

ORIGINAL

Decision No. 87781 AUG 30 1977

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of BENJAMIN NEPOMUCENO and LOURDES NEPOMUCENO, husband and wife, for authority to sell to KEEFNER ENTERPRISES, INC., E. F. KEEFNER, President, all of their right, title and interest in the water systems now owned by Benjamin Nepomuceno and Lourdes Nepomuceno and known as YOUNGTOWNE WATER COMPANY, in the unincorporated area of Apple Valley, County of San Bernardino, State of California, and to transfer certificate of public convenience and necessity.

Application No. 56828
(Filed October 25, 1976)

O P I N I O N

This application seeks authority for the sale of Youngtowne Water Company, Inc. (Youngtowne) to Keefner Enterprises, Inc. (Keefner). On November 18, 1976, December 13, 1976, and March 22, 1977, applicants transmitted information to the Commission to supplement the material in the application. These communications are designated Exhibit 1 in this proceeding. On March 28, 1977 the Commission staff prepared a report in connection with this matter, which is designated as Exhibit 2. Based upon the record herein, the Commission makes the following findings and conclusions.

Findings of Fact

1. Youngtowne is a California corporation. In Decision No. 62515 in Application No. 43008, entered on September 5, 1961, the Commission granted Youngtowne a certificate of public convenience and necessity to construct and operate a public utility water system and authorized it to issue a specified number of shares of its common stock. The order in Decision No. 62515, provided in part that:

"1.b. The certificate granted herein shall not become effective until applicant shall have installed and placed in operation defluoridation equipment which will reduce the fluoride content of all water served to not more than 1.0 part per million, all in a manner acceptable to the Commission, and shall have so notified the Commission in writing after the effective date of this order."

* * *

"7. Applicant shall render no service outside the boundaries of Tract No. 6182 unless and until permission for the rendering of such service has been previously obtained from the Commission.

"8. Applicant shall at all times supply water to its customers which has a fluoride content of not more than 1.0 part per million."

2. In Decision No. 63941 in Application No. 43008, entered on July 17, 1962, the Commission found that Youngtowne had complied with Ordering Paragraph 1.b. of Decision No. 62515 and ordered the certificate granted in Ordering Paragraph 1.a. of that decision to become effective on July 17, 1962.

3. On July 24, 1972, the Superior Court of the county of San Bernardino appointed a receiver for Youngtowne.

4. In 1971 the Legislature enacted Section 854 of the Public Utilities Code, which was in effect at the time of the appointment of the receiver. Section 854 provides as follows:

"No person or corporation, whether or not organized under the laws of this State, shall, after the effective date of this section, acquire or control either directly or indirectly any public utility organized and doing business in this State without first securing authorization to do so from the commission. Any such acquisition or control without such prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this State shall aid or abet any violation of this section."

5. The question of whether a receiver should be appointed for a utility is one for an appropriate court. (Hempy v Public Utilities Comm. (1961) 56 C 2d 214.) "In an ordinary receivership over private business concerns, a receiver, in the absence of specific authority, has only very limited powers and in doubtful or important matters must apply to the court for instruction and advice. (Northern Finance Corporation v. Byrnes (8th Cir.) 5 F.2d 11, 13.) However, when a receiver is appointed to take possession of and operate a quasi-public corporation obligated to render continued service to the public (such as a public utility), he may in the first instance be vested with broad authority to 'do anything the corporation might have done to make the most out of the assets in his hands.'" (People v Riverside University (1973) 35 CA 3d 572, 580; Pacific Railway v Wade (1891) 91 C 449; Pacific Indemnity Co. v Workmen's Comp. App. Bd. (1968) 258 CA 2 35.) Before an individual who is appointed as a receiver for a utility can act, the requisite approval under Public Utilities Code Section 854 must be obtained from the Commission. The Commission is not usually a party in, nor does it generally have knowledge of, receivership proceedings. While granting authority under Section 854 to a court-appointed receiver may be perfunctory in many instances, The Commission has a duty to determine, under its regulatory jurisdiction, whether the named receiver has the ability and fitness to

conduct the utility's operations and whether his assumption of control would be adverse to the public interest. (Hempy v Public Utilities Comm., supra.)

6. The Commission takes official notice that its records indicate that no order was entered under Section 854 authorizing the receiver to assume control of Youngtowne.

7. On April 16, 1976, the San Bernardino Superior Court, in the case of Nepomuceno v Burrows (Nos. CW 8595 and 154896) entered a judgment which, in part, conveyed the interests of Wesly S. Burrows, Wilma Burrows, and ABF Corporation in Youngtowne to Benjamin Nepomuceno and Lourdes Nepomuceno. The judgment also provided that the receiver convey all of his right, title, and interest in Youngtowne to the Nepomucenos.

8. On November 29, 1973, Youngtowne executed a grant deed which conveyed its real property and easements to the Nepomucenos. The deed was recorded on January 28, 1974. The purported transfer was subject to Section 851 of the Public Utilities Code. The Commission takes official notice that it granted no authority for this transfer.

9. Apply Valley View mutual Water Company (Apple Valley) serves 40 customers. On February 16, 1963, Youngtowne entered into an oral agreement with Apple Valley and provided water to Apple Valley through a single connection. On September 12, 1964, Youngtowne and Apple Valley executed a written contract for Youngtowne to provide water to Apple Valley. Youngtowne has provided water service to Apple Valley from February 16, 1963 to date. The aforesaid agreements, inter-connection and providing of water service are all contrary to the provisions of Ordering Paragraph 7 of Decision No. 62515.

10. On August 26, 1976, the Nepomucenos entered into an agreement with Keefner which provided for the sale of all the assets of Youngtowne to Keefner, subject to the approval of this Commission. The agreement provides that Keefner will purchase all the real and personal property of Youngtowne for \$50,000, in one of the following ways: "Down Payment: \$7,500.00 with purchaser to execute a note secured by a deed of trust in favor of sellers in the amount of \$42,500.00, payable at \$400.00 per month or more, including interest at 8½% per annum, with entire balance due 15 years from date of note. 'OR' Buyer to pay \$5,000.00 as down payment by securing an institution 1st trust deed of at least \$35,000.00 (70%) and executing a note secured by a deed of trust in favor of seller in the amount of \$10,000.00 payable at \$100.00 per month or more, including interest at 10% per annum, with entire balance due 5 years from date of note."

11. Keefner specializes in industrial water treatment. Its president, Eugene F. Keefner, is a registered professional engineer. Peter Cheesman, an associate who resides in Youngtowne's service area, is an aircraft maintenance engineer. If the requested authority is granted, Cheesman will operate the system.

12. For the eight months ending May 31, 1976, Keefner had gross revenues of \$135,644 and net income of \$30,834.

13. The Youngtowne system was adequately sized at the time of construction in 1962. Under the present requirements of General Order No. 103, there are two deficiencies: (1) Youngtowne has only one source of water supply. (2) There are fire hydrants on 4-inch water mains.

14. The receiver appointed by the Superior Court should be authorized to acquire control over Youngtowne pursuant to Section 854 of the Public Utilities Code.

15. The public interest requires that the transfers of utility property made pursuant to the judgment of the Superior Court from Wesly S. Burrows, Wilma Burrows, and ABF Corporation to Benjamin Nepomuceno and Lourdes Nepomuceno and the transfer from Youngtowne to Benjamin Nepomuceno and Lourdes Nepomuceno be exempt from the provisions of Public Utilities Code Section 851. (Public Utilities Code Section 853; Investigation of La Puente Co-Operative Water Co. (1966) 66 CPUC 614, 627-28; Investigation of R. J. & C. R. Erwin (1967) 67 CPUC 254, 257-8.)

16. Enforcement of the provisions of Ordering Paragraph 7 of Decision No. 62515 would result in the termination of water service to the 40 customers of Apple Valley and cause those persons extreme hardship.

17. The State Department of Health presently has jurisdiction over the water quality of Youngtowne. There is no longer a need for Ordering Paragraph 8 of Decision No. 62515.

18. The transfer of Youngtowne's certificate of public convenience and necessity and assets from the Nepomucenos to Keefner would not be adverse to the public interest. The transfer should contain conditions requiring compliance with the current provisions of General Order No. 103.

19. The proposed note or notes are for the purpose of acquiring utility property as contemplated by Public Utilities Code Section 817 and should be authorized.

20. A public hearing is not necessary in this matter.

Conclusions of Law

1. The receiver appointed by the Superior Court should be authorized to acquire control over Youngtowne.

2. The transfers from Wesly S. Burrows, Wilma Burrows, and ABF Corporation to Benjamin Nepomuceno and Lourdes Nepomuceno and the transfer from Youngtowne to Benjamin Nepomuceno and Lourdes Nepomuceno should be exempt from Section 851 of the Public Utilities Code.

3. Ordering Paragraph 7 of Decision No. 62515 should be modified to authorize Youngtowne to continue to provide service to the present customers of Apple Valley.

4. Ordering Paragraph 8 of Decision No. 62515 should be deleted.

5. Subject to conditions requiring compliance with the current provisions of General Order No. 103, the Nepomucenos should be authorized to transfer Youngtowne's certificate of public convenience and assets to Keefner.

6. Upon completion of the sale and transfer of the certificate of public convenience and necessity, properties, and equipment of Youngtowne the court appointed receiver, the Nepomucenos, and Youngtowne should be relieved of all public utility obligations.

7. The proposed long-term indebtedness is for proper purposes and the money, property, or labor to be procured or paid for by the issue of the note or notes authorized by this decision is reasonably required for the purposes specified, which purposes are not, in whole or in part, reasonably chargeable to operating expenses or income.

O R D E R

IT IS ORDERED that:

1. The receiver appointed by the San Bernardino Superior Court in Action No. CW 8595 is authorized to acquire control of Youngtowne Water Company, Inc.

2. The transfer by Wesly S. Burrows, Wilma Burrows, and ABF Corporation of all their right, title, and interest in Youngtowne Water Company, Inc., as set forth in the judgment of the San Bernardino Superior Court in Actions Nos. CW 8595 and 154896, entered on April 16, 1976, is exempted from Section 851 of the Public Utilities Code.

3. The transfer of property from Youngtowne Water Company, Inc. to Benjamin Nepomuceno and Lourdes Nepomuceno, dated November 29, 1973, is exempted from Section 851 of the Public Utilities Code.

4. Ordering Paragraph 7 of Decision No. 62515 is modified to read as follows: "Except as herein provided, the utility shall render no service outside the boundaries of Tract No. 6182 unless permission to do so has first been obtained from the Commission. The utility may sell water to the Apple Valley View Mutual Water Company in a sufficient quantity to enable the mutual to provide service to no more than 40 customers. If additional service connections are added by Apple Valley View Mutual Water Company the utility shall restrict the amount of water furnished to the mutual to the amount necessary to supply 40 customers, or, in the alternative cease furnishing water the the mutual water company.

5. Ordering Paragraph 8 of Decision No. 62515 is hereby deleted.

6. Within one hundred twenty days after the effective date of this order Benjamin Nepomuceno and Lourdes Nepomuceno may transfer the certificate of public convenience and necessity to operate as a water corporation along with the equipment and properties of Youngtowne Water Company, Inc. to Keefner Enterprises, Inc. in accordance with the agreement attached to the application as Exhibit C. Within thirty days of the actual transfer, Keefner Enterprises, Inc. shall notify this Commission in writing, of the date upon which the transfer was consummated.

7. Within sixty days of the date of actual transfer the tariffs of Youngtowne Water Company, Inc. now on file with the Commission shall be replaced by a new filing of Standard Tariff Schedules Applicable To Water Service and filed under the name of Keefner Enterprises, Inc., in accordance with the procedure prescribed in General Order No. 9b-A. No increases in the presently authorized filed rules and rates shall be made unless otherwise authorized by the Commission.

8. On or before the date of actual transfer, seller shall refund all customers' deposits and advances which are subject to refund. Any unrefunded advances and deposits shall be transferred to and become the obligation for refund of buyer.

9. On or before the date of actual transfer of the certificate of public convenience and necessity and the properties herein authorized, seller shall transfer and deliver to buyer and the latter shall receive and preserve all records, memoranda, and papers pertaining to the construction and operation of the water utility authorized to be transferred.

10. When compliance is made with Ordering Paragraphs 6, 7, 8, and 9 of this order, the receiver appointed by the San Bernardino Superior Court in Action No. CW 8595, Youngtowne Water Company, Inc., Benjamin Nepomuceno, and Lourdes Nepomuceno are relieved of public utility responsibility with respect to the operating authority and property authorized to be transferred herein.

11. Keefner Enterprises, Inc. shall attempt to secure an additional source of water supply which meets the requirements of the State Department of Health so that it will have two sources of water. Keefner Enterprises, Inc. shall transmit to the Commission's Hydraulic

Branch progress reports on its actions to secure the additional water supply on June 30 and December 31 of each year, pending further order of the Commission.

12. On or after the effective date of this order and on or before April 28, 1978, for the purposes set forth in this proceeding, buyer may issue a promissory note or notes, secured by a deed or deeds of trust, in a total amount not to exceed forty-five thousand dollars.

13. Keefner Enterprises, Inc. is placed on notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate fixing for any amount of money in excess of that originally paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, such rights extend to the holder a full or partial monopoly of a class of business. This monopoly feature may be modified or canceled at any time by the State, which is not in any respect limited as to the number of rights which may be given.

14. The issuer of the note or notes authorized by this order shall file with the Commission a report, or reports, as required by General Order No. 24-Series.

15. The authorization granted shall not be construed as a finding of the value of the rights and properties authorized to be transferred.

16. The authority granted by this order to issue a note or notes will become effective when the issuer has paid the fee prescribed by

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Section 1904.1 of the Public Utilities Code, which fee is \$90. In other respects the effective date of this order shall be twenty days after the date hereof.

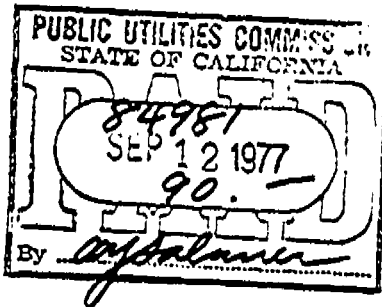
Dated at San Francisco, California, this 30th day of AUGUST, 1977.

President
William Sproule Jr.

Raymond L. Stinson

Richard D. Howell

Commissioners



Commissioner Robert Batinovich, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.