

Service Date: January 28, 1992

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. 5536c

FINAL ORDER APPROVING SALE OF THE ASSETS
OF BUTTE WATER COMPANY

BACKGROUND

The Montana Public Service Commission (Commission) held a hearing in this Docket on February 11, 1991 in Helena, Montana for the purpose of receiving evidence from Butte Water Company (BWC) on its efforts to obtain capital to make necessary improvements to the water system as ordered by the Commission.

BWC presented extensive testimony and evidence at the hearing on its proposed capital improvement program; its attempts to obtain conventional financing and/or issuance of private activity bonds; its contacts with entities to construct facilities to lease to BWC pending conventional financing; BWC's joint application with Butte-Silver Bow for a loan from the Montana Department of Natural Resources and Conservation; factors impairing BWC's ability to attract debt and equity capital; and efforts to mitigate effects of BWC's impaired ability to obtain debt and equity capital.

On May 17, 1991 the Commission issued Order No. 5536a directing the sale of BWC and imposing a number of requirements with an August 1, 1991 deadline for completion. The Commission found that, despite BWC's many efforts, it had demonstrated its inability to obtain the necessary financing to complete the required capital improvement program. The Commission determined that it was in the public interest for BWC to convey ownership of its public utility holdings to an entity capable of and committed to obtaining the necessary financing, constructing the improvements and discharging the public utility obligation to provide adequate service and facilities. Alternatively, the Commission would reconsider the finding that BWC was presently incapable of discharging its public utility obligation, provided that BWC demonstrated that it could obtain the financing necessary to complete the entire capital improvement program on an acceptable time frame. The Commission ordered the conveyance to be completed by August 1, 1991, or alternatively, the demonstration that BWC itself would complete the improvement program.

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, with a Memorandum in Support of Amended Second Motion.

On July 31, 1991 the Commission issued Order No. 5536b, Order on Motions for Reconsideration and Interlocutory Order on Sale. The Commission found that BWC had submitted a Letter of Intent entered into July 3, 1991 by and between BWC and the Montana Energy Research and Development Institute (MERDI) which

provided an exclusive option for MERDI through October 1, 1991 to acquire BWC's assets necessary for delivery of water to Butte area customers. The option was assignable to a nonprofit subsidiary of MERDI.

In Order No. 5536b the Commission found that parties had agreed that Butte-Silver Bow and Anaconda-Deer Lodge, or assigns, could negotiate a purchase of all or part of the assets, upon reimbursing MERDI for certain costs. The Commission found that Butte-Silver Bow and Anaconda-Deer Lodge were qualified, along with MERDI, as potential buyers. This qualification was required for a subsequent approval of a transfer of assets. The Commission further directed BWC and MERDI to file written documentation of the progress.

The Commission recognized a serious intent on the part of MERDI and extended the requirement from August 1, 1991 to October 1, 1991 for BWC/MERDI to complete a transaction, or MERDI could lose the exclusive option. Final date for compliance with Order No. 5536a was set for December 1, 1991.

The Commission issued Order No. 5536b as an interlocutory order incorporating the requirement in Order No. 5536a for BWC to convey the public utility holdings to an entity capable of obtaining financing, or alternatively for BWC to demonstrate that it could complete the program. The Commission asserted that Order No. 5536a was not final for purposes of appeal. However, BWC was not excused from compliance with Order No. 5536a. The Commission found that BWC had complied in proceeding to negotiate a sale.

To qualify as a transferee of the assets, MERDI was required to warrant that it would complete the construction schedule, with some flexibility as dictated, including any changes in compliance required by the Safe Drinking Water Act.

The Commission stated that its final order in this docket would be issued on or after October 1, 1991. Therefore, the Commission denied the June 21, 1991 and May 27, 1991 motions for reconsideration as premature, and granted the Amended Second Motion for Reconsideration (extending the deadline for a completed transaction).

On August 12, 1991 BWC filed a Motion for Reconsideration of Order No. 5536b, requesting deletion of Conclusion of Law No. 7 and related Findings of Fact (i.e., that the Commission may direct a utility to provide adequate service or facilities, or alternatively, to convey the public utility holdings to an entity capable of discharging this duty). The Commission denied this motion on August 22, 1991.

BWC and MERDI entered into an Addendum to the Letter of Intent on October 1, 1991, which extended the Initial Option Period pursuant to the initial letter upon a showing of significant progress in advancing MERDI's plans.

On November 12, 1991 MERDI and BWC filed their executed Agreement to Exercise Option to purchase the assets of BWC, contingent upon the governments of Butte-Silver Bow and Anaconda-Deer Lodge adopting prior to closing appropriate and necessary resolutions related to operations, debt retirement, etc. MERDI would establish nonprofit corporations on behalf of the local governmental entities, as appropriate or requested, pursuant to Revenue Ruling 63-20 for the benefit of the residents of Butte-Silver Bow and Anaconda-Deer Lodge. The agreed upon purchase price for the assets of BWC essential for utility operation was \$2,950,000, payable through financing, with notes and security, and delivery of cash to retire the financing within six months of the agreement. Contingencies, in addition to appropriate governmental resolution and financing, included (1) satisfactory, executed compliance agreements with the United States Environmental Protection Agency (US EPA) and the Montana Department of Health and Environmental Sciences (MDHES); (2) due diligence in site survey and environmental assessment; (3) obtaining releases from third party claimants upon assets to be acquired, if deemed necessary by MERDI; and (4) approval by the Commission as required by law and contemplated in the "Butte Water System Project" proposed by MERDI, dated October 1, 1991 and submitted to the Commission. The Agreement provided that if the contingencies were not met, the assets would be conveyed back to BWC or assigns on or before six months from the date of the Agreement, with MERDI or the 63-20 corporations retaining net income or

suffering net losses and assuming liabilities incurred in the interim. BWC would be responsible to reimburse MERDI or the 63-20 corporations for capital expenditures during the period. In addition to the purchase price, MERDI etc. would assume liability for a promissory note in the amount of \$858,500.

FURTHER FINDINGS AND DISCUSSION

The Commission finds that, pursuant to Order No. 5536b, BWC and MERDI have filed written documentation of the progress of negotiations through to the Acquisition Agreement entered into and executed on December 31, 1991. In addition to the documents discussed in preceding paragraphs, MERDI filed a capital improvement program to complete required construction by 1994 and written documentation of correspondence and presentations to the Butte-Silver Bow and Anaconda-Deer Lodge governments. On December 24, 1991 MERDI also filed the draft note and Mortgage, Security Agreement and Financing Statement subject of the Acquisition Agreement. On December 30, 1991 BWC filed its Notice of Intent to Sell Assets on December 31, 1991.

The Commission finds that on December 31, 1991, BWC and Silver Bow Water, Inc., a nonprofit subsidiary corporation created by MERDI, entered into an Acquisition Agreement for the Sale/Purchase of the utility assets of the Butte division only of BWC at a purchase price of \$2,774,000.

On January 10, 1992 Silver Bow Water, Inc. formally filed a comprehensive package of materials including the acquisition agreement (Butte division), Butte-Silver Bow resolutions; "Three-Year Improvements Program" prepared by Robert Peccia and Associates and submitted as a proposed compliance schedule with US EPA and MDHES; and "Presentation to Credit Enhancers" prepared by D.A. Davidson and Company to submit for prospective investment. Silver Bow Water, Inc. also requested the Commission to determine that Silver Bow Water, Inc., as a corporation doing business on behalf of the city-county government of Butte-Silver Bow as a 63-20 corporation, will not be regulated as a public utility. The Commission finds

that Butte-Silver Bow will be a municipal utility subject to limited Commission jurisdiction over rates pursuant to Title 69, Chapter 7, MCA. Further, the Commission finds that Silver Bow Water, Inc. is not a public utility in holding title to the assets and issuing bonds on behalf of and to the exclusive beneficial use and enjoyment of Butte-Silver Bow.

On January 22, 1992 the Anaconda-Deer Lodge County Commission voted to adopt a resolution to purchase the assets of the Anaconda division and to begin operations immediately.

On January 24, 1992 BWC and MERDI entered into an Acquisition Agreement for the sale/purchase of assets of the Anaconda division essential for public utility service at a purchase price of \$176,000. MERDI then assigned its rights, duties and obligations to Anaconda-Deer Lodge, vesting title in the utility assets in Anaconda-Deer Lodge County at an acquisition price of \$226,000 or less, to the extent that the attorney fees and other administrative costs totalled less than \$25,000. MERDI was guaranteed \$25,000 for its efforts in facilitating the transaction.

The Commission finds that MERDI has submitted exhaustive written documentation of the acquisition transactions, including but not limited to copies of executed Acquisition Agreements; the promissory note and Mortgage/Security Agreement/Financing Statement (Butte division); opinion letters; Certification of Silver Bow Water, Inc.; Resolution of the Board; Bylaws and other corporate documents; Butte-Silver Bow Resolution Nos. 1404 and 1408 approving the creation of Silver Bow Water, Inc. and issuance of notes, bonds, etc., and creating a fund in the Department of Public Works; property and lease agreements; Insurance binder; Accounts Receivable Agreements; Subordination and Assumption Agreement; Management Contract (for BWC to manage through February 1, 1992); Quit claim Deed-Easements; Warranty Deed; Water Rights Transfer Certificates; Tax Certificate; Butte Water Financial Statement; Bill of Sale; conveyance of title to Anaconda-Deer Lodge (Anaconda division); schedules of real and personal property; and other pertinent documents.

The Commission finds, considering the foregoing, that BWC has complied with the requirements in Order Nos. 5536a and 5536b. BWC has conveyed its public utility holdings to a qualified buyer, MERDI, or its subsidiary. MERDI has established a 63-20 nonprofit corporation, Silver Bow Water, Inc., to acquire, improve and renovate the assets of the Butte division, to incur indebtedness, assume liability for the promissory note and issue tax exempt bonds on behalf of Butte-Silver Bow. MERDI has directly conveyed its public utility holdings in the Anaconda division to Anaconda-Deer Lodge, also a qualified purchaser under Order No. 5536b.

The Commission further finds that BWC has conveyed all its utility assets essential for the operation of the public utility to MERDI or its subsidiary. MERDI has conveyed all of the essential utility assets of the Anaconda division to Anaconda-Deer Lodge; Silver Bow Water, Inc. has acquired all the necessary utility assets of the Butte division for the beneficial use of and operation by Butte-Silver Bow. Upon this finding that all the necessary assets were conveyed, the Commission determines that the request shall be granted authorizing the present rate structure to be assumed by the acquiring and operating entities. The Commission finds that the rates shall remain at the same level so that these entities can continue to provide service. When these entities need additional revenues, they may take proper steps to obtain rate increases.

The Commission further finds that Butte-Silver Bow and Anaconda-Deer Lodge are consolidated governments which have all powers conferred on cities, towns and counties, pursuant to § 7-3-1104, MCA, and the status of incorporated municipalities, pursuant to § 7-3-1103, MCA. In the opinion of counsel for MERDI and Butte-Silver Bow, each of the consolidated governments may proceed to operate the assets as a municipal utility. There fore, the Commission determines that upon the finalizing of the conveyances and this order approving the sale of assets, Butte-Silver Bow will be in control of and operating a municipal utility and Anaconda-Deer Lodge will own, operate and control its municipal utility.

The municipalities are subject to the provisions of Title 69, Chapter 7, MCA, with the power and authority to regulate, establish and change rates, charges and

classifications, upon a municipal rate hearing, provided that the rate increases are less than a 12 percent increase in total annual revenues or do not exceed amounts necessary to meet financing requirements for mandated improvements. This Commission has limited jurisdiction over rate increases of a municipality which exceed this 12 percent threshold or amounts necessary to meet financing obligations of the local government's share of mandated improvements.

The Commission finds that the capital improvements outlined in the capital improvement program are mandated by the Commission in its Adequacy of Service Orders in Docket No. 88.9.29, as incorporated into Order Nos. 5536a and 5536b in this Docket. These mandated improvements may be modified in agreements between Butte-Silver Bow, Silver Bow Water, Inc. and MDHES and the US EPA. Nevertheless, the Commission has mandated improvements to the distribution system, filtration and storage necessary to provide adequate service and facilities. Silver Bow Water, Inc., and Butte-Silver Bow acquire this obligation in the transfer.

The Commission finds that capital improvements to the Anaconda division of BWC will be mandated to comply with the requirements of the Safe Drinking Water Act. To provide adequate capacity and avoid the requirement to filter a surface water supply not owned by or a part of the Anaconda division, the wells drilled by BWC are mandated improvements, as are any additional wells, transmission, distribution and storage required to meet demand and capacity. Upon acquiring the system, Anaconda-Deer Lodge succeeds to BWC's obligation to complete necessary improvements.

CONCLUSIONS OF LAW

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

Prior to acquisition and/or control by the municipalities, Butte Water Company has been a public utility subject to the Commission's jurisdiction. § 69-3-103, 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. § 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. § 69-3-206, MCA.

A public utility has the duty to provide adequate service and facilities at reasonable rates. § 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. § 69-3-330, MCA.

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

The Commission concludes, as a matter of law, that BWC has complied with Order Nos. 5536a and 5536b in this Docket in conveying its public utility holdings to Silver Bow Water, Inc., and MERDI, qualified purchasers.

The Commission concludes, as a matter of law, that the city-county consolidated governments have the status of a municipality, pursuant to § 7-3-1103, MCA, and all the powers, pursuant to § 7-3-1104, MCA.

The Commission concludes, as a matter of law, that each of the municipalities will be operating a municipal utility, subject to the provisions of Title 69, Chapter 7, and further, that the Commission will have limited jurisdiction over rates as provided therein.

The Commission concludes, as a matter of law, that the capital improvements outlined in this order are necessary and mandated, respectively, for the Butte-Silver Bow and Anaconda-Deer Lodge city-county governments.

The Commission concludes, as a matter of law, that Silver Bow Water, Inc. is not a public utility subject to the Commission's jurisdiction under Title 69, Chapter 3, MCA, so long as it remains a nonprofit corporation under Revenue-Ruling 63-20.

As a matter of law, the Commission approves the sale of the assets of BWC as outlined in this order, with the municipalities to assume the present rate structures until such time as each has followed the requirements for a municipal rate increase.

ORDER

Wherefore the Commission issues the following order:

The Commission approves the sale of the essential utility assets of the Anaconda division of Butte Water Company to Montana Energy and Research Development Institute (MERDI), and the subsequent assignment to Anaconda-Deer Lodge City-County government.

The Commission approves the sale of the essential utility assets of the Butte division of the Butte Water Company to MERDI's nonprofit subsidiary corporation Silver Bow Water, Inc.; the acquisition shall be for the benefit and beneficial use of Butte-Silver Bow City-County government.

The Commission orders and mandates Butte-Silver Bow and Anaconda-Deer Lodge to complete the capital improvements as outlined in this order.

Butte-Silver Bow and Anaconda-Deer Lodge city-county governments shall operate and control the utility assets as municipal utilities.

The Commission directs the municipal utilities to assume the rate structures in place until a rate change is required, at which time the municipalities shall follow required procedures under Title 69, Chapter 7, MCA.

The Commission issues this order as its final order closing this Docket and terminating its jurisdiction over Butte Water Company as a privately owned public utility.

Done and Dated this 27th day of January, 1992 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: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.