

ALJ/JBW/wav

Decision 98-03-069 March 26, 1998

Mailed

MAR 26 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Searles Domestic Water Company (U-368-W), Harris Chemical Group, Inc., and INC Global, Inc. for authority to transfer control of Searles Domestic Water Company to IMC Global, Inc.

Application 98-01-019
(Filed January 8, 1998)

O P I N I O N

Statement of Facts

Kerr-McGee Chemical Corporation (Kerr-McGee) and its predecessor company, American Potash & Chemical Company (American Potash) for many years were engaged in recovering minerals and chemicals from brine pumped from Searles Lake, a dry lakebed in San Bernardino County. To provide water to operate its plants and to provide potable water to employee families located in communities along the lake's west shoreline, American Potash had developed the Searles Domestic Water Company (Searles), a California corporation, and the latter was granted a Certificate of Public Convenience and Necessity by Decision (D.) 36822 on January 12, 1944 (amended on March 19, 1944 by D.36936 to revise the service area).

When the Commission authorized public utility service by Searles, it also approved a 30-year term Water Purchase Agreement under which Searles would obtain all its water from the parent company, which in turn obtains the water from wells 30 miles distant at Indian Wells Valley. There is no source for potable water in the Searles locale.

In 1990, Kerr-McGee and North American Chemical Company (North American)¹ entered into an asset purchase agreement by which North American was to

¹ North American's immediate corporate parent is Harris Chemical North America, Inc., a direct subsidiary of Harris Chemical Group, Inc. (Harris).

purchase all the assets of Kerr-McGee's Soda Products Division, and filed Application (A.) 90-12-028 for Commission authorization of the transfer of control.

Concerned that Searles showed net losses in its operations, Commission staff concluded there would be a risk that North American would either seek a dramatic increase in the price of purchased water North American would be supplying to Searles, or would try to sell Searles.² Following negotiations, in 1993 all parties to A.90-12-028 joined in a motion seeking Commission approval and adoption of a Settlement Agreement. That agreement provided that the price of purchased water North American would charge would be capped at the cost of purchased electricity and the cost of payroll and outside maintenance, as limited by increases in the Gross National Product Price Index. The price would also be subject to reasonableness review from time to time by the Commission. Concluding that the settlement agreement was reasonable in light of the whole record, consistent with law, and in the public interest, the Commission by D.94-01-042, issued January 19, 1994, approved the settlement agreement, and authorized the sale of all Searles capital stock to North American.

Today Searles provides public utility water service to approximately 1,100 customers in the communities of Argus, Trona, Pioneer Point, South Trona, West End, and Point of Rocks, all located on the west shoreline of Searles Lake.

In order to build on their core competencies in mining, chemical processing, and international distribution logistics and marketing, with the associated opportunity to allow realization of substantial synergies with major cost-reduction opportunities, IMC Global, Inc. (IMC)³ and Harris determined to join their interests. Accordingly, for that purpose IMC created a wholly-owned subsidiary, IMC Merger Sub, Inc. (Newco), and as of December 11, 1997, IMC, Harris, and Newco entered into an Agreement and Plan

² Searles purchased its water from its corporate parent, Kerr-McGee, under a 30-year Water Purchase Agreement dated March 13, 1986.

³ IMC, a publicly-traded Delaware corporation, is one of the world's largest producers and distributors of crop nutrients.

of Merger. Under that agreement and plan, Newco will be merged with and into Harris. Harris will then become a wholly-owned subsidiary of IMC and will continue as the surviving corporation, but will exist under a new name, IMC Inorganic Chemicals, Inc. (IMC Inorganic).

After consummation of the transaction, scheduled to close on March 31, 1998,⁴ Searles will remain a wholly-owned subsidiary of North American, as part of the IMC Inorganic family, in its turn a subsidiary of IMC.

No changes will be made to the services or rates provided by Searles, and service will continue to be provided in full accord with Searles' existing terms of service and applicable Commission regulations.⁵

In that transfer of control of Searles to IMC is involved as a corollary of the IMC-Harris-Newco transaction, IMC and Harris have filed the present application pursuant to Public Utilities (PU) Code § 854 for authorization of the proposed transfer.⁶

Notice of the application appeared in the Daily Calendar of the Commission on January 27, 1998. No protests have been received.

As relevant to proceedings filed on or after January 1, 1998, Rule 6.1 of the Commission's Rules of Practice and Procedure require the Commission to preliminarily determine the category of the proceeding and whether or not a hearing is indicated. By Resolution ALJ 176-2986 adopted February 4, 1998, the Commission preliminarily designated the captioned application as "Ratesetting" with the probability that no

⁴ As failure to close on March 31, 1998 subjects IMC to onerous monetary penalties, the applicants request expedited ex-parte approval of their application.

⁵ IMC and Harris have stated in Part VI of their application that the Settlement Agreement approved by the Commission in D.94-01-042 will continue to remain in full force and effect, and will not be affected by the IMC-Harris transaction.

⁶ PU Code § 854, as relevant here, provides that no corporation, whether or not organized under the laws of California, shall control, either directly or indirectly, any public utility organized and doing business in California without first having secured authorization to do so from the Commission. Any acquisition of control without prior authorization is void and of no effect.

hearing would be required. Commissioner Henry M. Duque and Administrative Law Judge (ALJ) John B. Weiss respectively were designated as the assigned Commissioner and ALJ.

As ex parte processing was requested by the applicants, after considering the application and expiration of the 30-day response pleading period with no responses, Commissioner Duque and ALJ Weiss, on February 27, 1998, issued a Joint Ruling and Scoping memo pursuant to Rule 6(a)(3) affirming the "ratesetting" category for the application and concluding that a hearing was not necessary. This ruling constituted a final determination, under Rule 6.6, that hearings were not needed, and that consequently the procedure set forth in Article 2.5 of the Commission's Rules of Practice and Procedure relating to SB 960 ceased to apply. The scope of the proceeding would be to determine whether the proposed transfer of control should be granted (possibly subject to conditions), or should be denied as adverse to the public interest. The submission date was stated to be February 27, 1998, and the proposed date for rendition of the Commission's decision on the application was to be March 26, 1998. ALJ Weiss was designated as the presiding officer.

Discussion

PU Code § 854 requires prior authorization of the Commission for any transfer of control (see fn. 4) of a public utility. This is because it is the function of the Commission to protect the public interest, to prevent impairment of the public service by a transfer into the hands of parties incapable of rendering adequate service at reasonable rates or upon terms which would produce the same undesirable result (*So. Cal. Mountain Water Co. (1912) 1 CRC 520*).

In the present situation, there is no evidence that the transfer of ultimate control from the hands of one holding company to another would in any way be injurious to the public interest. We are assured by the parties that Searles' existing terms of service will continue and that all applicable regulations will be observed. Searles will continue as a wholly-owned subsidiary of North American. No change will be made to the service or rates provided by Searles. The price Searles will pay to North American for

water will continue to be calculated using the power and payroll cap as provided by the Settlement Agreement adopted by D.94-01-042,⁷ and will continue to be subject to reasonableness review by the Commission in any future rate proceeding initiated by Searles before the Commission. The Settlement Agreement will not be affected by the transfer of control.

Findings of Fact

1. Searles is a public utility providing water service to communities on the west shoreline of Searles Lake in San Bernardino County, and presently serves approximately 1,100 customers.
2. Searles is a wholly-owned subsidiary of North American, which in turn is a direct subsidiary, once removed, of Harris, a Delaware corporate holding company.
3. Searles today obtains its water supplies from North American under a 30-year Water Purchase Agreement which is subject to a Settlement Agreement adopted by the Commission in D.94-01-042; the latter agreement provides a price cap for the water based upon North American's electricity, payroll, and maintenance costs in providing water, that a cap in turn limited by the increase each year in the Gross National Product Price Index.
4. IMC with its specially-created wholly-owned subsidiary Newco has entered into an Agreement and Plan of Merger with Harris whereby Harris will merge into and with Newco, with Harris to continue as the serving entity, but as IMC Inorganic, a wholly-owned subsidiary of IMC.

⁷Specifically, pursuant to the "Water Purchase Agreement" dated March 13, 1986, Searles receives up to 200 million gallons per year of water from North American for a period of 30 years. North American sets the price for water to Searles at North American's allocated cost of producing that water. The allocated cost consists of 1) the cost of purchased electricity (as reflected in rates assessed to North American by the Southern California Edison Company or any successor electric utility; and 2) the labor, benefits, and outside maintenance costs increased each year to reflect the increase in the Gross National Product Price Index. These prices assessed to Searles are subject to reasonableness review by the Commission.

5. Under the IMC-Newco-Harris Agreement and Plan of Merger, Searles will continue as a wholly-owned subsidiary of North American, both to be part of the IMC Inorganic corporate family under IMC.

6. The IMC-Newco-Harris Agreement and Plan of Merger would result in the transfer of ultimate control of Searles from Harris to IMC, a transfer of control that under PU Code § 854 requires prior Commission authorization.

7. By this application, the parties seek Commission authorization for the transfer of ultimate control over Searles that will result from consummation of their Agreement and Plan of Merger, which transaction is scheduled to close on March 31, 1998.

8. The parties to the application agree and accept that the Settlement Agreement adopted by the Commission in D.94-01-042 will continue to remain in full force and effect and will not be affected by their Agreement and Plan of Merger.

9. The IMC-Newco-Harris Agreement and Plan of Merger, once consummated, will not affect service or rates provided by Searles, and is not adverse to the public interest.

10. As a failure to close on March 31, 1998, will subject IMC to onerous monetary penalties, the application requires expeditious approval.

Conclusions of Law

1. The application to transfer control of Searles to IMC through IMC's acquisition of Harris as a wholly-owned subsidiary should be granted, conditioned upon continuance of the terms of the Settlement Agreement adopted in D.94-01-042 as applicable to the water purchased by Searles from North American.

2. The effective date of the order that follows should be the date of signature, in order that the parties may carry out the proposed transfer of control through IMC's acquisition of Harris on or before March 31, 1998, and thus avoid monetary penalty to IMC.

O R D E R

IT IS ORDERED that:

1. Within six months after the effective date of this order, IMC Global, Inc. (IMC) may acquire control of Searles Domestic Water Company (Searles) through the proposed IMC acquisition of Harris Chemical Group, Inc. (Harris); the transfer of control being conditioned upon continuance through IMC of the terms of the Settlement Agreement adopted by D.94-01-042 as regards caps on the purchase price of water Searles purchases from North American Chemical Company.
2. Within ten days of consummation of the IMC-IMC Merger Sub, Inc.-Harris Agreement and Plan of Merger (which consummation effectively transfers control of Searles to IMC), IMC, Harris, and Searles shall notify the Commission in writing of the date on which the Agreement and Plan of Merger was consummated.
3. This application proceeding is closed.

This order is effective today.

Dated March 26, 1998, at San Francisco, California.

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