

MAR 7 1997

Decision 97-03-008 March 7, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Borrego Springs)
 Water Company (the "Company"),)
 doing business as Borrego Springs)
 Water Company, to sell and Borrego)
 Water District (the "District"))
 and Borrego Water District Public)
 Facilities Corporation (the)
 "Corporation") to buy the Company's)
 water system in San Diego County.)

ORIGINAL

Application 96-09-016
(Filed September 3, 1996)

Fritz R. Stradling, Attorney at Law, for Borrego
 Water District; and Jeri Hansen, for Borrego Springs
 Water Company; applicants.
Steve Haskins, Attorney at Law, for Borrego Springs
 Community Association, protestant.
Arthur B. Jarrett, for Commission's Water Division.

O P I N I O N

Summary

On September 3, 1996, Borrego Springs Water Company (the Company), Borrego Water District (the District), and Borrego Water District Public Facilities Corporation (the Corporation) filed a joint application seeking approval of the merger of the Company into the Corporation and concurrently therewith, sale of the water system owned and operated by the Company to the District.

Notice of the filing of the application appeared in the Commission's Daily Calendar on September 12, 1996. A protest was timely filed on behalf of the Borrego Springs Community Association which expressed concern that the transfer would subject the customers of the Company to liability for past obligations of the District, and to increased water charges. Pursuant to notice, an evidentiary hearing was held in Borrego Springs on December 11, 1996, at which all parties appeared by counsel or other representative. All parties were afforded the opportunity to call and examine witnesses, and to cross-examine witnesses called by others. No post-hearing briefs were requested or filed, and the matter was submitted for decision at the close of the evidentiary hearing.

We grant the application and approve the merger of the Company into the Corporation and concurrently therewith, the transfer of ownership and control of the water system operated by the Company from the Corporation to the District.

Comments

The Proposed Decision (PD) in this case was issued on January 24, 1997, and in order that it might be considered at the Commission's February 5, 1997 agenda, the comment period was shortened and all parties advised that comments were to be filed not later than February 3, 1997. Protestants filed comments in opposition to the application. Those comments suggested that since San Diego Local Agency Formation Commission's (LAFCO) approval of the annexation of the Company's service area into the District's sphere of influence had subsequently been challenged by more than 25% of the registered voters in the area to be annexed, a new vote on the annexation was required, and that the sale of the Company to the District could not proceed until that vote was held. In view of that question, the PD was withdrawn from the agenda.

The applicant filed a response to the protestants' comments, addressing whether the sale of the Company could proceed in the absence of a final vote on annexation, and we conclude that it may. Government Code § 56133 recognizes that a water district may provide service outside its boundaries. Applicant has advised LAFCO it will seek permission to provide service within the Company's service area in the event the re-vote on annexation fails.

Background

Borrego Springs Water Company is a private/investor owned public utility under California Public Utilities Commission (CPUC or Commission) jurisdiction providing water service to approximately 1,144 customers in the community of Borrego Springs in San Diego County pursuant to a certificate of public convenience and necessity (CPCN) issued by this Commission in June 1947 in

Application (A.) 28977. The current shareholders of the Company desire to sell all of their shares of the Company's stock and get out of the water business.

Borrego Water District, a duly organized public agency in the State of California, engaged in providing water and sewer service in the community of Borrego Springs, wishes to purchase the Company and annex the Company's service area into its sphere of influence. The District desires to acquire the Company in order to: 1) enhance the management of the Borrego Valley water basin, which is the only source of water in the area; 2) be in a better position to construct an intertie between the two systems which would provide emergency sources of water for both systems as well as operational efficiencies of both systems; 3) provide for local control of the Company's system operation by its own customers through a locally elected Board of Directors; 4) implement programs to correct current Company deficiencies in water storage and fire flow; and 5) take advantage of public agency access to funding that is not available to privately owned systems.

On May 29, 1996, the District's Board of Directors adopted Resolution No. 96-5-3 which declared its intention to acquire the Company's property and property rights by eminent domain. Shortly thereafter, the District and the Company entered into negotiations for the sale of the Company to the District in lieu of proceedings in eminent domain.

On July 3, 1996, the District and the Company entered into an agreement called "Agreement and Plan of Merger" whereby the District would acquire the Company by purchase. Under the agreement, transfer of ownership and control of the Company will take place through the vehicle of the Corporation, which was formed by the District to acquire the Company by purchase of all shares of existing shareholders with a subsequent transfer and conveyance to the District of all the assets and liabilities of the Company.

The sales price for the acquisition is \$1,283,000 which includes a termination fee of \$117,500 to be paid to Del Oro Water Co., Inc. At the time the District and the Company entered into negotiations whereby the Company would sell its assets to the District, a merger agreement was pending between the Company and Del Oro. In order to enter into the Company/District agreement, the parties agreed to terminate the Del Oro merger agreement and provide for the payment of compensation (termination fee) to Del Oro upon the consummation of the agreement now under consideration. The purchase will be financed by the sale of tax-exempt securities underwritten by Miller & Schroeder Financial, Inc.

Service

A major concern of the Commission in any case involving the transfer of ownership of a water utility under its jurisdiction is the assurance that service to customers is not compromised under the new ownership. In its investigation into the Company's general rate increase request in 1996, the Commission's Water Branch (Branch) found the Company providing good service to its customers and having a well maintained and operated system. The California Department of Health Services (DHS) Office of Drinking Water, which is responsible for health and safety issues with both privately and publicly owned water systems, has informed Branch that the District also provides good service to its customers and its system is well maintained and operated. In view of its findings, Branch has indicated that it believes that service to customers will not be jeopardized as a result of the transfer of ownership and control sought in this application.

Rates

The Company's present rates were authorized in Commission Resolution No. 3995, dated August 2, 1996. In the application herein, the District proposes to adopt the Company's present rates. This intention was verified at the District's October 23, 1996 meeting in which its Board of Directors resolved to take over the

Company with the water rate structure adopted by the Commission in August 1996. The proposed budget of the District's Improvement District No. 4 (the property acquired herein) (Exhibit 8, pp. 4-5) indicates revenue collected at present rates will be enough to cover its expenses to maintain and operate the system, pay the debt service on the tax exempt securities to be sold to finance the purchase of the Company, and to do approximately \$70,000 in system improvements. Although Branch did not analyze the individual elements of the District's proposed budget, it believes that the District's resolve to maintain the District's current rates after taking over ownership of the Company is realistic and reasonable.

After the acquisition is completed, the Company's service area will become the District's Improvement District No. 4 (ID-4). All revenues collected in ID-4 will be used to pay expenses incurred in ID-4. All revenues collected for system improvements in ID-4, whether from rates or from special assessments, will be used only for system improvements in ID-4. Likewise, any operating expenses or assessments for system improvements incurred in another Improvement District in the District will be paid for by customers within that particular Improvement District. The Company's customers will not be subsidizing customers in another Improvement District of the District after the transfer.

Local Agency Formation Commission

In order for the District to acquire the Company, it was thought desirable that the Company's service area be within the District's sphere of influence. The District, therefore, submitted a request to LAFCO to amend its current sphere of influence by annexing the Company's service area. LAFCO staff conducted its required investigation, and set forth its findings and recommendations in a comprehensive report (Exh. 2) which it presented to LAFCO at LAFCO's meeting held on November 4, 1996. The LAFCO staff recommended approval of the requested annexation which LAFCO overwhelmingly endorsed at the meeting.

Protests

The Commission and LAFCO have received several letters from Borrego Springs Community Association, including a petition with approximately 220 signatures protesting the annexation of the Company into the District's sphere of influence and the purchasing of the Company by the District.

The main concerns of the protestants are as follows:

1. The District will raise rates as soon as the transfer takes place.
2. A local Board of Directors would not be as responsive to customer concerns as the Commission has been.
3. Groundwater management will not be enhanced by the transfer.
4. A recent Grand Jury Report concerning the District is basis for denial of approval for the transfer.
5. The proposed intertie between the Company and the District will take water away from the Company/ID-4 to be used elsewhere in the District.
6. Revenues from the Company/ID-4 will be used to pay off existing District liabilities.

Discussion of Protests

Concern No. 1

As indicated earlier, the District has resolved not to raise rates immediately after the transfer of ownership. The Commission's Water Branch staff believes there is ample revenue generated in the current rates to allow the District to pay for operational costs, pay the debt service on the securities sold to purchase the Company, and to make some improvements to the system.

Inasmuch as the Company would cease to be under the jurisdiction of the Commission upon the transfer, there is no way that the Commission can guarantee that the rates will not change in

the future; however, since the District is answerable to the voters of the affected community, we feel the interests of the ratepayer will remain of paramount concern to the District.

Concern No. 2

Elections in the District are based on the number of registered voters. At the time Branch Staff's report was issued, there were 645 registered voters in the District and 743 registered voters in the area serviced by the Company. With the District's Board of Directors being elected "at large", the ID-4 customers could eventually have complete control over the makeup of the entire Board. While the Commission acts as a ratepayer advocate for a privately owned water utility, insuring that service is adequate and rates are reasonable, it does not micro-manage the system and does not get involved in its day-to-day operation. It certainly would not have the kind of control that ID-4 customers would have as part of the District with its majority vote.

Concern No. 3

As the proposed Borrego Valley water management agency in the 1984 Department of Water Resources (DWR) Water Management Plant, the District could only improve its ability to manage the water basin by increasing its sphere of influence.

Concern No. 4

The local Grand Jury submitted a report in the Superior Court alleging Brown Act violations, perceived irregularities in the management of District bonds and reserve funds, and possible conflict of interest in conducting District elections. The District and San Diego County District Attorney were directed to comment on the findings and recommendations of the report. The District provided comments with evidence to disprove the Grand Jury findings. The District Attorney's comments did not identify any violations of the Brown Act. No final ruling has been made in the matter.

Even though this matter has not been resolved, we are of the opinion that if violations of law on the part of the District are found, appropriate action will be taken by local officials charged with the responsibility of prosecuting such violations. If other instances of wrongdoing are uncovered, local officials are in a position to resolve the same.

Concern No. 5

DHS has long recommended that the two systems, the District and the Company, install an intertie connection to provide an emergency alternative water source for both systems. The intent of the intertie is to benefit both systems and not an attempt to supply one at the expense of the other. DHS also advised Branch that both systems have adequate water supply so there would be no need for the District to take water away from ID-4.

Concern No. 6

Branch's comments on the concern that revenue from ID-4 will be used to pay off existing District liabilities have been discussed above under the heading "Rates" and need not be repeated here.

Miscellaneous Matters

A large percentage of the testimony of witnesses for the protestants was taken up with concerns that there were parties other than the District that were or might be interested in purchasing the Company, and the witness urged that such a possibility be fully explored prior to this matter being considered by the Commission.

While the concern of the witness is understandable, it must be recognized that the Company is a private investor owned entity, and it must be presumed by the Commission that the Company is quite capable of looking out for its own best financial interests, and that in the opinion of the officers of the Company, this is the best offer that it had or would reasonably receive. If anything, it is in the interest of those customers who would

shoulder the responsibility to repay the bonds necessary to finance the purchase of the Company that the purchase price be lower, not higher.

In addition, one of the witnesses expressed great concern that the cost of funding the purchase of the Company was unduly expensive, and that a better deal could be obtained by borrowing the purchase money directly from a bank, rather than by the issuance of bonds. Once again, that is a business decision best left to the directors of the District. Aside from the allegations of the witness, we have no information from which we could conclude that a commercial loan would, in fact, be less expensive than issuing bonds, or even that such a loan is or would be available. If the directors of the District fail to exercise that degree of business acumen expected of them by those in ID-4, it is within the power of those in ID-4 to remove the directors from office, and to seek redress from the directors for any provable losses suffered.

Findings of Fact

1. The Company is a private investor owned public utility under Commission jurisdiction providing water service to approximately 1,144 customers in the community of Borrego Springs in San Diego County. The Company operates pursuant to a CPCN issued by the Commission in June 1947 in A.28977.

2. The shareholders of the Company desire to sell and the District desires to purchase, through the Corporation as a vehicle for the transfer, all facilities of the Company used to provide water services to existing customers of the Company in the Borrego Springs area.

3. The purchase price is \$1,283,000, which includes a fee of \$117,500 to be paid to Del Oro Water Co., Inc. for termination of a prior merger agreement between Del Oro and the Company.

4. The District is a duly organized public agency engaged in providing water and sewer service in the community of Borrego Springs.

5. By a vote taken on November 4, 1996, LAFCO authorized the amendment of the District's sphere of influence by annexing the Company's service area; however, that vote was challenged and a revote on the issue of annexation is required and is scheduled to take place in April 1997.

6. Protests were filed by or on behalf of Borrego Springs Community Association opposing the sale or certain aspects of the sale.

7. An evidentiary hearing was held in Borrego Springs on December 11, 1996.

8. The Commission's Water Branch conducted an investigation into the proposed purchase and sale, and recommended that the acquisition of the Company by the District through the vehicle of the Corporation be approved.

9. The District has resolved to retain the rate structure adopted for the Company by the Commission in August 1996.

10. Following the acquisition of the Company by the District, the Company's service area will become the District's Improvement District No. 4 (ID-4).

11. The proposed budget adopted by the District for ID-4 indicates revenue collected at present rates will be sufficient to cover its expenses to maintain and operate the system, pay the debt service on the tax exempt securities to be sold to finance the acquisition, and to do approximately \$70,000 in system improvements.

12. After the acquisition, all revenues collected in ID-4, whether from rates or from special assessments, will be used to pay expenses incurred in ID-4.

13. There will be no cross-subsidization between Improvement Districts following the acquisition.

14. All protests are either without merit or outside the jurisdiction of the Commission.

15. The acquisition of the Company by the District is not adverse to the public interest.

16. Upon transfer of the Company to the District, the Commission will lose regulatory jurisdiction over the provision of water to the service area of the Company.

Conclusions of Law

1. The District has legal capacity to acquire the Company through the Corporation.

2. The acquisition of ownership and control of the Company by the District is not adverse to the public interest.

3. The protests are either without merit or are outside the jurisdiction of the Commission.

4. The District has resolved to adopt the Company's rate schedule.

5. The Commission's Water Branch recommends approval of the application.

6. The application should be approved and the CPCN currently held by the Company cancelled.

O R D E R

In view of the foregoing, IT IS HEREBY ORDERED that:

1. The merger of the Borrego Springs Water Company (Company) into the Borrego Water District Public Facilities Corporation and transfer of ownership and control of the water system to the Borrego Water District (District) is approved.

2. The certificate of public convenience and necessity held by the Company is hereby cancelled.

3. Within ten (10) days of formal closing of the transaction hereby authorized, the District shall advise the Commission of the name and address of the official custodian of the records of the transaction.

4. Application 96-09-016 is closed.

This order is effective today.

Dated March 7, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners