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Decision 91-11-054 November 20, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of EOS (Petaluma), Inc. for a Finding of Exemption from Public Utilities Commission Regulation.	))))	Application 91-07-046 (Filed July 31, 1991)

ORIGINAL

Latham and Watkins, by Virginia D. Estes, Kelley M. Gale, and Christopher W. Garech, Attorneys at Law, and Andrew J. Skaff, Attorney at Law, for Envirotech Operating Services (Petaluma), Inc., applicant.

Dickson & Ross, by Kathryn Burkett Dickson and Jeffrey A. Ross, Attorneys at Law, for Friends of Petaluma and Petaluma River Council, protestants.

Edward R. Becker and Denis Dandeneau, for Envirotech Operating Services, Inc.; M. Patricia Hilligoss, Mayor, City of Petaluma; John L. Scharer, City Manager, City of Petaluma; Richard D. Rudnansky, City Attorney, City of Petaluma; Robert T. Feraru, Public Advisor's Office; and Matt Maguire, Clara Q. Nelson, Duane M. Bellinger, and Vasco Brazil, for themselves; interested parties.

Hallie Yacknin, Attorney at Law, and Arthur B. Jarrett, for Water Utilities Branch.

I N D E X

OPINION

I. Introduction

In this proceeding, applicant, Envirotech Operating Services (Petaluma), Inc. (EOS-Petaluma), pursuant to California Local Government Privatization Act of 1985 (California Government Code, Section 54250 et seq. and California Public Utilities (PU) Code § 10013) seeks a determination that the wastewater treatment project (the project) to be developed by applicant in Petaluma, Sonoma County, California is not a public utility within the meaning of PU Code § 216, and is therefore exempt from regulation by the California Public Utilities Commission.

This is the first application under the Privatization Act to be considered by the Commission.

II. The Parties

Envirotech Operating Services, Inc. (EOS) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is the predecessor in interest to the applicant herein with respect to the Memorandum of Understanding (MOU) involved in this proceeding.

EOS-Petaluma is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is authorized to do business in the State of California. A copy of Certificate of Qualification No. 1692099 issued by the Office of the California Secretary of State on July 12, 1991, authorizing EOS-Petaluma to transact "intrastate business within the State of California" is attached as Exhibit H to the application herein.

EOS-Petaluma was originally incorporated as a Delaware corporation on March 21, 1991, under the corporate name "Wheelabrator International Holding Co., Inc." On June 26, 1991, a

Certificate of Amendment of the Certificate of Incorporation was filed with the Delaware Secretary of State. This amendment changed the name of the corporation from Wheelabrator International Holding Co., Inc. to Envirotech Operating Services (Petaluma), Inc. (see Exhibit G to application).

The City of Petaluma (the City) is a charter city located in Sonoma County. By Resolution No. 97-107 N.C.S., dated April 29, 1991, its City Council authorized its City Manager to enter into, on its behalf, the MOU involved herein.

Friends of Petaluma is an unincorporated association of residents of, and businesses in the City of Petaluma. It appears in this proceeding as a protestant.

The Petaluma River Council is an unincorporated association of individuals and organizations concerned with the development and quality of the Petaluma River. It appears in this proceeding as a protestant.

III. The Application

The application herein was filed on July 31, 1991, and notice of said filing was published in the Commission's Daily Calendar on Wednesday, August 7, 1991. Two formal protests have been filed and letters from several interested residents of the City have been received seeking denial of the application for exemption.

The application was initially determined to be incomplete. Additional documentation was requested by the Commission and timely furnished by applicant's counsel. The application was deemed complete within the meaning of PU Code § 10013(c) by a letter from Arthur B. Jarrett, Project Manager, CPUC Water Utilities Branch, to applicant's counsel dated August 27, 1991.

An evidentiary hearing was held on September 23, 1991, at which exhibits were offered and admitted into evidence, and attorneys for EOS and the City argued in support of the application. Members of the public were also given an opportunity to express their views concerning the application. Because witnesses for the applicant and the City were unavailable for the hearing, a second hearing was held on October 9, 1991, at which witnesses for EOS and the City testified and were cross examined, briefs were submitted by the parties, and the public was once again given the opportunity to express their views concerning the application.

Pursuant to PU Code § 10013(c), within 90 calendar days after the application is deemed complete, the Commission must determine whether the privatization project is a public utility within the meaning of PU Code § 216. The 90-day time limit may be waived by the parties; however, in this case, the applicant refused to agree to a waiver of the time limit for Commission action. Since the application was deemed complete on August 27, 1991, the Commission must, in the absence of a waiver, issue its decision on the application not later than November 25, 1991. Should it fail to issue its decision by that date, the privatization project will, in accordance with PU Code § 10013(c), be deemed exempt from Commission regulation. In other words, the application will, in effect, be granted by default.

The short time frame within which the Commission must act on the application becomes extremely critical when it is considered that the Commission must allow 30 days from the date the application is deemed complete for those opposing the application to file a protest (see California Constitution, Article XII, Section 2; PU Code § 1701; and Rule 8.3 of the Commission's Rules of Practice and Procedure). Furthermore, if hearings are held, the Commission may not issue its decision until at least 30 days following the filing and service of the proposed decision of the

administrative law judge (see PU Code § 311(d)). In an emergency, this latter 30-day period may be reduced or waived by the Commission.

Since the 30-day protest period must have expired before any hearings on an application may be held, realistically, the time for the administrative law judge to hear the matter, prepare, file and serve his recommended decision, and the Commission to consider comments received concerning the administrative law judge's recommended decision, and prepare and vote on a final decision is reduced to 30 days or less, unless the Commission waives the 30-day Section 311 period, in which event its time to finally act is 60 days or less. It is for this reason, and this reason alone, that no time was available in this case for the preparation and submission of briefs post-hearing. Instead, because of the severe time constraints, the briefs were directed to be filed on the last day of hearing. We feel all parties were denied a substantial right by this draconian time schedule. The power to correct this shortcoming, however, lies not with this Commission, but with the Legislature.

In this regard, we feel compelled to note in passing that when this legislation (S.B. 163) was under consideration in 1985, the Commission urged that the Bill be amended to increase the time limit or vetoed because the time limit for Commission action was so constrained. The Commission's concerns were, unfortunately, ignored.

Because this is a case of "first impression" under the Privatization Act, we deem it advisable to review in some detail the project, the MOU executed by and between the City and EOS, the applicant's predecessor in interest, regarding the project, and the applicable law.

IV. Factual Background

The existing City of Petaluma wastewater treatment plant (existing plant) is a combination of facilities which have been added piecemeal over the past 50 years or so. The original plant was constructed in 1938 and provided treatment for the entire community waste load. As the community grew, additional facilities were added to the plant in an effort to keep up with the community's growth and to comply with effluent requirements, discussed below.

With the sustained growth of the City, the existing plant has proved to be inadequate and has been experiencing difficulties due to high flow, and the age and configuration of the plant. The City has continued to upgrade the existing plant in an attempt to meet the increased demand, but it is generally conceded by those who have examined the facility that the existing plant is approaching the end of its useful life expectancy.

The existing plant is operated pursuant to a National Pollutant Discharge Elimination System permit (NPDES permit) issued by the Regional Water Quality Control Board, San Francisco Bay Region (the Board) pursuant to delegation authority under the Clean Water Act (33 U.S.C. Sec. 1251, et seq.)(see Exhibit A attached to the application). The NPDES permit notes the existing plant's capacity and processing limitations and provides for ongoing regulation and review by the Board and its staff of any proposed changes to the existing plant, including review of engineering reports documenting adequate reliability, capacity and performance.

Of particular concern is the fact that the NPDES permit also specifies a schedule for either the construction of upgraded facilities at the existing plant or the construction of a new treatment plant to remedy the existing deficiencies and increase capacity (see exhibit A, pp. 2, 3, and 12 attached to the

application). The schedule provides, among other things, that the City must (1) submit a plan for the new construction by July 1, 1991, (2) submit to the Board a status report regarding the environmental review of whatever action the City proposes to take by December 1, 1991, and (3) begin construction by May 1, 1992.

A. Current Operation of the Existing Plant

For the past 13 years, EOS, 100% owner of EOS-Petaluma, has been employed under a contract with the City of Petaluma as the operator of Petaluma's existing wastewater plant. EOS has operated and maintained the existing plant in apparent substantial compliance with the discharge requirements of the City's NPDES permit and has continued to serve the increasing demands of the City. It has reportedly never been cited or fined for any violation of law or administrative regulation for any infraction arising out of the operation of the facility.

EOS is 100% owned by Wheelabrator Technologies, Inc. (WTI), a publicly held Delaware corporation which is, in turn, 56% owned by Waste Management, Inc. (WMI), also a foreign corporation headquartered outside California. According to the applicant, WTI is one of the largest developers of privately owned environmental facilities in the country, including a number of waste-to-energy facilities and four co-generation facilities. WMI is the largest processor of municipal solid waste in the U.S., and through its "Recycle America" program, provides 2.5 million homes throughout the nation with curbside recycling.

EOS was formed in the early 1970's to assist municipalities with the operation of their wastewater treatment facilities and help them comply with the discharge standards imposed by the Clean Water Act. At present, EOS operates approximately 30 facilities around the nation.

B. The New Facility

According to the application, because of (1) limitations of the existing plant, (2) the expected growth of the City as projected in its General Plan for the years 1987 through 2005, and (3) the requirements of the NPDES permit, the City and EOS in 1988 began discussing various options available to the City to relieve the problems associated with the existing plant. One of several options identified was to have EOS build a new facility and sell wastewater treatment services to the City, which, in turn, would provide those services to its residents. As part of the effort to identify the elements and costs of this alternative, the City and EOS in 1988 began negotiating a Memorandum of Understanding (MOU) with respect to the terms under which the City and EOS would enter into such an arrangement.

According to the applicant, once the various available options were identified, the City Council held a meeting on or about July 24, 1989, to discuss the MOU and the other alternatives, and then asked its engineering staff to evaluate the proposed solutions and the technical and cost considerations involved. This meeting was a duly noticed, regularly scheduled meeting of the Council, but consideration of the MOU was not specified in the notice of the meeting. The staff thereafter conducted the requested analysis and published its conclusions in the "Staff Report for Expansion of the Wastewater Treatment Plant" dated April 16, 1990 (staff report). A copy of that report is attached as exhibit B to the application. In its report, the staff concluded that it would not be prudent to add new capital equipment to the existing plant because its life expectancy was too short, that it would be more cost effective to develop a completely new facility to accommodate the projected growth of the City, and that the most cost effective and expedient means for doing so was to have EOS design, build, own and operate the new facility and sell

the wastewater treatment services to the City (staff report, pp. 5-8).

The City and EOS then proceeded with further negotiation of the MOU and at another regularly scheduled Council meeting the Council reviewed the project and the terms of the MOU. On April 29, 1991, the City Council unanimously approved the MOU (see exhibits C and D attached to the application). As contemplated by the terms of the MOU, EOS then formed EOS-Petaluma as a wholly-owned subsidiary to construct, own and operate the project. By a writing dated June 30, 1991, EOS assigned all of its right, title and interest in the MOU to EOS-Petaluma, and EOS-Petaluma assumed EOS's obligations under the MOU.

V. Positions of the Parties

A. EOS-Petaluma

EOS-Petaluma takes the position that the proper procedure to be followed under the Privatization Act is that followed by them and the City of Petaluma in this case. That is, preliminarily enter into a memorandum regarding the major points of understanding concerning construction of a new wastewater facility and the general terms under which wastewater services will be provided to the City. EOS-Petaluma argues that such a memorandum of understanding is the appropriate vehicle upon which the Commission may grant its exemption. It recognizes that the MOU is nonbinding upon the parties to it, but argues that the privatization act precludes them from entering into a final, binding agreement until after the exemption is applied for by the privatizer and granted by this Commission.

EOS-Petaluma argues that the MOU contains sufficient information on all matters essential to the statute and meets all statutory requirements for exemption.

Recognizing that the MOU, by its terms is not a binding agreement, EOS-Petaluma argues that after initial exemption is granted by the Commission, the parties to the MOU will return to the bargaining table and continue negotiations looking toward a final agreement under which EOS-Petaluma will plan, construct and operate the wastewater facility for the City, and the City will provide those services to its residents. If final agreement cannot be reached, the project will be discontinued and neither party will be further obligated to the other under the MOU. If, however, a final agreement is reached, that agreement will be submitted to the Commission for final exemption consideration.

B. The City of Petaluma

The City of Petaluma takes the same position as EOS-Petaluma with respect to the procedure to be followed in this case for seeking and obtaining exemption from the Commission for this privatization project. That is, a three step process; initial exemption based on the nonbinding MOU, followed by additional negotiations to "firm up" the terms of the agreement, followed by a second submission to the Commission for exemption in the event a final agreement is reached by and between the parties. If no final agreement is reached, the parties are not obligated to pursue the matter and life goes on as before. The City notes that during the time negotiations are going on between the parties, the City will take all action necessary for it to comply with any provision of Government Code Section 54253 from which it is not exempt by reason of its status as a Charter City.

C. Friends of Petaluma and Petaluma River Council

It is the position of these Protestants that the application for exemption filed by EOS-Petaluma is premature and does not contain any binding commitments, and as such does not constitute a proper foundation for exemption by this Commission. Protestants argue that before the City can enter into any understanding with any party for the provision of services of the

type contemplated by the MOU, it must comply with each and every requirement of Government Code Section 54253. They argue that even if the City is exempt from certain of the requirements contained in that section, it must still comply with the remaining requirements of that section of the law. Protestants are particularly concerned and incensed about the City's refusal to select a privatizer by means of a competitive process before entering into negotiations with and signing the MOU with EOS-Petaluma, under which the City undertook to deal exclusively with EOS-Petaluma for a period of 18 months from the date of execution of the MOU or until a service agreement is reached between the City and EOS-Petaluma.

As noted, the City claims that, as a Charter City, it is not required to comply with the provisions of Government Code Section 54253, and thus is free to deal exclusively with EOS-Petaluma without having to competitively bid the project or comply with any other requirement of Section 54253.

Protestants argue that the proper procedure to be followed in an application of this nature is for the City to comply with the requirements of Section 54253 before entering into any type of agreement or understanding with a privatizer. After all Government Code prerequisites have been met, a binding service agreement subject to or contingent upon Commission exemption, may be entered into. That is, the agreement which the Commission reviews and upon which any exemption finding is based must be an otherwise final, binding agreement which spells out each detail of the services to be provided and the exact terms controlling the provision of those services, as well as all other rights and obligations of each of the parties. This agreement would be contingent upon a grant of exemption by the Commission. That is, if the Commission found that the agreement met the requirements of PU Code $ 10013, and granted the exemption, the agreement would take effect without further action by the parties. If, on the other hand, the Commission was to find the agreement wanting in one

detail or another and denied the exemption, the agreement, being contingent upon a grant of exemption, would be of no force or effect. This, according to Protestants, would satisfy the statutory prohibition against executing a final agreement prior to Commission exemption.

Finally, protestants argue that the MOU is of no force or effect because the City Manager who negotiated the MOU on behalf of the City and the Mayor and a majority of the City Council who approved it on behalf of the City each had a conflict of interest which disqualified or should have disqualified them from negotiating or voting on the MOU.

In regard to the charge of conflict of interest, protestants note that during the time the City Manager was conducting negotiations with EOS, he held 130 shares of stock in Waste Management, Inc., the holder of 56% of Wheelabrator Technologies, Inc., EOS's parent company. Further, protestants allege that at the time the Mayor voted on the MOU, she was the owner of 100 shares of stock in Waste Management, Inc. In addition, protestant notes that prior to voting on the MOU, four of the members of the City Council had received political contributions from Waste Management, Inc., or one of its affiliates. Protestants claim that the stock ownership in, and/or the acceptance of political contributions from Waste Management, Inc. or any of its affiliates at or about the time the City Manager, Mayor and City Council members acted on the MOU constituted a conflict of interest which contaminated or compromised their independence and impartiality, and by reason thereof, the application for exemption based upon the MOU should be denied.

We take no direct action on this issue for two reasons. First, when compared to the total number of shares of stock of Waste Management, Inc. outstanding, the number of shares held by either the City Manager or the Mayor is insignificant and the

likelihood of either receiving dividend increase or other benefit directly from this transaction is nil. That is not to say, however, that each of these officials was under no obligation to disclose their interest in Waste Management, Inc. To the contrary, their failure to disclose their personal ownership of shares of stock, however small in number, gives rise to an appearance of impropriety that was easily avoidable. Second, we take no action based on the acceptance by the Council members of political contributions from Waste Management, Inc. for two reasons. First, there is evidence that each of the Council members who accepted the contributions properly reported the same as required by law. Second, the amount each of the Council members received was nominal (in most, if not all cases, it was $200). From a more practical point of view, if each of the Council members had disqualified herself or himself from voting on the MOU, a quorum could not have been assembled. While there are no doubt those who would suggest that course of action should have been followed, we will leave the resolution of that question to the voters of Petaluma.

D. The California Public Utilities Commission

The technical staff of the Commission's Water Branch issued a report determining all prerequisites to granting the exemption met, and urged the Commission to grant the exemption based on the MOU. On the other hand, the legal staff representing the Water Branch noted that subsequent to the time the technical staff examined the MOU, hearings have been held which impact upon or affect the previous opinion of the Water Branch. Further, counsel for the Water Branch argues that the privatization statute under which this proceeding is brought is so poorly drafted as to be unenforceable, and urges the Commission to seek its amendment or outright repeal. Barring this, the Commission is urged to deny the exemption on the ground that the MOU does not meet the requirements of PU Code § 10013(e). Further, counsel contests the interpretation put forth by the other parties concerning the

responsibilities imposed upon the Commission under the California Environmental Quality Act (CEQA). Because of the action we take on the application, we do not reach this latter point.

Public Interest in the Proceeding

Subsequent to the issuance of the ALJ's proposed decision in this proceeding, several comments were received from the parties and from unrepresented members of the public.

Nineteen letters were received from unrepresented members of the public who reside or have their office in Petaluma. Of the 19 responses, two are supportive of the application and urge the Commission to approve the application. While dated subsequent to the issuance of the ALJ's recommended decision, neither of these responses, one from a builder and the other from a representative of a real estate brokerage/investments/management company, refer to nor comment on the ALJ's recommended decision. The remaining 17 responses from the public oppose the application and urge the Commission to deny the application. Of those 17 negative responses, six are dated prior to and 11 are dated subsequent to the issuance of the ALJ's proposed decision. Of the 11 post-issuance responses, seven refer to and urge the adoption of the ALJ's proposed decision denying the application. The remaining four post-issuance responses do not refer to the ALJ's proposed decision, but simply urge the Commission to deny the application.

The contents of each of these letters are noted.

VI. Discussion

A. Existing Regulatory Scheme

As a general rule, all entities which fall within the definition of "public utility" contained in PU Code § 216 are under the regulatory control of this Commission (PU Code §§ 216, 701). There is an exception in the case of a public utility owned and/or controlled by a municipal corporation. (Constitution, Article XI,

Section 9). As long as the public utility is owned and/or controlled by a municipal corporation, regulatory control over that public utility lies with the municipality, not this Commission. However, if ownership and/or control over that public utility passes from the municipality to a private entity such as a corporation, regulatory control over the utility passes from the municipality and vests in this Commission. The Commission may, however, upon a proper privatization project application, determine, pursuant to PU Code $ 10013, that the utility is not a public utility within the definition of PU Code $ 216, and thus is exempt from regulation by this Commission. This is an application for such a determination.

B. Applicable Law

In 1985, the California legislature recognized that federal grant money for constructing and improving local wastewater and sewerage systems had sharply declined during the preceding several years, and because then current levels of federal and state funding were inadequate, California was in need of an additional two billion dollars to meet then current clean water goals.

In the face of this fiscal crisis, alternative methods of financing the construction, operation and improvement of wastewater and sewerage systems had to be developed. The legislature noted that the Governor's Infrastructure Review Task Force report of April, 1984, had identified one alternative method of financing needed wastewater treatment systems, known as privatization. Essentially, privatization is nothing more than the process by which a municipality enters into an agreement with a private entity under which the private entity supplies or performs some otherwise governmental service or function in exchange for a fee. The legislature then determined it to be in the public interest to allow such privatization projects under certain conditions and safeguards (Section 1, S.B. 163, approved October 1, 1985 and filed

with the Secretary of State October 1, 1985) (see exhibit E to application).

S.B. 163, the legal framework within which an application for privatization is to be undertaken, is, unfortunately, not one of the more worthy examples of legislative draftmanship. It is difficult to determine specifically what this Commission is to consider in its analysis and evaluation, the chronology in which various events are to occur, what weight is to be given to any particular item, and what "home rule" powers, if any, the local municipality retains over the various aspects of the evaluation process. For instance, in connection with this application, the City of Petaluma maintains that as a "Charter City," it is excused from compliance with certain laws which, but for its status as a "Charter City", would otherwise be binding upon it. It maintains that one of the statutory requirements with which it, because of its "Charter City" status, did not need to comply before entering into the Memorandum of Understanding is the requirement of competitive selection for awarding "outside" contracts, such as that involved here. Such a requirement is contained in Government Code Section 54253(b).

Because of our disposition of this application, as well as the specific wording of PU Code $ 10013(d), we need not address that particular contention concerning the powers of a "Charter City." We do not at this point concede, however, that a "Charter City" is completely relieved from compliance with laws of otherwise general application. We do note, however, that the record indicates that the City Charter of the City requires public bidding for contracts in excess of $3,000. In his testimony, John Scharer, the Petaluma City Manager, stated that the City Charter provision referred to does not apply to "service contracts," and that this project would thus not have to be competitively bid. Since a determination of this issue by this Commission is specifically barred by the provisions of PU Code $ 10013(d), we need not resolve

it, but will leave that to some other forum should the occasion arise.

PU Code § 10013(c) requires this Commission to determine whether the privatization project is a public utility within the meaning of PU Code § 216. Section 10013(c) further provides that in making that determination, the criteria in subdivisions (d) and (e) of Section 10013 are to be used.

Section 10013(d) provides:

> "The commission may determine that a privatization project is not a public utility within the meaning of Section 216, and is therefore exempt from commission regulation if it finds that the application submitted and any subsequent changes to the executed franchise, license, or service agreement both demonstrates that the local agency retains sufficient jurisdiction to protect the public interest and adequately addresses all aspects of the provision of service which would otherwise be subject to commission regulation. In making its determination, the commission shall not determine whether the local agency has complied with Section 54253 of the Government Code. The decision of the commission shall be final and conclusive in the absence of any subsequent changes." (Emphasis added.)

Section 54253 of the Government Code, the emphasized portion of the above-quoted provision of the PU Code, specifies the prerequisites which must be met before any franchise, license or service agreement for a privatization project may be entered into between a privatizer and a local agency.

The section reads as follows:

> "54253. Agreements with privatizers; prerequisites
>
> "No franchise, license, or service agreement for a privatization project pursuant to this article shall be entered into between a local agency and a privatizer, unless and until all of the following occur:

"(a) The privatizer has filed an application with the commission and the commission has made a determination that the project is exempt pursuant to subdivision (c) of Section 10013 of the Public Utilities Code.

"(b) The local agency has selected the privatizer through a competitive procedure which is not based solely on the price offered by the privatizer.

"(c) The local agency has evaluated the project's design, capacity, financial feasibility, and cost compared with other conventional financing methods, as well as other alternatives to the project and found that the project's costs will be equal to, or lower than, conventional financing.

"(d) The local agency has conducted a noticed public hearing on the proposed franchise, license, or service agreement. The notice for the public hearing shall be published pursuant to Section 6062 [requiring 10 days notice] and shall contain, at a minimum, all of the following:

"(1) A statement that the privatizer has applied for an exemption from commission regulation, pursuant to Section 10013 of the Public Utilities Code.

"(2) A statement describing the proposed privatization project, including its cost and service area.

"(3) A statement of the time and place of the public hearing to be held for the purpose of hearing public comments on

the proposed franchise, license, or service agreement for the privatization project.

"(4) A statement of where and when the proposed franchise, license, or service agreement will be available for public inspection prior to the hearing.

"(e) The local agency has adopted the executed franchise, license, or service agreement for a privatization project by ordinance which states that it is subject to the provisions for referendum applicable to a local agency.

"(f) The local agency retains ownership over any treated effluent from the privatization project that is not consigned to an outfall sewer but is made available for commercial or agricultural use.

"(g) The agreement contains provisions stating it shall be subject to the state's prevailing wage laws.

"(h) The local agency has met and conferred with all affected employee organizations under whose jurisdiction the work or service proposed under the franchise, license, or service agreement would normally be performed. The local agency shall make all reasonable efforts to avoid reducing its existing work force or demoting its existing employees as a result of entering into the franchise, license or service agreement. If any adverse impacts which are raised by either party during the meet and confer process are necessary, the local agency shall adopt by resolution detailed findings

explaining the necessity for the adverse impacts.

"(i) The local agency finds that the privatizer has the expertise to ensure the continued operation and maintenance of the privatization project. This expertise shall include, but not be limited to, an adequate number of personnel certified in wastewater treatment plant operations pursuant to Chapter 9 (commencing with Section 13625) of Division 7 of the Water Code.

"(j) The agreement contains provisions to ensure that the privatization project is operated to meet any applicable federal or state water quality standards or other laws."

While PU Code § 10013(d) specifically states that the Commission shall not determine whether the local agency has complied with Section 54253 of the Government Code, it does not indicate on whom that responsibility devolves, nor how the Commission is to be advised of the local agency's compliance with the requirements of that section. That omission presents the Commission with a dilemma inasmuch as items specified in subsections (c), (d)(2), (g), (h), (i) and (j) are normally considered by the Commission in utility licensing cases.

PU Code § 10013(e), over which the Commission does have review authority, sets forth the prerequisites that must be met before the Commission may make a finding that the privatizer is not a public utility within the meaning of § 216 and is, therefore, exempt from regulation by this Commission.

PU Code § 10013(e) reads as follows:

"(e) In making a determination pursuant to subdivision (c), the commission shall review the application and any subsequent changes to the executed franchise, license, or service agreement to ensure

that the application or executed agreement, where applicable, grants the local agency, at a minimum, all of the following: (Emphasis added.)

"(1) Exclusive authority to establish all rates and rate changes charged to the public.

"(2) Approval over any proposal of the privatizer to provide new, additional, or alternative service to any other public or private entity or to change the service fee paid to the privatizer by the local agency.

"(3) Approval over the original design and construction of the project, including any changes in design, alterations, or additions to the project.

"(4) Approval over any changes in ownership of the party or parties subject to the franchise, license, or service agreement.

"(5) Authority to impose fines and penalties for noncompliance with any provision of the executed franchise, license, or service agreement, or for failure to provide the service within the time period agreed to in the franchise, license, or service agreement.

"(6) Authority to ensure that the facility is adequately maintained.

"(7) Adequate opportunity to monitor compliance with the agreement and to ensure the project will be operated to meet any applicable federal or state water quality standards or other applicable laws.

"(8) Adequate opportunity to amend the agreement in the event of unforeseen circumstances or contingencies, such as flood, earthquake, fire, or

other natural disasters or federal tax law changes."

As is indicated above, the legislation pursuant to which an application for exemption is undertaken is not a model of clarity, and unfortunately affords little guidance to the parties responsible for moving the project through the procedures which hopefully will end with a finding of exemption from regulation by this Commission. The statutory provisions are, in certain instances, internally inconsistent or mutually exclusive, with the result that those involved in the process find themselves faced with an apparent "Catch 22" situation.

For example, the introductory sentence to Government Code Section 54253 indicates that no franchise, license, or service agreement for a privatization project shall be entered into until certain thereafter designated items or events occur. However, subdivision (e) of that section, one of the designated items or events that must occur prior to a franchise, license or service agreement being entered into, reads that the local agency must have adopted the executed franchise, license, or service agreement. How this feat is to be accomplished is not explained.

Further, subdivision (a) of PU Code § 10013 provides that prior to signing an executed franchise, license, or service agreement with a local agency, a privatizer shall apply to the commission for a determination that the proposed project is not a public utility within the meaning of PU Code § 216. On the other hand, subdivision (a) of Government Code Section 54253 provides that no franchise, license, or service agreement will be entered into until the privatizer has filed an application with the commission and the commission has made a determination that the project is exempt pursuant to subdivision (c) of section 10013 of the P. U. Code. Once again, there appears to be an inconsistency.

The task before this Commission, however, is to examine the application and supporting documentation to determine whether the local agency, in this case the City of Petaluma, retains the powers enumerated in PU Code § 10013(d) and (e). In making this assessment, as we previously recognized, we are expressly forbidden to determine whether the City has complied with § 54253 of the Government Code. If the City does not retain the powers enumerated in PU Code § 10013(d) and (e), the application for exemption must be denied. It should be clearly understood that as far as the Commission is concerned, a denial of exemption does not preclude the parties from entering into any agreement they desire. It simply means that any agreement under which EOS, EOS-Petaluma, or any entity other than the City becomes the owner of, or acquires control over the existing or new wastewater facility, the facility will be considered a public utility as defined in PU Code § 216, and, as such, come under the regulatory jurisdiction of this Commission.

VII. Issues

The fundamental, threshold issue which must be determined is whether the requested exemption may be granted on the basis of a memorandum of understanding, which by its own terms is intended to be nonbinding, and admittedly does not contain the final, binding agreement of the parties.

If we answer the first question in the affirmative, we must then resolve the additional issue of whether the requirements of PU Code § 10013(d) and (e) are satisfied by the terms of the MOU.

We answer the first question in the affirmative and the second in the negative.

With respect to the first issue, it is noted that a memorandum of understanding is usually not intended to bind the parties to the terms and conditions included in the memorandum. Rather, it serves to show the good faith of the parties as negotiations wind their way to what each of the parties hope will ultimately result in a contract. It may express the general areas of understanding already reached and delineate areas requiring further negotiation and/or future resolution. Preliminary negotiations do not usually constitute a contract, and an agreement to enter into a contract is of no effect unless all of the terms and conditions of the contract are agreed upon and nothing is left to future negotiations.

The MOU before us clearly falls into the category of preliminary negotiations. The preamble to the MOU reads as follows:

> "This Memorandum of Understanding("MOU") is made and entered into..., for the purpose of memorializing the understanding of the parties concerning certain key provisions to be included in a definitive waste water treatment services agreement...proposed to be executed by the parties subject to the satisfaction of certain conditions, as described below. This MOU is not intended to be a binding agreement, or a complete and final expression of the agreement of the parties concerning the matters addressed herein. Rather, it is intended to provide a framework for future negotiations, and to allow EOS-Petaluma to seek an exemption from regulation by the California Public Utilities Commission."

One would be hard pressed to find a clearer expression that the parties to the MOU did not intend it to be a final binding agreement and that its contents were not definitely established, but subject to future negotiation. By its own terms, any provision in the MOU is subject to change until a final, binding agreement on all subjects contained therein is reached between the parties.

Having concluded that the MOU on which the instant application for exemption is made is not intended to be a binding agreement and does not express the final agreement of the parties on the points contained in the MOU, we must now decide whether such a document is a sufficient basis upon which to make a determination whether to grant the exemption requested.

Except in the most unusual of circumstances, before a document can become an operative document giving rise to legal rights and obligations, the document must be binding. That is to say, there must be some agreement between the parties which sets forth the rights and/or obligations sought to be enforced. To be legally enforceable, these rights and obligations of the parties must result from a "meeting of the minds" after "arms length negotiations." Utilizing this test, the MOU between the City and EOS-Petaluma normally could not be the basis for Commission action as the Commission must be satisfied, and the parties must understand, that the document on which the Commission's decision is based cannot be altered in any way without prior Commission approval without jeopardizing any permit or license granted by the Commission based on the original document.

In this case, however, because of the peculiar language of the privatization act, we must conclude that the legislature intended the exemption decision of the Commission to be based not on a final, binding agreement, but upon a preliminary document such as that now before us, to be followed by further review of the final document negotiated between the privatizer and the local agency.

In several places in the privatization act, the legislature makes it clear that an application for exemption has to be made <u>prior</u> to the parties signing an executed franchise, license or service agreement. Section 54252 of the Government Code states:

> "(a) In accordance with Section 10013 of the Public Utilities Code, <u>prior to signing an executed</u> franchise, license, or service

> agreement with a local agency, a privatizer shall apply to the commission [California Public Utilities Commission] for a determination that the proposed privatization project is not a public utility...." (Emphasis added.)

Again in Section 54253 of the Government Code, similar language is used to express the intent of the legislature. Here it is stated:

> "No franchise, license, or service agreement for a privatization project pursuant to this article shall be entered into between a local agency and a privatizer, unless and until all of the following occur:
>
> "(a) The privatizer has filed an application with the commission and the commission has made a determination that the project is exempt...." (Emphasis added.)

In PU Code § 10013, the Legislature expressed the idea in these terms:

> "(a) Prior to signing an executed franchise, license, or service agreement with a local agency, a privatizer shall apply to the commission for a determination that the proposed privatization project is not a public utility...." (Emphasis added.)

Once again, in PU Code § 10013(c), it is provided:

> ". . . No franchise, license, or service agreement between a privatizer and a local agency shall be entered into until the commission has either exempted the project or the 90-calendar-day period has expired...." (Emphasis added.)

From all of the foregoing, we conclude that the legislature did not intend a local agency and a privatizer to enter into a final franchise, license or service agreement unless and until an application for exemption has been made to the commission and granted by it. Only after this preliminary application

approval has been obtained may the parties enter into a final, binding service agreement or similar undertaking.

While it appears that the legislature intended the Commission to consider exemption based on less than a final, binding service agreement, the Commission must, as a matter of necessity, insure that any document submitted for consideration as a basis for exemption contain sufficient information to satisfy the requirements of PU Code $ 10013(d) and (e). Thus, exemption may be granted if the document upon which exemption is sought both demonstrates that the local agency retains sufficient jurisdiction to protect the public interest and adequately addresses all aspects of the provision of service which would otherwise be subject to Commission regulation, and further satisfies the requirements of PU Code $ 10013(e)(1) through (8) inclusive. On the other hand, exemption must be denied if the document, whatever its form, fails to satisfy any of those requirements.

Further, if exemption is based on a preliminary non-binding resolution or memorandum of understanding such as in the present case, the Commission will retain jurisdiction to insure that any later or supplemental agreement between the parties intended to replace, modify in any way, or ratify the document upon which the exemption was based meets or continues to meet the statutory exemption criteria. In such case, the later document must be submitted to the Commission in order that the Commission may satisfy itself that the final agreement does not contain anything that would cause the Commission to withhold a final grant of exemption or to revoke the exemption previously provisionally granted. In short, the Commission must ensure that any post-exemption service agreement not change or eliminate the justification for the exemption.

We now turn to the MOU as submitted and consider whether, as written, it satisfies all of the requirements of PU Code $ 10013(e). The applicant contends that the MOU satisfies the

statutory requirements and offers a comparison of MOU provisions with the statutory requirements (Exhibit F to the application) as evidence of that compliance. We will examine each of the statutory requirements in order and determine whether the provisions of the MOU meet those requirements.

PU Code § 10013(e)(1) requires that the application (and any subsequent changes to the executed franchise, license, or service agreement) ensure that the application or executed agreement grants the local agency exclusive authority to establish all rates and rate changes charged to the public.

This requirement is dealt with at Section 1.13 on page 10 of the MOU, which states in relevant part, "...the City will have exclusive authority to establish all rates, rate changes, connection charges and other fees payable by members of the public for sewer services." While it would be instructive for the application to include information about how the City will calculate the new base rates, or how, when, or even if increases or decreases in operating expenses will be factored into the rates, we cannot conclude that bare compliance with § 10013(e)(1) requires such a showing. Therefore, we find that the requirements of PU Code § 10013(e)(1) have been met.

PU Code § 10013(e)(2) requires the local agency to retain approval over any proposal of the privatizer to provide new, additional or alternative service to any other public or private entity or to change the service fee paid to the privatizer by the local agency.

This requirement is dealt with in two provisions of the MOU; Section 1.11 on page 9 and Section 1.14 on page 10. Once again, the MOU merely reiterates the provisions of the statute. In this case, however, such reiteration is sufficient, as the satisfaction of the statutory requirement does not require any information in addition to the statutory wording. Thus, the MOU meets the requirements of PU Code § 10013(e)(2).

PU Code § 10013(e)(3) requires that the local agency retain approval over the original design and construction of the project, including any changes in design, alterations, or additions to the project. This requirement is dealt with in the MOU at Section 1.3 on page 2.

Even though the MOU provides for increases in monetary compensation to the privatizer to accommodate additional costs arising out of any change in design, the local agency retains approval rights over any proposal of the privatizer to change design or construction of the project, including any changes in design, alterations, or additions to the project. We conclude that the requirements of PU Code § 10013(e)(3) are satisfied by the MOU as written.

PU Code § 10013(e)(4) requires that the local agency retain approval over any changes in ownership of the party or parties subject to the franchise, license, or service agreement. This requirement is the subject of Section 1.17 on page 12 of the MOU.

The MOU spells out the right of the privatizer, on 5 days' notice to the local agency, to assign its rights under the MOU to EOS-Petaluma. That assignment has previously been made.

In addition, the MOU reserves to the privatizer the right, once again on 5 days notice to the local agency, to transfer the MOU and its rights thereunder, "to an Affiliated Company of EOS-Petaluma...." "Affiliated Company" is therein defined as set forth in 15 U.S.C.A. Section 80a-2.

Further, under the provisions of Section 1.17 of the MOU, the privatizer has the right to "collaterally assign its interest in the Project including, without limitation, its rights under the ground lease, this MOU and the Service Agreement to secure financing...."

The MOU provides that with the above described exceptions, the service agreement "will grant to the City the right of approval, which shall not be unreasonably withheld, over any changes in ownership of the equity owner of the Project, whether EOS-Petaluma or its successor. The City shall approve a change in ownership where the new owner meets criteria to be specified in the service agreement relating to financial capability."

During the hearing, a witness testified that the privatizer had, as indicated above, assigned the MOU and all its rights thereunder to EOS-Petaluma in accordance with the provisions of the MOU. The witness further testified that no further assignment of the MOU or rights thereunder was contemplated at this time.

While no further assignment may be presently contemplated, the terms of the MOU specifically allow for such further assignment and that right cannot be "unreasonably" obstructed by the local agency. Thus, on 5 days notice, at any time during the 20-year contract, EOS-Petaluma could announce, without veto power in the City, that it was assigning EOS-Petaluma's interest to some affiliate, currently in existence or formed after the execution of the service agreement, which meets the definition of "affiliate" as contained in 15 U.S.C. Section 80a-2. The agreement further seeks to constrain the City's discretion with respect to approval even over nonaffiliated companies by indicating that criteria will be established under which the City must grant approval of changes of ownership. Under such circumstances, the City is, in effect, agreeing in advance to contract away any discretion which it must statutorily retain. Under such circumstances, the requirements of PU Code § 10013(e)(4) are not satisfied.

PU Code § 10013(e)(5) requires that the local agency retain authority to impose fines and penalties for noncompliance with any provision of the executed franchise, license, or service

agreement, or for failure to provide the service within the time period agreed to in the franchise, license, or service agreement.

Section 1.10 of the MOU, which deals with the Section 10013 (e)(5) requirement, limits the authority contained in that section to (1) a delay in project completion, and (2) fines imposed upon the City by state and federal regulatory agencies (up to $600,000 annually). The MOU fails to grant the City the statutorily required authority to impose fines and penalties for other noncompliance, and by reason thereof, fails to meet the requirements of PU Code $ 10013(e)(5).

PU Code $ 10013(e)(6) requires that the local agency retain authority to ensure that the facility is adequately maintained.

While Section 1.7 of the MOU generally provides that the privatizer will maintain and repair all equipment, structures, vehicles and component parts of the project, and states that the City shall have the authority required by PU Code $ 10013(e)(6), that authority is not unlimited. Section 1.7 of the MOU contains the following limitation: "The City may inspect the Project in order to examine whether EOS-Petaluma's maintenance obligations are being adequately discharged, so long as such inspection shall not interfere with the day to day operation of the Project." (Emphasis added.)

At the hearing, it was recognized by the privatizer's counsel that inspection may, of necessity, entail shutting down or partially disassembling equipment which, by definition, would interfere with the operation of the project. While this shortcoming in the language of the MOU is not considered a major defect, it is a disqualifying defect insofar as exemption is concerned.

PU Code $ 10013(e)(7) requires the agreement between the parties to grant the local agency adequate opportunity to monitor compliance with the agreement and to ensure the project will be

operated to meet any applicable federal or state water quality standards, or other applicable laws. This requirement is the subject of Sections 1.8 on page 6 of the MOU. This section generally complies with the requirements of PU Code $ 10013(e)(7). Further, compliance with that section of the PU Code is assured by penalty provisions contained in Section 1.10 of the MOU.

PU Code $ 10013(e)(8) requires the agreement between the privatizer and the local agency to provide for an adequate opportunity to amend the agreement in the event of unforeseen circumstances or contingencies, such as flood, earthquake, fire, or other natural disasters or federal tax law changes.

Section 1.20 of the MOU, which deals with the subject of the Section 10013(e)(8) requirement, provides only for an adjustment of the fees due EOS-Petaluma and for excusing its performance in the event of unforeseen circumstances of the nature described in the statutory provision. Most succinctly stated, the MOU provision protects only EOS-Petaluma and the wording of its provisions anticipate an <u>increase</u> in fees due in the event of a disaster. Basically, under the provision as written, the City would adjust the fees paid to EOS-Petaluma "in order to cover any increased costs and costs of amortizing any additional debt issued and/or equity contributed (including a reasonable return on such equity), if any, and to insure that EOS-Petaluma's debt coverage ratio under the service agreement is not otherwise impaired."

The natural disaster provision, as currently written, does not comply with the requirements of the statute. As written, the MOU provides only for specific amendments accruing to EOS-Petaluma's benefit at the expense of the City. Such a provision, as now written, cannot be said to either satisfy the requirements of PU Code $ 10013(e)(8), or protect the public interest.

In view of the fact that several provisions of the MOU fail to satisfy the requirements of PU Code $ 10013(e), the conclusion follows that under the MOU as written, the local agency

does not retain sufficient jurisdiction to protect the public interest, nor does the MOU adequately address all aspects of the provision of service which would otherwise be subject to commission regulation.

The application for a determination that the wastewater treatment project to be developed by applicant in Petaluma, Sonoma County, California is not a public utility within the meaning of PU Code § 216 should be denied without prejudice to refiling after amendment.

While it it not within our power to rewrite the terms of the MOU between EOS-Petaluma and the City, we cannot help observing that it appears that in its quest to obtain a quick and painless solution to a problem partially caused by its own long continuing failure to earmark access or "hook up" fees for capital expansion or replacement, the City has entered into an MOU in which the "benefit of the bargain" is decidedly in favor of the privatizer at the expense of the public interest. One example will suffice.

Under the MOU, the privatizer is to plan, design, construct and operate a new wastewater facility for the City. The term of the agreement runs for 20 years. The project will be built on land owned by the City and leased to the privatizer. The term of the ground lease, however, runs for 48 years. When questioned about what would happen in the event the parties decided not to renew the service contract at the end of the initial 20 year term, the representatives of both the privatizer and the City indicated that the City could exercise its power of condemnation (eminent domain) and take possession of the property. Under condemnation, the City would be required to pay the fair market value of the physical plant plus the fair market value of the remaining 28 years of the ground lease. Thus, the City would be required to pay the fair market value of a 28-year lease on its own property whose lease value would greatly exceed the nominal rental it receives from the privatizer. If the City decided to condemn only the

physical plant and not the ground lease and then to operate the plant itself, the privatizer would become the City's landlord with respect to the land upon which the plant sits.

On the other hand, if the termination date of the ground lease coincided with the termination date of the service agreement and the parties decided not to renew the service agreement and condemnation was required, the City would merely have to pay the privatizer the then fair market value of the physical plant. It would not be required to condemn the real property on which the plant stood, as the leasehold which the privatizer held would have expired and all interest in the real property would have reverted to the City.

Without some rational explanation why the MOU provides for a service term of 20 years and a ground lease for 48 years, the 48 year ground lease term does not appear to be in the public interest.

Comments

The representative of the protestants, Friends of Petaluma and Petaluma River Council, fully supports the ALJ's proposed decision and urges its adoption by the Commission with one correction. Counsel suggests that Conclusion of Law 12 be revised to read "The application for exemption should be denied without prejudice to refiling after amendment" rather than the proposed language "The MOU should be denied without prejudice to refiling after amendment." The reference to the MOU in this conclusion of law is erroneous and the recommended change has been made.

The City of Petaluma agrees with the approach taken by the ALJ, but in essence defers to EOS to comment on the proposed decision. The City does, however, note that its claim of charter city autonomy with respect to the requirements of Government Code Section 54253 extends only to the requirement of competitive bidding under Section 54253(b). That is, it does not claim that it is not required to comply with all provisions of Government Code

Section 54253, only that it is not required to comply with the competitive bid requirement of Section 54253(b). It further states that "The City does intend to comply with the remaining portions of the Act." (Comments, p. 2, lines 7-8.)

That the City recognizes its responsibility to comply with the Government Code provisions contained in the Privatization Act (excluding its debatable views concerning Section 54253(b)) strengthens our conviction that compliance with those provisions should be accomplished prior to application to the Commission for exemption. Only the peculiar language of the Privatization Act which precludes entering into a final agreement until after Commission exemption prevents such pre-application compliance. Without that restriction, the parties could, as noted elsewhere in this decision, comply with all requirements of the Privatization Act, enter into an agreement contingent upon Commission exemption, and upon Commission approval have the entire process completed. If that procedure was allowed and followed, the entire process would be open to public scrutiny, all interested parties would be fully informed and have an opportunity to participate, and the application would have to be presented to the Commission only once at the completion of all other steps, not piecemeal as is presently required under the Act.

The Commission's Water Branch agrees with the ALJ's analysis and rationale and recommends adoption of the ALJ's proposed decision. Water Branch strongly recommends an applicant's compliance with the provisions of the Government Code prior to application to the Commission, and urges this Commission to seek repeal or amendment of PU Code Section 10013 and Government Code Section 54253 consistent with the concerns and guidance presented in the ALJ's proposed decision.

Water Branch's concerns and recommendations will be considered in another forum.

As its comments on the ALJ's proposed decision, EOS-Petaluma provides the Commission with approximately 10 pages of "enhancements" to the MOU which it claims will resolve the concerns expressed by the ALJ at the hearings and expressed in his proposed decision. In other words, if we accept these "enhancements" as part of or somehow integrated into the MOU, the MOU would then pass muster. We reject both the "enhancements" and the rationale supporting them.

We view the proffered "enhancements" as new matter and as an attempt to amend the application after hearing. The "enhancements" have not been examined nor tested by cross-examination. Indeed, our acceptance of these "enhancements" would simply deprive the other parties of this time honored method of discovery of truth. We will not place our stamp of approval on this type of procedure. (See Rule 77.3 of the Commission's Rules of Practice and Procedure.)

Findings of Fact

1. EOS is a Delaware corporation authorized to do business in the State of California.

2. EOS-Petaluma is a Delaware corporation authorized to do business within the State of California as evidenced by Certificate of Qualification No. 1692099 issued by the California Secretary of State on July 12, 1991.

3. The City of Petaluma is a Charter City located in Sonoma County, California.

4. The City, by resolution, authorized its City Manager to enter into, on its behalf, the MOU dated April 30, 1991, between the City and EOS. The City Manager has exercised that authority.

5. By assignment dated June 30, 1991, EOS assigned all its right, title, and interest in the MOU to EOS-Petaluma.

6. EOS-Petaluma has made this application for a determination that the wastewater treatment privatization project to be developed by it in Petaluma, Sonoma County, California is not

a public utility within the meaning of PU Code § 216, and is therefore exempt from regulation by this Commission.

7. Evidentiary hearings were held in this cause on September 23 and October 9, 1991.

8. The Commission makes no determination concerning the City's compliance with Section 54253 of the Government Code.

9. The MOU grants the City exclusive authority to establish all rates and rate changes charged to the public.

10. The MOU grants the City approval over any proposal of the privatizer to provide new, additional or alternative service to any other public or private entity or to change the service fee paid to the privatizer by the City.

11. The MOU grants the City approval over the original design and construction of the project, including any changes in design, alterations, or additions to the project.

12. The MOU does not grant the City approval over any changes in ownership of the party or parties to the franchise, license, or service agreement.

13. The MOU does not grant the City authority to impose fines and penalties for noncompliance with any provision of the executed franchise, license, or service agreement, or for failure to provide the service within the time period agreed to in the franchise, license, or service agreement.

14. The MOU does not grant the City authority to ensure that the facility is adequately maintained.

15. The MOU grants the City adequate opportunity to monitor compliance with the agreement and to ensure the project will be operated to meet any applicable federal or state water quality standards or other applicable laws.

16. The MOU does not grant the City adequate opportunity to amend the agreement in the event of unforeseen circumstances or contingencies, such as flood, earthquake, fire, or other natural disasters or federal tax changes.

17. The application for a determination that the wastewater treatment project here involved is not a public utility within the meaning of PU Code § 216 should be denied without prejudice to refiling after amendment.

Conclusions of Law

1. All parties to this action have standing before this Commission.

2. The MOU between EOS-Petaluma and the City of Petaluma may form the basis for Commission determination under the privatization act (Government Code Section 54253 and PU Code § 10013).

3. The MOU meets the requirements of PU Code § 10013(e)(1).

4. The MOU meets the requirements of PU Code § 10013(e)(2).

5. The MOU meets the requirements of PU Code § 10013(e)(3).

6. The MOU does not meet the requirements of PU Code § 10013(e)(4).

7. The MOU does not meet the requirements of PU Code § 10013(e)(5).

8. The MOU does not meet the requirements of PU Code § 10013(e)(6).

9. The MOU meets the requirements of PU Code § 10013(e)(7).

10. The MOU does not meet the requirements of PU Code § 10013(e)(8).

11. The MOU as written does not serve the public interest.

12. The application for exemption should be denied without prejudice to refiling after amendment.

ORDER

IT IS ORDERED that the application is denied without prejudice to refiling after amendment.

This order is effective today.

Dated November 20, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

Commissioner John B. Ohanian, being necessarily absent, did not participate.

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director