penalty would be deemed excessive because Respondents do not have the resources to pay any penalty. A penalty should not be assessed at this time.

7. Categorization and Need for Hearing

In the Order instituting this investigation, the Commission determined preliminarily that this was an adjudicatory proceeding and that an evidentiary hearing would be necessary. In their responses to the order, no party objected to these determinations and we affirm them at this time.

8. Assignment of Proceeding

John A. Bohn is the assigned Commissioner and Michael J. Galvin is the assigned ALJ in this proceeding.

⁴⁴ 84 CPUC2d, 154, at 182-185.

Findings of Fact

1. Yermo Water Co. is a regulated water utility serving approximately 350 metered customers approximately ten miles north of Barstow in San Bernardino County.
2. The Commission found in Yermo's 1993 general rate proceeding that Yermo's water system was antiquated with most of its pipes over 50 years old and in constant need of repair, which resulted in numerous customer complaints.
3. The Respondents to this investigation are Yermo Water Company and Walker, the sole owner of Yermo.
4. Respondents did not provide any direct testimony at the evidentiary hearing.
5. Resolution W-3812 required Yermo to maintain a customer complaint log and comply with G.O. 103 with respect to customer complaints.
6. Resolution W-3812 required Yermo to file a plan of action no later than the end of February 1994 detailing repair work and system upgrading and to provide scheduled updates on the plan of action.
7. Respondent Walker, not sure if the required plan of action was filed with the Commission, does know that scheduled updates were not filed.
8. The only reportable improvement made to the water system from January 2003 to December 2007 was \$2,000 for Other Equipment.
9. Pub. Util. Code § 791 requires Yermo to have an office in a county of this State in which its property is located and shall keep in that office all the books, accounts, papers, and records required by the Commission to be kept within this State.
10. Respondent Walker moved out-of-state to Florida in 2002 and continued to manage the water company from Florida without Commission authorization.

11. Respondents closed the Yermo water business office in 2006 and relocated the office and all financial records to Florida.

12. The billing functions continue to be handled out of Florida.

13. Respondents currently have a part-time State certified operator for the water system.

14. Respondent Walker reported in Yermo's filed 2003 Annual Report that he was the president of Yermo, a California corporation.

15. Respondent Walker reported in Yermo's filed 2005 Annual Report that he was the owner of Yermo, an unincorporated entity.

16. Respondent Walker reported in Yermo's filed 2006 Annual Report that Yermo is a Florida corporation.

17. Pub. Util. Code § 818 prohibits a public utility from issuing stock without having first secured from this Commission an order authorizing the issuance of stock.

18. Pub. Util. Code § 825 provides for the issuance of stock without an order of authorization from the Commission to be void.

19. Pub. Util. Code § 851 precludes the sale of a water system without prior Commission authority.

20. G.O. 103 sets forth the minimum standards and rules for water service.

21. G.O. 103 requires a water utility to comply with the laws and regulations of the state or local department of Public Health.

22. CDPH required Respondents to issue a Boil Water Advisory Notice from July 3, 2006 to August 10, 2006 and again from July 19, 2007 to August 14, 2007.

23. The CDPH issued Respondents a citation on January 8, 2009 for failure to resolve prior CDPH citations and payment of a \$2,500 civil penalty. That civil penalty has increased to \$43,800.

24. Respondents' Tariff Schedule No. UF 104-W, dated April 29, 1998 requires customers to be billed a 1.4% user fee surcharge.

25. The user fee surcharge was increased to 1.5% from 1.4% effective July 1, 2007.

26. Respondents did not bill customers a user fee surcharge.

27. Respondents have not updated tariffs to reflect the current user fee surcharge.

28. Special Condition 1 of Yermo's Tariff Schedule No. 1 for metered services provides for a purchased power balancing account and requires a \$0.38 per hundred cubic feet purchased power surcharge to be added to the quantity rate of each customer's water usage.

29. Yermo does not maintain a purchased power balancing account.

30. Respondents have been trying to sell Yermo for the past ten years.

31. Ordering Paragraph 6 of the order initiating this investigation required Respondents to submit to the Director of the Water Division a copy of their 2002 through 2007 customer complaint logs no later than May 23, 2008.

32. Respondents complied with Ordering Paragraph 6 of the order initiating this investigation in August of 2008, three months late.

Conclusions of Law

1. Respondents have consistently violated and remain in violation of Commission and CDPH orders.

2. Yermo is unable or unwilling to adequately serve its ratepayers.

3. Yermo's inability to adequately serve its ratepayers has a potential adverse effect on public health.

4. Clear title of Yermo and its public utility water properties, including well sites, needs to be established because of Respondents' recent unauthorized changes in the legal ownership of Yermo.

5. Pub. Util. Code § 855 provides that the Commission may petition the Superior Court for appointment of a receiver to operate a water system when the Commission determines, after notice and hearing, that the water system company is unable or unwilling to adequately serve its ratepayers, or has been actually or effectively abandoned by its owners, or is unresponsive to the rules or orders of the Commission.

6. The Commission's Legal Division should be directed to file immediately with the Superior Court of San Bernardino County a petition for appointment of a receiver to take possession of and operate the water system of Yermo.

7. The Commission's Division of Water and Audits should audit Yermo's 2003 through 2008 user fee calculations and payments.

8. The Division of Water and Audits should audit Yermo's purchased power surcharge billing practices.

O R D E R

IT IS ORDERED that:

1. The Commission's Legal Division shall file immediately with the Superior Court of San Bernardino County a petition for appointment of a receiver to assume possession of and operate the water system of the Yermo Water Company.

2. The 2006 incorporation of Yermo Water Company as a Florida corporation is voided pursuant to Pub. Util. Code §§ 818, 825, and 851.

3. The Commission's Division of Water and Audits shall audit Yermo Water Company's 2003 through 2008 user fee calculations and payments within 30 days after the effective date of this decision.

4. The Division of Water and Audits shall audit Yermo Water Company's billing procedures to determine whether the purchased power surcharge has been billed and, if so, offset that revenue against Yermo's purchased power costs and require Yermo to record on its accounting records any balance in a purchased power balancing account within 30 days after the effective date of this decision.

5. Yermo Water Company shall reimburse the Commission for the reasonable costs incurred in having Division of Water and Audits staff travel to its out-of-state office, in the event that Yermo does not produce the records and information needed by the Division of Water and Audits to undertake its audit of user fees and purchase power surcharge for inspection in California.

6. Investigation 08-04-032 is closed.

Dated May 7, 2009, at San Francisco, California.

[D0905022 Appendices A-C](#)