

Service Date: July 31, 1991

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Investigation)	UTILITY DIVISION
and Monitoring of Butte Water)	
Company's Capital Improvement Plan)	DOCKET NO. 90.12.93
and Financing Efforts.)	ORDER NO. 5536b

ORDER ON MOTIONS FOR RECONSIDERATION
AND INTERLOCUTORY ORDER ON SALE

BACKGROUND

On May 17, 1991 the Montana Public Service Commission (Commission) issued Order No. 5536a in this Docket directing the sale of Butte Water Company (BWC) and imposing a number of requirements with an August 1, 1991 deadline for completion.

BWC filed (a) a Request for Extension of Time to File a Motion for Reconsideration on May 27, 1991, (b) Supplemental Motion for Reconsideration on June 21, 1991, and (c) Second Motion for Reconsideration on July 18, 1991, as amended on July 22, 1991.

On May 28, 1991 the Commission waived the requirement that a party apply for reconsideration within 10 days of the order and granted an additional 10 days to file to

June 10, 1991. The Commission thereafter allowed BWC an additional 10 days to file its supporting brief. The Supplemental Motion and Brief were duly filed.

On July 1, 1991 the Commission waived the provisions of ARM 38.2.4806 requiring the Commission to act on a motion for reconsideration within 10 days.

The Commission acted on July 26, 1991 to grant BWC's Second Motion for Reconsideration, as amended, pursuant to the terms and conditions as provided in this order.

FINDINGS OF FACT

BWC has submitted a Letter of Intent entered into July 3, 1991 by and between BWC and the Montana Energy Research and Development Institute (MERDI) (jointly, Parties). Parties agree that MERDI shall have an exclusive option through October 1, 1991 to acquire BWC's assets necessary for delivery of water to Butte-area customers of BWC. This option is assignable to Silver Bow Leasing, a new corporation to be formed by MERDI.

MERDI is a nonprofit corporation with principal offices in Butte incorporated primarily to promote economic development in Southwestern Montana. MERDI believes it can acquire the technical, financial and management expertise to resolve the financing problems for the Butte water system.

Parties agree that BWC may negotiate a sale of all or a part of its assets to Butte-Silver Bow, Anaconda-Deer Lodge County, or assigns, within the Option Period, provided that a binding sales agreement shall require the purchaser to reimburse MERDI for certain costs.

DISCUSSION AND FURTHER FINDINGS

Pursuant to its Order No. 5536a, the Commission directed conveyance by August 1, 1991 of the public utility holdings and operation to a qualified buyer capable of obtaining the necessary financing to complete the required capital improvement program.

Alternatively, BWC would be relieved of the obligation to sell upon a demonstration that it can obtain the financing necessary to complete the entire capital improvement program, beginning with the 1991 construction season.

The Commission's concern is that BWC expedite a transfer so that the new entity can complete the necessary improvements in time to comply with the Federal Safe Drinking Water Act (SDWA). Implicit and express throughout the Letter of Intent is the intention of MERDI, upon exercise of this option, to obtain the necessary financing and to proceed post-haste to compliance with state and federal regulations applicable to public water systems, including necessary construction.

In its Order No. 5536a, the Commission directed that before a sales transaction is completed, BWC and the purchaser shall present written documentation that there will be no impediments to financing and completing the capital improvement program as filed and accepted by the Commission in Docket No. 88.9.29. The Commission cannot approve a transfer without the assurance that the transferee is capable of completing the improvements critically needed to provide adequate service and facilities. This showing must be made, whether the transferee is MERDI or another entity. MERDI has submitted to the Commission a preliminary proposal and in meetings with staff has committed to resolving impediments to obtaining financing and to completing BWC's established construction schedule. As the negotiations progress, the Commission directs BWC and MERDI to file written documentation of the progress. By October 1, 1991 the Commission requires a filing by BWC and MERDI in compliance with Order No. 5536a in order not to activate the requirement to begin advertising.

With the Letter of Intent and its Option Period for MERDI, the Commission recognizes a serious intent to purchase the Butte water system. The Commission also recognizes that its requirement for a completed transaction by August 1, 1991 cannot be

met. Therefore, the Commission finds it reasonable to grant the request in the Amended Second Motion for Reconsideration for an extension to October 1, 1991 for time to complete a transaction with MERDI. If MERDI and BWC have not concluded their negotiations by October 1, MERDI will lose its exclusive option. Although MERDI and BWC may continue negotiations, BWC will also be required to begin advertising to other potential buyers on and after October 1 pursuant to the requirements established in Order No. 5536a. The final date for compliance with the terms, conditions and requirements of Order No. 5536a is December 1, 1991.

In acting upon the Amended Second Motion for Reconsideration, the Commission issues this Order No. 5536b as an inter locutory order incorporating the requirement in Order No. 5536a to convey the public utility holdings to an entity capable of obtaining financing and completing the capital improvement program, or alternatively, demonstrating that BWC can complete the program. The Commission hereby allows an extension of the final transaction deadline to December 1, 1991, with the requirement that BWC begin advertising pursuant to Order No. 5536a on October 1, 1991 if the MERDI transaction is not complete. In waiving the 10 day requirement for action on a motion for reconsideration in ARM 38.2.4806(5), Order No. 5536a was not final for purposes of appeal, as provided in ARM 38.2.4806(6). However, filing its motions for reconsideration has not excused BWC from compliance with Order No. 5536a. See ARM 38.2.4806(2). The Commission finds that BWC has complied with this order in proceeding to negotiate a sale of the water system.

The Commission finds that MERDI is qualified and eligible as a potential buyer. To qualify for a transfer to MERDI, MERDI must warrant to the Commission that it will complete the construction schedule, with some flexibility as conditions dictate, including any changes in compliance required by the agency enforcing EPA regulations and the SDWA. To the degree that MERDI owns and operates the water system facilities, there will be an appropriate degree of Commission oversight to be outlined in an order approving the transfer.

Likewise, Butte-Silver Bow consolidated government and Anaconda-Deer Lodge County are qualified and eligible to negotiate a purchase of some or all of the water system assets. Upon a transfer of ownership and operation of the water system to either consolidated government, the government entity will likely assume appropriate regulation of the rates and service. This assumption is based upon the provision in Section 7-3-1104, MCA, that a consolidated form of government may exercise the powers of a municipality, including owning and operating a municipal water system.

CONCLUSIONS OF LAW

The Montana Public Service Commission is invested with full power of supervision, regulation and control of public utilities, subject to the provisions of Title 69, Chapter 3. Section 69-3-102, MCA.

Butte Water Company is a public utility subject to the Commission's jurisdiction. Section 69-3-101, MCA.

The Commission has the general power to do all things necessary and convenient in the exercise of its powers under Title 69, Chapter 3, and has the power to regulate the manner of all investigations and hearings of the public utilities before it. Section 69-3-103, MCA.

The Commission has full authority to inquire into the management of the business of all public utilities, to keep itself informed, and to obtain from the public utility all necessary information to perform its duties. Section 69-3-206, MCA.

A public utility has the duty to provide adequate service and facilities at reasonable rates. Section 69-3-201, MCA.

If, upon hearing and due investigation, the Commission determines that service is inadequate or that any reasonable service cannot be obtained, the Commission may make such order related to service as is just and reasonable. Section 69-3-330, MCA.

Upon a finding that a utility cannot or will not discharge its public utility obligation, the Commission may therefore direct the utility to provide adequate service and facilities, or alternatively to convey the public utility holdings to an entity capable of discharging this duty. Section 69-3-330, MCA.

INTERLOCUTORY ORDER

WHEREFORE, THE Commission issues the following order:

The Montana Public Service Commission modifies Order No. 5536a issued May 17, 1991, incorporating the following terms:

- a. Montana Energy and Research Development Institute and Butte Water Company's Letter of Intent is accepted granting MERDI an exclusive option to purchase the water system through October 1, 1991;
- b. Pursuant to the Letter of Intent, Butte-Silver Bow consolidated government and Anaconda-Deer Lodge County also may negotiate a purchase of the system or assets;
- c. If MERDI does not exercise its option by October 1, 1991, BWC shall begin advertising pursuant to the requirements of Order No. 5536a in this Docket;
- d. The deadline for a completed transfer of the public utility holdings shall be December 1, 1991 instead of August 1, 1991.

The Commission grants the Amended Second Motion for Reconsideration to the extent consistent with this order.

The Commission denies the June 21, 1991 and May 27, 1991 motions for reconsideration as premature and inconsistent with this order. Appropriate motions may be filed as timely upon a subsequent order in this Docket as provided in the following paragraph.

This interlocutory order outlines requirements for BWC up to October 1, 1991. If MERDI does not exercise its option by that date the terms of Order No. 5536a will become fully and finally incorporated as modified by Order No. 5536b. The Final Order

determining BWC's duties if MERDI does not exercise its option will be issued on or after October 1, 1991.

DONE IN OPEN SESSION at Helena, Montana, this 26th day of July, 1991 by a vote of 5 - 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Chairman

DANNY OBERG, Vice Chairman

BOB ANDERSON, Commissioner

JOHN B. DRISCOLL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter.
Judicial review may be obtained by filing a petition for review within thirty (30) days of the service of this order. Section 2-4-702, MCA.