

Service Date: November 26, 1997

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

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IN THE MATTER OF LONE MOUNTAIN)	UTILITY DIVISION
SPRINGS, INC., Petition for Approval of)	
Transfer of Assets and Liabilities to Big Sky)	DOCKET NO. D97.8.140
Water and Sewer District No. 363)	ORDER NO. 6027

FINAL ORDER

INTRODUCTION

1. On August 6, 1997, the Big Sky County Water and Sewer District No. 363 (District) filed a petition before the Public Service Commission (PSC), requesting approval of a transfer to the District of the assets and certain liabilities of Lone Mountain Springs, Inc. (LMS). The District is a county water and sewer district, organized and operated pursuant to provisions of Title 7, MCA (Title 7, ch. 13, parts 22 or 23, MCA). The District presently provides sewer services to customers within its Big Sky, Montana, service area. LMS is a privately-owned public utility providing water services to customers within its Big Sky service area. LMS, as a public utility, is regulated by the PSC pursuant to Title 69, MCA (primarily Title 69, ch. 3, parts 1 through 3, MCA).

2. On August 12, 1997, the PSC issued a Notice of Opportunity for Hearing on the District's petition. Requests for hearing were received from several interested persons. Written comments were also received from interested persons, some in support and some in opposition to the proposed transfer. On September 15, 1997, the PSC granted the requests for hearing and issued a public notice of the hearing. On October 1, 1997, the PSC conducted a hearing on the matter in the Big Sky community. At hearing testimony and public comment were received, predominantly favoring the transfer. Legal issues involved have been argued in briefs submitted to the PSC. The PSC has now fully considered the facts and the arguments and determines that the transfer of the assets and certain liabilities of LMS to the District, as proposed in the District's petition, is in the public interest and is approved in accordance with the following discussion.

DISCUSSION

General and Background

3. During the last several years the District and Boyne USA, Inc. (Boyne), have been involved as opposing parties in litigation. (Boyne is the principal owner and operator of the recreational facilities in the Big Sky area. Boyne's principal shareholder is the principal shareholder of LMS.) A settlement agreement reached in the District and Boyne litigation provides that the assets and certain liabilities of LMS will be transferred to the District and, upon transfer, the District will commence operations providing water services within the service area.

4. Joined in the District and Boyne litigation are several other parties. One is the Big Sky Owners Association, Inc. (Association), members of which are owners of property in the Big Sky area. The Association is a party to the settlement agreement involving the transfer. The Association has supported the proposed transfer before the PSC. Another party to the litigation is Paul Cronin (Cronin), a developer with interests in the Big Sky area. Cronin is not a party to the settlement agreement. Cronin has appeared before the PSC as the principal opponent to the transfer.

5. The proposed transfer from LMS to the District has presented three issues for the PSC to decide. The first is whether the PSC has jurisdiction over the transfer, the second is whether Cronin is entitled to more procedure than that which has already been afforded, and the third is whether the proposed transfer should be approved.

PSC Jurisdiction

6. The District and LMS argue that the PSC does not have authority over the proposed transfer. Although they recognize that the PSC may have broad powers, they are able to find no specific authority in the PSC over transfers of public utilities, particularly when, as in the present case, the transfer is to a county water and sewer district, which is exempt from PSC regulation (county and consolidated city and county water or sewer districts as defined in Title 7, ch. 13, parts 22 and 23, MCA, are exempt from PSC regulation pursuant to 69-3-101(2), MCA).

Cronin argues that the PSC does have jurisdiction over the matter and the parties arguing otherwise have not fully reviewed the law applicable, including the case law cited by them in support of their positions.

7. The PSC does have authority over the transfer of the assets of a public utility, including when the proposed transfer is to an entity not regulated by the PSC, (e.g., the present transfer to an unregulated county water and sewer district). When an unregulated entity is involved the PSC asserts jurisdiction over the public utility not the unregulated entity. Although the PSC encouraged arguments to the contrary, it has not been persuaded by those made by the District and LMS and it knows of no valid argument which supports the position taken by the District and LMS.

8. The basis for the PSC's jurisdiction is relatively simple and straight forward. Public utilities are vested with a public interest in such a way that the essential services provided by them cannot be discontinued without regulatory approval. In this regard no party disputes that LMS is a public utility within the meaning of that term at 69-3-101, MCA, and no party disputes that LMS is subject to PSC regulation and has been regulated by the PSC as a public utility in accordance with Montana law, primarily that at Title 69, ch. 3, MCA. A key provision within Title 69, MCA, requires that public utilities furnish reasonably adequate services and facilities at reasonable and just rates. Sec. 69-3-201, MCA. This requirement is an ongoing legal obligation on public utilities. No provision in Title 69, MCA, or in any other applicable law, allows a public utility to unilaterally terminate this legal obligation or in any other way choose not to continue to meet this legal obligation (although there are exceptions for legal events such as bankruptcy or receivership, even the appointed trustees and receivers in those proceedings must continue to operate as regulated public utilities, 69-3-101, MCA). A transfer of the assets of LMS, such as proposed in the litigation settlement agreement, amounts to a termination of service by LMS (i.e., through the settlement agreement LMS has, in effect, agreed that it will terminate service). A public utility has no authority, inherent or otherwise, to unilaterally (without state approval) dismiss its obligation to serve.

9. At the same time that utilities have a continuing obligation to serve, the law and regulation under it would be incomplete and unresponsive to the public interest without providing a mechanism for termination of service. It is not always the case that a particular public utility should be viewed as the best entity to continue meeting the obligation. All parties recognize the PSC has broad authority over public utilities. In this regard 69-3-102, MCA, provides that the PSC is invested with full power of supervision, regulation, and control of public utilities and 69-3-103, MCA, provides that the PSC has the power to do all things necessary and convenient in its supervision, regulation, and control of public utilities. The only limitation to the PSC's authority is that the supervision, regulation, and control of public utilities that it exercises must be done in accordance with law (primarily as expressed in Title 69, MCA, but also as may be expressed in other laws of Montana generally applicable to the powers and procedures of administrative agencies). In this regard, under its general supervisory powers, the PSC provides a means for public utilities to terminate service and, as in the present case, will consider requests to do that, through transfer or otherwise. The PSC will approve the requests if it finds termination to be in the public interest. As indicated above and discussed below the PSC determines that the proposed transfer from LMS to the District is in the public interest.

Procedure and Cronin's Due Process Rights

10. Following receipt of the District's petition the PSC publicly noticed the matter, inviting requests for hearing and comments. Requests for hearing were received by the PSC. Cronin is one of the interested persons who requested a hearing. The PSC granted the requests for hearing, publicly noticed a hearing on the matter, and conducted that hearing for the purpose of obtaining testimony, comments, and arguments. The notice of hearing indicated that the hearing would be conducted as a contested case.

11. Following the notice of hearing Cronin requested that a full contested case proceeding be implemented. The PSC deferred ruling on that request and advised the parties that it would determine whether further proceedings would be necessary after it had heard the matter as scheduled. But nothing presented at the scheduled hearing or in arguments submitted to the

commission has demonstrated that further proceedings are necessary or that any party is, as a matter of right, entitled to further proceedings.

12. Cronin has argued that the PSC's notice was untimely and the hearing was inadequate in regard to his due process rights. The PSC determines that Cronin's arguments are not accurate assessments of the notice or the hearing or the relation these have to his due process rights. Cronin argues that he has had no opportunity to be heard in a meaningful manner through cross-examination of witnesses, examination of other parties' exhibits, or through subpoena of witnesses. However, Cronin received notice of the hearing and was advised through that notice that the hearing would be conducted as a contested case. Cronin appeared at hearing only through counsel. Cronin presented no witnesses or exhibits at hearing and engaged in only minimal cross-examination, although Cronin had every opportunity to do otherwise (the PSC did deny Cronin's request that LMS's attorney take the witness stand). Cronin has provided the PSC with nothing upon which to base a determination that further proceedings are, or even might be, necessary. Cronin is a party to the District and Boyne litigation giving rise to the settlement agreement concerning the transfer of LMS to the District. As a party to that litigation Cronin must be familiar, if not intimately familiar, with the issues in that litigation and the settlement agreement. Even with this, nothing was presented by Cronin, or any other person or party involved in the matter, that would serve as a valid basis for the PSC to question the transfer or determine that further proceedings are, or even might be, justified.

Approval of the Transfer of Assets and Certain Liabilities of LMS

13. The PSC determines that the proposed transfer of the assets and certain liabilities of LMS to the District is in the public interest. The PSC generally believes that the District will provide a better utility service to the Big Sky area. The District has actually operated LMS successfully for one or more periods in the past. Overwhelmingly the public comment received on this matter supports the conclusion that the transfer should be approved. Nothing has been presented to demonstrate that the transfer is contrary to the best public interest.

ORDER

14. Effective on the service date (above) of this Final Order the requested transfer of the assets and certain liabilities of Lone Mountain Springs, Inc. to the Big Sky County Water and Sewer District No. 363 is approved, as filed.

Done and dated this 24th day of November, 1997, by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.
A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.