

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)
OF PACKSADDLE WATER SYSTEMS,) **CASE NO. PKS-W-15-01**
INC. FOR APPROVAL OF ITS PURCHASE)
OF THE WATER SYSTEM AND A)
CORRESPONDING NAME CHANGE) **ORDER NO. 33603**
)

On November 30, 2015, Packsaddle Water Systems, Inc. (the Company) applied to the Commission for an Order approving its October 1, 2015, purchase of a water system from Packsaddle Estates Water Corporation (PEWC), a public utility that operated in Teton County, Idaho under Certificate of Public Convenience and Necessity (CPCN) No. 320.

The Commission issued a Notice of Application and Notice of Modified Procedure soliciting input from interested persons. *See* Order No. 33525. The Commission Staff and seven customers filed comments in the case. The Company did not reply.

Having reviewed the record, we: (1) conditionally approve PEWC’S sale of its water system to the Company; and (2) cancel CPCN No. 320 and relieve PEWC of any further obligation to serve customers as a public utility. Our decision is further explained below.

THE APPLICATION

In its Application, the Company stated that PEWC owned and operated a water system that served the Packsaddle Creek Estates subdivision (the Subdivision) for about 40 years. The Company also stated, however, that the person who ran PEWC’s water system is in poor health and can no longer maintain and operate the system. Thus, in the fall of 2015, PEWC sold the system to Packsaddle Water Systems, Inc., which was formed at PEWC’s request by several Subdivision residents to own and operate the water system on the Subdivision residents’ behalf.

Unlike PEWC, which was a privately-owned, for-profit public utility that did not allow its customers a say in how it operated the water system, the Company is a “mutual non-profit organization represented by board members in a democratically-run corporation.” Application at 3. The Company likened itself to a homeowners’ association (HOA); it has a board of directors and officers who serve without compensation, and it will serve about 30 customers/members who each have one vote on Company issues. Additionally, the Company

will use all fees paid by its members to operate and maintain the water system on their behalf, and to establish and grow a fund for emergencies and capital improvements to the system. The Company plans to keep its books in accordance with the Commission's Uniform System of Accounts.

The Company explained that shortly before it bought PEWC's water system, the Eastern Idaho Public Health Department inspected the system and found no significant problems besides the lack of a water testing and sampling plan. This problem was promptly remedied, and the Company is aware of and has access to persons with expertise to maintain compliance with the Idaho Department of Environmental Quality's water testing requirements. In addition, the water system's former operator has educated the Company on how to operate the system, and is willing to consult with the Company as needed. The Company also has retained a maintenance man, and the business that has repaired the system for the past 25 years remains available to repair the system for the Company, if needed.

In its Application, the Company asked the Commission to approve its purchase of PEWC's water system. The Company also asked the Commission to transfer PEWC's CPCN to the Company, if needed. However, the Company noted that because it is a mutual non-profit corporation instead of a regulated public utility like PEWC, there may be no need for it to operate the system under PEWC's CPCN.

THE COMMENTS

Some of PEWC's former customers, and the Commission Staff, commented on the Application. No other comments were received, and the Company did not reply. The customers' and Staff's comments are summarized below.

A. Customer Comments

Seven of PEWC's former customers commented on the Application. They noted that the Company did not inform them that it had purchased PEWC's water system until after the sale had occurred. Further, while persons who plan to live in a subdivision typically receive advance notice that they will become members of an HOA if they move into the subdivision, the Subdivision's residents here had no notice that the Company would conscript them as members and customers of the Company. Concern was also expressed that the Company's board members could act in their own best financial interests to the detriment of other customers, including a sizable minority of less frequent water users and future customers, such as persons who own

Subdivision lots but who do not yet reside there. Because of this potentially unfair treatment, PEWC's former customers asked the Commission to regulate the Company if the Commission approves the sale.

B. Commission Staff Comments

Commission Staff recommended that the Commission approve the sale. In forming this recommendation, Staff analogized PEWC's sale to the Company to an electric utility's sale of its public utility assets to a third-party. Staff thus analyzed the transaction under the standards expressed in *Idaho Code* § 61-328, a statute that precludes the Commission from approving a corporation's transfer of generation, transmission, and distribution assets to a third-party unless the Commission finds: (a) the transaction is consistent with the public interest; (b) the cost of and rates for supplying service will not be increased by reason of such transaction; and (c) the third-party has the bona fide intent and financial ability to continue to operate and maintain the property in the public service. Here, Staff opined that the sale should be approved because:

- The sale is consistent with the public interest because PEWC's system is the only water system serving the area, PEWC is unable to operate the system, and the Company has been operating it since October 1, 2015;
- The sale will not cause rates to increase;
- The Company intends, and is able, to maintain the system to serve the Subdivision. The Company intends (as its articles of incorporation state) that customer payments will be available to operate, maintain and improve the system rather than pay management or potential income taxes. Further, the Company has been willing to accept guidance from Staff on utility practices and accounting procedures and has taken reasonable steps to maintain water service to the Subdivision's customers.

While Staff recommended that the Commission approve the sale, Staff also recommended that the Commission regulate the Company as a public utility in light of the Company's structure and level of customer input. In summary, the Company's Articles of Incorporation specify that each customer is a member with one vote on each issue coming before the board, with a simple majority of votes carrying the day. The board itself has four members who serve without pay. The directors may increase the number of directors by majority vote. But if a director resigns, all remaining directors must agree on a replacement. Staff disagreed that the Company's structure affords customers the sufficient control to remove the Company from the need for Commission regulation. In particular, Staff noted that the Company's Articles

do not provide that directors must be elected by customers/members. Accordingly, Staff does not believe the Company qualifies as a non-profit that would be exempt from Commission regulation.

Based on its analysis, Staff ultimately recommended that the Commission:

1. Approve PEWC's sale of the water system to the Company;
2. Transfer PEWC's CPCN to the Company and then regulate the Company as a public utility; and
3. Direct the Company to:
 - (a) File a revised tariff that reflects that the Company now owns the water system, is consistent with the Commission's Utility Customer Relations Rules (IDAPA 31.21.01), and incorporates the rates and charges that are currently approved for PEWC; and
 - (b) Submit an Explanation of Rates, Rules Summary and billing and collection documents for Staff review and approval.

DISCUSSION

The Commission has jurisdiction over PEWC, a water utility, and the issues in this case under Title 61 of the Idaho Code. Specifically, the Commission regulates "public utilities," including "water corporations" that serve the public or some portion thereof for compensation. *See Idaho Code* §§ 61-129 and -125. PEWC is a "water corporation" and public utility as defined in these laws. It has been issued CPCN No. 320 and, for 40 years, it has dedicated its water system to serving the public within its certificated service area in the Subdivision.

Like all public utilities, PEWC must continue to serve the public unless relieved of that obligation by the Commission. *See Idaho Code* § 61-302 ("Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment, and facilities, as shall promote the safety, health, comfort and convenience of the public. . . ."); *Thomas v. R.R. Co.*, 101 U.S. 71, 83 (1879) (railroad company could not contract away its obligation to serve without the State's consent). PEWC should not, therefore, have attempted to sell its water system to the Company until *after* PEWC had obtained the Commission's consent to the sale, or at least specified in the purchase and sale agreement that the sale was to be conditioned upon receiving the Commission's approval.

Although PEWC sold the system to the Company without the Commission's approval, we nevertheless find it reasonable to ratify that transaction and approve the sale in the public interest, and to terminate PEWC's further obligation to serve the public in Idaho. We note, in particular, that PEWC can no longer reliably operate and maintain the system to serve its customers, and that there is no other water system nearby to serve them either. It was thus imperative for PEWC to find someone to own and operate the system in its stead. The Company has now been operating the system for about a year. It appears to possess, or at least have the ability to retain persons with, sufficient expertise to operate the system in a reasonably safe and reliable manner. Under the circumstances, we find PEWC has taken reasonable steps to ensure its former customers will continue to receive affordable and reliable water service. We thus find it reasonable and in the public interest to ratify and approve PEWC's sale of its water system to the Company, and to terminate PEWC's obligation to provide further water service in Idaho.

Some of PEWC's former customers have asked the Commission to regulate the Company to ensure it treats them fairly. We decline this request because we find that contrary to Staff's analysis, the Company is not a "public utility" under our jurisdiction.

A "public utility" is an entity that is dedicated to serving the general public in its service area. *See Idaho Code* § 61-129(1). The Company, however, has not dedicated itself to serving the public but to serving only its members. And, while it is true that the term "public utility" is defined to include "water corporations," the Company is not a "water corporation" as defined in the Idaho Public Utilities Law. Under the law, a "water corporation" is "every corporation" that owns, controls, operates or manages a water system for compensation. *Idaho Code* § 61-125. The term "corporation" specifically *excludes* a "mutual nonprofit or cooperative . . . water . . . corporation or any other public utility organized and operated for service at cost and not for profit. . . ." *Idaho Code* § 61-104. Here, the Company's Application characterizes the Company as a "mutual non-profit organization." Further, the Company's Articles support this designation. In particular, the Articles show the Company:

- Is a non-profit corporation organized under the Idaho Nonprofit Corporation Act (*Idaho Code* § 30-30-101 *et seq.*);
- Uses all revenues to operate, maintain, and improve the system (Article III);
- Has directors who serve without compensation (Article V); and

- Has customers who are members of the Company, with each customer having one vote on each issue addressed at a meeting and a simple majority of votes deciding each issue (Article VII).

Thus, the Company is similar to a non-profit cooperative that is owned and operated by members for the purpose of providing water services to themselves. *See Idaho Code* § 30-30-103(6) (defining “cooperative corporation” and “cooperative”). As noted above, the Commission does not regulate utilities that are cooperatives, mutual benefit companies, or that otherwise provide service at cost and not for profit.

We appreciate various customers’ concerns that the Company’s directors could self-deal and discriminate against Company members, but find these comments disregard provisions in the Idaho Nonprofit Corporation Act that would guard against this. For example, directors and officers must act in good faith (*Idaho Code* §§ 30-30-618 and -623), may not be involved in an unfair, conflict of interest transaction with the Company (*Idaho Code* § 30-30-619), or obtain loans or guarantees from the Company that are not similarly available to all other customers/members (*Idaho Code* § 30-30-620). In addition, the Company’s customers/members have a right to inspect the Company’s records, including minutes, resolutions, and financial statements (*Idaho Code* §§ 30-30-1101 through -1105), and to remove any offending directors (*Idaho Code* § 30-30-610).

In addition, while Staff expressed concern that the members have no right to elect the Company’s directors, the Company’s Articles combined with the Idaho Nonprofit Corporation Act provide the Company’s members with that right. Specifically, the Company’s Articles designate an initial board of directors (Articles X and XII). And since the Company has no bylaws or articles that specify the directors’ terms, the default term from *Idaho Code* § 30-30-605 applies, and the “term of each director shall be one (1) year.” The Articles, however, say nothing about who has the right to elect a new director when an existing director’s one-year term expires. What is clear is that because the initial directors were designated in the Articles, “the vacancy may not be filled by the board.” *Idaho Code* § 30-30-610. Rather, under *Idaho Code* § 30-30-604, “*all directors, except the initial directors, shall be elected at the first annual meeting of members, and at each annual meeting thereafter. . . .*” The only exception to the members’ right to annually elect the Company’s directors would be if “the articles or bylaws provide some other time or method of election, or provide that some of the directors are appointed by some

other person or designated.” *Id.* This exception does not apply here, however, because the Company has no bylaws or articles that express how a new director is to be elected when an initial board member’s one-year term expires, or that new directors are to be appointed or otherwise designated to a place on the board by someone besides the members. Thus, the Company’s members retain the right to elect new directors each year.

The Commission appreciates the Company’s willingness to own and operate the water system in a cooperative effort with its members in the Subdivision. There is no further need for the Commission to regulate the Company or the service to the members, as those members by vote will effectively regulate themselves.

ORDER

IT IS HEREBY ORDERED that Packsaddle Estates Water Corporation’s sale of its water system to Packsaddle Water Systems, Inc. is ratified and approved;

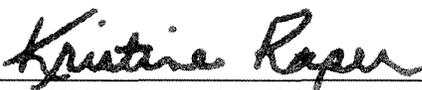
IT IS FURTHER ORDERED that Packsaddle Estates Water Corporation’s CPCN No. 320 is cancelled, and Packsaddle Estates Water is relieved of its obligation to serve the public as a public utility in Idaho.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code* § 61-626.

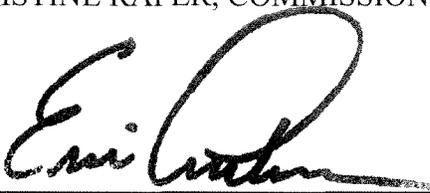
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 21st
day of September 2016.



PAUL KJELLANDER, PRESIDENT

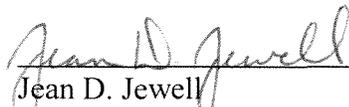


KRISTINE RAPER, COMMISSIONER



ERIC ANDERSON, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

O:PKS-W-15-01_kk2