

ALJ/SMW/gd2

PROPOSED DECISION

Agenda ID #11868 (Rev. 1)

Ratesetting

3/21/2013

Item 5

Decision PROPOSED DECISION OF ALJ WILSON (Mailed 1/18/2013)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of James L. and Marianne S. Orvis to sell, and Aspen Forest Investment Co., LLC, to buy, Five Thousand (5,000) Shares of the Common Stock of the water system known as Lake Alpine Water Company, Inc. (U148WTD) Located in Alpine County, California.

Application 11-04-013
(Filed April 15, 2011)

**DECISION GRANTING CONDITIONAL AUTHORITY FOR JAMES L. AND
MARIANNE S. ORVIS TO SELL AND ASPEN FOREST INVESTMENT CO.,
LLC TO BUY 5,000 SHARES OF COMMON STOCK OF
THE LAKE ALPINE WATER COMPANY**

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**DECISION GRANTING CONDITIONAL AUTHORITY FOR JAMES L. AND
MARIANNE S. ORVIS TO SELL AND ASPEN FOREST INVESTMENT CO.,
LLC TO BUY 5,000 SHARES OF COMMON STOCK OF
THE LAKE ALPINE WATER COMPANY**

1. Summary

James L. and Marianne S. Orvis are conditionally authorized to sell and Aspen Forest Investment Co., LLC (Aspen) is conditionally authorized to buy 5,000 shares, representing 50%, of the common stock in Lake Alpine Water Company. This transfer of stock is authorized on a prospective basis, from the date of this decision. This decision is conditioned on Aspen's receipt of required California Department of Public Health permits and the filing of the associated compliance filing in this docket. This proceeding remains open to consider whether a penalty should be assessed against Applicants for not timely filing an application requesting authority for the above referenced transaction.

2. Background

Lake Alpine Water Company, Inc. (LAWC) is a Class D water utility subject to the jurisdiction of this Commission, providing water service to approximately 488 metered customers in Bear Valley, Alpine County. LAWC was started in 1964 by Bruce Orvis, Sr. and his wife Roma Orvis during the development of the Bear Valley Community. Up until the transaction that is the subject of this application, the LAWC Board of Directors¹ consisted of Bruce Orvis, Sr., Bruce Orvis III, and James L. Orvis.

By agreement dated February 11, 2003, Aspen Forest Investment Co., LLC (Aspen) purchased 5,000 shares of LAWC's common stock (which represents

¹ Referred to as either LAWC Board or Board throughout this decision.

50% of the total Common Stock) from James L. and Marianne S. Orvis (J&M Orvis). As a condition to its closing, the agreement requires the execution of a Shareholder Voting Agreement (SVA) that provides that Aspen and, jointly, the owners of the remaining 50% of LAWC common stock (at the time, Bruce Orvis, Sr. (now deceased), Roma P. Orvis, Bruce Orvis III, and Paula D. Orvis)² are each entitled to elect two Directors of the LAWC Board, and that the four Directors thus elected, select a mutually agreeable, independent Fifth Director. There appears to be no dispute that the SVA was executed by all shareholders and that directorship on the LAWC Board has since been elected pursuant to this agreement.

J&M Orvis and Aspen (jointly, Applicants) did not file an application for authority for the February 2003 transaction based on their belief that none was required pursuant to Public Utilities (Pub. Util.) Code §§ 851 through 854. However, based on Commission staff recommendation, Applicants ultimately filed the current application on April 15, 2011. Applicants request that the transfer of stock be granted on a nunc pro tunc basis, i.e., retroactively.

Protests were filed by Paula D. Orvis and Bruce Orvis III (Orvis) and by the Ratepayers of Lake Alpine Water Company (RLAWC), asserting that the 2003 transaction is null and void for failure to have obtained Commission approval, and that the application should be denied for being against the public interest.

² Bruce Orvis Sr. and Roma P. Orvis were husband and wife. Bruce Orvis III is their son, and Paula D. Orvis is married to Bruce Orvis III. In 2003, these four family members each owned stock in LAWC, the total of which amounts to a 50% ownership in the stock of LAWC. Throughout this decision, references to the "Orvis Family" refer to these four family members.

Concurrent opening briefs were filed on August 24, 2012, jointly by Applicants and LAWC and jointly by RLAWC and Orvis. Concurrent reply briefs were filed on September 14, 2012, jointly by Applicants and LAWC, and jointly by RLAWC and Orvis.

3. Is this Transaction Subject to Pub. Util. Code §§ 851, 852, and 853?

RLAWC and Orvis assert that this transaction is governed by Pub. Util. Code §§ 851 and 852. Pub. Util. Code § 851³ requires, in part, that a public utility

³ A public utility, other than a common carrier by railroad subject to Part A of the Interstate Commerce Act (49 U.S.C. Sec. 10101 et seq.), shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, or by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having either secured an order from the commission authorizing it to do so for qualified transactions valued above five million dollars (\$5,000,000), or for qualified transactions valued at five million dollars (\$5,000,000) or less, filed an advice letter and obtained approval from the commission authorizing it to do so. If the advice letter is uncontested, approval may be given by the executive director or the director of the division of the commission having regulatory jurisdiction over the utility. The commission shall determine the types of transactions valued at five million dollars (\$5,000,000) or less, that qualify for advice letter handling. For a qualified transaction valued at five million dollars (\$5,000,000) or less, the commission may designate a procedure different than the advice letter procedure if it determines that the transaction warrants a more comprehensive review. Absent protest or incomplete documentation, the commission shall approve or deny the advice letter within 120 days of its filing by the applicant public utility. The commission shall reject any advice letter that seeks to circumvent the five million dollar (\$5,000,000) threshold by dividing a single asset with a value of more than five million dollars (\$5,000,000), into component parts, each valued at less than five million dollars (\$5,000,000). Every sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the advice letter and approval from the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing

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not sell, lease, assign, mortgage, dispose of, encumber, merge, or consolidate, the whole or any part of its assets that are necessary or useful in the performance of its duties to the public, without first having either secured an order from the Commission authorizing it to do so for qualified transactions. Pub. Util. Code § 852⁴ requires that a public utility, its subsidiary or affiliate, or corporate holding company receive authority from the Commission before it purchases or acquires, takes or holds, any part of the capital stock of any other California public utility.

with Section 1001) of Chapter 5, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture. This section does not prevent the sale, lease, encumbrance, or other disposition by any public utility of property that is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property that is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee, or encumbrance dealing with that property in good faith for value, provided that this section does not apply to the interchange of equipment in the regular course of transportation between connecting common carriers.

⁴ No public utility, and no subsidiary or affiliate of, or corporation holding a controlling interest in, a public utility, shall purchase or acquire, take or hold, any part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this state, without having been first authorized to do so by the commission; provided, however, that the commission may establish by order or rule categories of stock acquisitions which it determines will not be harmful to the public interest, and purchases within those categories are exempt from this section. Every assignment, transfer, contract, or agreement for assignment or transfer of any stock by or through any person or corporation to any corporation or otherwise in violation of any of the provisions of this article is void and of no effect, and no such transfer shall be made on the books of any public utility. Nothing in this section prevents the holding of stock previously lawfully acquired.

Neither J&M Orvis nor Aspen is a public utility, its subsidiary or affiliate, or its corporate holding company. Accordingly, Pub. Util. Code §§ 851 and 852 do not require Commission approval of the agreement to transfer shares from J&M Orvis to Aspen.

RLAWC and Orvis assert that Aspen acquired more than stock under this transaction. Specifically, they assert that Aspen acquired 50% of the assets of LAWC when it purchased 50% of the common stock of LAWC, and that Charles Toeniskoetter (of Aspen) disposed of LAWC assets, including water tanks, a backhoe, and a company truck. To the contrary, title to assets owned by LAWC prior to the transfer of stock is still held by LAWC (unless LAWC itself has sold the assets). Regardless of whether LAWC's sale of equipment was subject to Pub. Util. Code §§ 851 and 852, it is irrelevant to the question of whether the share transfer agreement between J&M Orvis and Aspen is subject to these statutes.

Pursuant to Pub. Util. Code § 853,⁵ the Commission may exempt a public utility from Public Utilities Code, as long as such transaction is in the public interest. The Commission does not exempt this transaction.

⁵ (a) This article does not apply to any person or corporation which transacts no business subject to regulation under this part, except performing services or delivering commodities for or to public **utilities** or municipal corporations or other public agencies primarily for resale or use in serving the public or any portion thereof, but shall apply to any public utility, and any subsidiary or affiliate of, or corporation holding a controlling interest in, a public utility, if the commission finds, in a proceeding to which the public utility is or may become a party, that the application of this article is required by the public interest.

(b) The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public

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Since, as explained below, we find that Aspen has complied with the requirements of Pub. Util. Code §854, we see no logical reason to exempt them from the requirements that they have already fulfilled.

4. Is this Transaction Subject to Pub. Util. Code § 854?

RLAWC and Orvis argue, and Applicants and LAWC dispute, that this transaction is governed by Pub. Util. Code § 854.⁶ Pub. Util. Code § 854 requires,

utility or class of public utility is not necessary in the public interest. The commission may establish rules or impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision. These rules or requirements may include, but are not limited to, notification of a proposed sale or transfer of assets or stock and provision for refunds or credits to customers or subscribers.

(c) The provisions of Sections 851 and 854 that prohibit any assignment, acquisition, or change of control without advance authorization from the commission, do not apply to the transfer of the ownership interest in a water utility, with 10,000 or fewer service connections, from a decedent to a member of the decedent's family in the manner provided in Section 240 of the Probate Code or by a will, trust, or other instrument.

(d) It is the intent of the Legislature that transactions with monetary values that materially impact a public utility's rate base should not qualify for expedited advice letter treatment pursuant to this article. It is the further intent of the Legislature that the Commission maintain all of its oversight and review responsibilities subject to the California Environmental Quality Act, and that public utility transactions that jurisdictionally require a review by the commission, as the lead agency, under the act should not qualify for expedited advice letter treatment pursuant to this article. An advice letter may be filed for transactions by the public utility if the lead agency has completed the appropriate review under the California Environmental Quality Act for the transaction, and the commission is the responsible agency under the act. The advice letter shall be subject to approval by resolution voted upon by the commission.

⁶ Relevant portions of Pub. Util. Code §854. (a) No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission. The commission may establish by order or rule the definitions of what constitute merger, acquisition, or control

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in relevant part, that the Commission must authorize the merger, acquisition, or change of control of a public utility.

Historically, the Commission has assessed the applicability of Pub. Util. Code § 854 on a case by case basis. As we discussed in D.03-06-069, the Commission has asserted jurisdiction to review the transaction under Pub. Util. Code § 854 in cases where a 50% interest has been transferred. We also look to the California Corporations Code § 160 for guidance, which states in part “a) except as provided in subdivision (b), “control” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a corporation.”⁷

In the current case, a 50% split in ownership of LAWC’s common stock means that either party is potentially in control, i.e., can create a stalemate. The transfer of this amount of common stock, therefore, constitutes a change of

activities which are subject to this section. Any merger, acquisition, or control without that prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this state, and no subsidiary or affiliate of, or corporation holding a controlling interest in a public utility, shall aid or abet any violation of this section.

(d) When reviewing a merger, acquisition, or control proposal, the commission shall consider reasonable options to the proposal recommended by other parties, including no new merger, acquisition, or control, to determine whether comparable short-term and long-term economic savings can be achieved through other means while avoiding the possible adverse consequences of the proposal.

⁷ (a) Except as provided in subdivision (b), "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a corporation.

(b) "Control" in Sections 181, 1001, and 1200 means the ownership directly or indirectly of shares or equity securities possessing more than 50 percent of the voting power of a domestic corporation, a foreign corporation, or another business entity.

control pursuant to Pub. Util. Code § 854. Accordingly, we conclude that this application is subject to Pub. Util. Code § 854(a).

Applicants and LAWC argue that the 50% stock transfer did not transfer control to Aspen because, under the SVA, Aspen appoints only two members of the five-member Board, while the Orvis Family also appoints two Board members, and the fifth Board member is voted on by the other four Board members. Therefore, since both the Aspen Board members and the Orvis Family have the power to control appointment of the fifth Board member, both have control – i.e., the ability to create a stalemate.

RLAWC and Orvis assert that Dr. David Ritchie has consistently voted with Aspen on LAWC Board votes, that he is a paid employee of Bear Valley Ski Resort (which is partly owned by Aspen), and that he supports Aspen's plans regarding the installation of a single meter for a condominium building instead of meters on an individual basis (which is not advocated by current Orvis Family Board members). RLAWC and Orvis argue that this demonstrates that the sale of 50% of LAWC common stock resulted in transfer of control to Aspen. To the contrary, the question of transfer of control does not turn on the individuals who comprise the Board at any one point in time. As discussed above, the question of control concerns the *power* to direct actions. Accordingly, it is not necessary for us to determine whether the fifth Board member favors Aspen or not. It is only necessary to determine whether Aspen has the *power* to direct – or, for example, in the alternative -- to discharge the fifth Board member. As discussed previously, Aspen's acquisition of 50% of the common shares conferred this control.

Applicants and LAWC argue that the 2003 stock transfer did not result in a change of control because it did not result in any change in the day-to-day

operation of LAWC or its corporate governance. They point out that, prior to the stock transfer and afterwards, Bruce Orvis Sr. was President and Chairman of LAWC, and remained so until his death in 2010, Bruce Orvis III remained in charge of the day-to-day operations until late 2008, and Roma Orvis remains as the Secretary/Treasurer to this day. In 2007, Kimi Johnson was hired as LAWC's Office Manager. We do not agree that the continuity in the day-to-day operation of a corporation is determinative of whether a stock transfer is a change in control. A change in control does not require a change in operations. As Corporations Code Section 160 reflects, "control" means the power to direct actions; it is not contingent on how such power is exercised.

Accordingly, we find that Pub. Util. Code § 854 applies to the sale of 50% of the common stock in LAWC from J&M Orvis to Aspen.

5. Should this Transaction be Approved Pursuant to Pub. Util. Code § 854?

The Commission requires a test of ratepayer indifference when evaluating the sale of a public utility.⁸ As part of this test, and in order to determine whether the sale is in the public interest, the Commission normally evaluates several key metrics including: (1) service quality; (2) continuity of service; and (3) the impact of the purchase price on ratebase. As the purchase price of the shares acquired by Aspen does not affect the value of LAWC's rate base, the purchase price does not affect rates. Therefore, we do not consider the purchase price criteria in our assessment of Aspen's compliance with Pub. Util. Code § 854.

⁸ Under the ratepayer indifference test, any sale of a public utility should not have any net consequences that cause the ratepayer to prefer the seller to the buyer.

When assessing the current transfer, we also consider the financial resources of the proposed owner/operator of a public utility. Pursuant to Exhibit D of A.11-04-013, Aspen has a net worth in excess of \$1 million, showing that Aspen has the financial resources to own 50% of the common stock of LAWC and participate in LAWC's operation

We also assess whether the transaction is in compliance with California Environmental Quality Act (CEQA) requirements, and whether all required approvals of other agencies have been received, when assessing the sale or transfer of control of a water utility.

Throughout our evaluation of Aspen pursuant to Pub. Util. Code § 854 and CEQA, as detailed below, we also address a number of issues raised by RLAWC and Orvis, which include but are not limited to Toeniskoetter's actions regarding: 1) issuance of a bank loan; 2) LAWC's Safe Drinking Water State Revolving Fund (SDWSRF) loan; 3) LAWC's water and service quality since 2003; 4) increased rates since 2003; 5) construction activity since 2003; 6) installation of water meters; 7) acquisition of water rights; 8) the sale of water to the Bear Valley Alpine Ski Company (BVASC); and 9) a construction management contract. Throughout our assessment of these issues, we consider both the evidence detailed below, as well as other similar evidence presented in the record of this proceeding, which we have not detailed because it is cumulative.

5.1. Service Quality

Aspen has the ability to own and operate LAWC. Aspen, in particular its managing member Toeniskoetter, has experience in the management of businesses in Bear Valley. Toeniskoetter was also a member of the Board of Directors of SJW Corp. and San Jose Water Company from 1991 - 2012. Since

Aspen purchased 50% of the common stock in LAWC approximately nine years ago, Aspen has been part of the operational and management team that has continued to provide safe and reliable water service to the customers of LAWC. Aspen's acquisition of 50% of the common stock in LAWC is supported by the Bear Valley Residents Association, Inc. and the Bear Valley Business Association.⁹ As discussed in more detail below, both Aspen and Orvis representatives had responsibility for and were involved in various LAWC operational issues and management actions that parties have concerns about.

RLAWC and Orvis are concerned that by allowing LAWC to issue an unsecured note (Bridge Bank Loan) without Commission authority and agreeing to conditions on the Bridge Bank Loan without agreement by the LAWC's Board (no payment of dividend without consent of lender),¹⁰ Toeniskoetter breached his fiduciary duty. RLAWC and Orvis go on to state that LAWC shareholders were also harmed by this action because instead of dividends being paid to shareholders, the funds were used to pay for capital projects which RLAWC and Orvis believe are only useful for future development.¹¹ Pursuant to Resolution W-4766 (June 9, 2009), we authorized LAWC's request for authorization to enter into an unsecured note, replacing the void unsecured note executed without prior Commission approval. Also, signatures of both Aspen and Roma Orvis are on the loan documents, and, pursuant to the minutes of the November 1, 2004 LAWC Board Meeting, the Bridge Bank loan was approved by the Board. Since the replacement financing was approved by us, the lack of Commission

⁹ See Exhibits A-20 and A-21.

¹⁰ See Joint Opening Brief of RLAWC and Orvis at 85.

¹¹ See Joint Opening Brief of RLAWC and Orvis at 86.

permission regarding the financing has been resolved. And, since the Bridge Bank Loan was approved by the Board and signed by an Aspen and an Orvis Family member (Roma Orvis), responsibility for it is shared by both Aspen and Orvis Family owners of LAWC. Therefore any lack of compliance with Commission regulations or agreement to selected terms is shared by all board members.

RLAWC posits that Toeniskoetter intentionally delayed reviewing the accounting for LAWC's SDWSRF loan in violation of the terms of the loan. In Resolution W-4911 (March 23, 2012), in which we resolved the concerns regarding over-collection of the SDWSRF surcharge, including the refunding of over-collected SDWSRF funds to LAWC ratepayers, we also found that the over-collection did not violate the terms of the loan agreement. Therefore, even if Toeniskoetter was responsible for LAWC retaining the over-collection, his actions did not result in a violation by LAWC of the terms of the loan agreement. Since SDWSRF surcharge funds are kept separate from other funds used by LAWC in its operations, such funds cannot be used for other purposes.

RLAWC states that the service quality has declined since the transfer. We find that service quality has not declined since Aspen's acquisition of 50% of LAWC's common stock. Information about LAWC can be accessed by customers via LAWC's website or its newsletter. LAWC also has office hours Monday through Friday, and on weekends the plant operator can be reached via a cell phone. LAWC staff includes a Plant Manager and Operator as well as an Office Manager. We also note that concerns regarding service quality are reviewed in General Rate Cases (GRC), and to date have not been found wanting.

In its comments to the proposed decision, RLAWC states that the PD omits mention of Mr. Tom Stillman's "complaint" in his testimony (Exhibit R-9). While

Stillman complains in his testimony about the taste and quality of the water, he also compliments the customer service of the operations personnel of LAWC. In hearings, he reiterated this compliment, adding that he was pleased with the office manager's efforts as well.¹² Stillman's testimony therefore presents a mixed view of the service quality of LAWC. In Exhibit R-10, Gloria Dralla on behalf of RLAWC, also complains about the taste of the water. The record of this proceeding therefore contains "complaints" regarding water and service quality by approximately 4% of the customers of LAWC.¹³ This represents a very small percentage of the total customers of LAWC. As discussed in more detail below, the California Department of Public Health (CDPH) found that LAWC had no major deficiencies and is in compliance with all applicable water quality regulations and standards.¹⁴ Therefore, we find that LAWC provides good service quality and complies with water quality regulations.

RLAWC posits that LAWC rates have risen dramatically since the transfer of stock to Aspen, in part due to the institution of metered rates, and believes that for this and other rate related reasons discussed below, Aspen is unfit to operate LAWC in the public interest. While California Water Code § 527 requires metering by January 1, 2025, the Commission's 2010 and 2005 Water Action Plans encourage water utilities to accelerate their metering program. Also, as discussed below, metered rates were authorized by us. Since LAWC's institution of metering was undertaken pursuant to the Commission's

¹² See TR 479.

¹³ RLAWC represents 19 customers (see RLAWC Protest dated 5/23/11) of the 496 customers of LAWC (see A.11-04-013). $19/496 = 3.8\%$.

¹⁴ See Resolution W-4856 (December 17, 2010).

Water Action Plans and our authority, such action does not support RLAWC's concern that Aspen is unfit to operate LAWC.

Both RLAWC and Orvis advance that rates have also increased since the transfer due to the acquisition of additional water rights (increasing capacity), and construction of new plant, all of which they suggest occurred because of Aspen's development interests in Bear Valley. These are all issues that have been addressed in previous Commission proceedings and ruled on by us. We have found such activities reasonable and required in order to provide service to existing customers, during a period in which both Aspen and Orvis Family members have been actively involved in the operation of LAWC. Our resolutions regarding LAWC's requests to the Commission did not state that the approved requests would benefit development in Bear Valley or any interests of Aspen. Our resolutions authorized reasonable requests that are part of the proper operation of LAWC. The various rate changes and construction activities are reasonable and necessary activities in the operation and management of a well-run water utility. The new water rights acquired by LAWC are not being paid for by existing customers, but are paid for by future customers through facilities fees. Also, since Bruce Orvis, Sr. supported the acquisition of new water rights,¹⁵ the acquisition of water rights was a joint effort by Aspen and Bruce Orvis, Sr., and not Aspen alone. As to outstanding expenses incurred because of the current proceeding, the proper venue for assessment of those costs is a GRC.

¹⁵ See Exhibit A-5 and A-6.

The construction of the new treatment plant was necessary to comply with the California Department of Health Services (predecessor agency to the CDPH) citations and compliance orders in existence prior to the transfer, and the cost of the new treatment plant and tank have been reviewed and authorized by us. In Resolutions W-4480 (July 19, 2004) and W-4508 (December 23, 2004), we stated that the treatment plant financed by the SDWSRF loan was permanently excluded from rate base; therefore ratepayers would only have to pay the surcharge for the loan. And Bruce Orvis, Sr. signed the SDWSRF documents for LAWC.¹⁶ We note that resolution of the CDPH citations and compliance orders occurred soon after the transfer occurred, even though the citations and compliance orders had been in existence for some years under the prior ownership format. Pursuant to Resolution W-4856 (December 17, 2010), LAWC has no outstanding compliance orders from CDPH, which supports the position that LAWC provides safe and healthy water to its customers. RLAWC and Orvis believe that Toeniskoetter engaged in self-dealing regarding the water rate charge to BVASC (of which Toeniskoetter is a part owner). As Bruce Orvis, Sr. was the signatory for LAWC on the agreement between LAWC and BVASC for the purchase of water, the responsibility for this contract lies with Bruce Orvis, Sr., and not Toeniskoetter. Therefore, the agreement with BVASC does not support the claim of self-dealing.

Another example of what RLAWC and Orvis refer to as Toeniskoetter's self-dealing is an LAWC contract with TBI Construction and Construction Management, Inc. (TBI) for construction management services that was not put

¹⁶ See Exhibit A-2.

out for bid.¹⁷ Prior to January 1, 2004, TBI was known as Toeniskoetter & Breeding Inc. Construction and was owned by Mr. Dan Breeding and Toeniskoetter.¹⁸ Pub. Util. Code § 451 requires in part that all charges demanded or received by a public utility be just and reasonable. As the Commission is unable to audit the costs of every construction project included in rates in order to determine if they are just and reasonable, we regularly rely on competitive bidding as one of the indicators to determine whether the construction costs are just and reasonable. Since: 1) TBI had been partially owned by Toeniskoetter when this contract was first discussed at LAWC Board Meetings (March and June 2003); 2) Bruce Orvis, Sr. was the signatory for LAWC on the TBI construction management contract in 2004; and 3) LAWC entered into this contract with TBI when Toeniskoetter no longer owned the predecessor to TBI,¹⁹ fault for not putting this contract out for bid is shared by both Aspen and Bruce Orvis, Sr. Since both Aspen and an Orvis Family member were involved in this contract, and the contract was discussed at LAWC Board meetings, this lack of putting a contract out for bid does not support a claim of self-dealing by Toeniskoetter alone.

RLAWC and Orvis state that the Applicants failed to provide notice to customers of the transfer in 2003 via the filing of an application at that time, and of the current application. They posit that this lack of notice deprived ratepayers of their rights under state law.²⁰ There is no requirement that Applicants should

¹⁷ See Joint Opening Brief of RLAWC and Orvis at 58, and Exhibit A-1.

¹⁸ Breeding then became an employee of TBI.

¹⁹ See Exhibit A-1.

²⁰ See Joint Opening Brief of RLAWC and Orvis at 59.

have provided notice to customers of the current proceeding. Therefore, this lack of notice to customers does not result in a violation. We address consequences of Applicants filing the current application after the transfer occurred in Sections 5.3 and 5.4 below.

5.2. Continuity of Service

Since the sale of 50% of the common stock in LAWC to Aspen, safe and reliable service has continued to be provided to customers without interruption. For many years after the transfer, Bruce Orvis, Sr. remained active as a Board Member and President, and in the operation of LAWC until his death in 2010; and Bruce Orvis III remained in charge of day to day operations, leaving in 2008. Bruce Orvis Sr.'s wife Roma served on the Board until 2011 and remains as the Secretary Treasurer. Paula and Bruce Orvis III currently represent the Orvis Family on the Board. In 2007, Kimi Johnson was hired as Office Manager. No change in day to day operations occurred for approximately five years after Aspen acquired 50% of the common stock of LAWC and the Orvis Family continues to serve on the Board.

With regard to RLAWC's and Orvis' concern regarding a change in the Orvis Family philosophy regarding the operation of LAWC after the transfer of the common stock to Aspen, we find no evidence that events subsequent to Aspen's acquisition of 50% of the common shares in LAWC have not been in the public interest. As discussed above, CDPH citations and compliance orders were resolved. The various construction projects and rate changes have all been found reasonable and necessary for the operation of the utility and approved by this Commission. If there was a change in philosophy, Bruce Orvis, Sr., his wife Roma, and son Bruce Orvis III were involved in it. Bruce Orvis, Sr. was intimately involved in such things as the construction of the water treatment

plant, purchase of water rights, and rate agreements with the BVASC.

Bruce Orvis, Sr. also held positions as President, Chairman, and Member of the LAWC Board, as did Roma and Bruce Orvis III. As discussed above, Bruce Orvis III was in charge of day to day operations until 2008. As a result, any change in philosophy is not a result of the transfer of shares from J&M Orvis to Aspen.

5.3. Conclusion

Applicants have shown they should be granted authority under Pub. Util. Code § 854. We conclude that the transfer of 50% of the common stock in LAWC passes the ratepayer indifference test, is reasonable, and is in the public interest. We therefore approve the application for transfer of 5,000 shares of common stock in LAWC on a prospective basis, as of the date of this decision.

We deny this application to the extent it requests nunc pro tunc authority under Pub. Util. Code § 854(a). The purpose of Pub. Util. Code § 854(a) is to enable the Commission to review a proposed acquisition, *before it takes place*, in order to take such action as the public interest may require.²¹ Granting this application on a nunc pro tunc, or retroactive basis, would thwart the purpose of Pub. Util. Code § 854(a). The Commission has enacted careful guidelines for scrutiny of the owners of public utilities, and we cannot condone the transfer of control of a public utility to an owner that has not passed through our approval process in advance. Since we do not grant retroactive authority, Aspen's acquisition of 50% of LAWC's common stock is void under § 854(a) for the

²¹ D.99-02-061, 1999 Cal. PUC LEXIS 56 *12; D.98-07-015, 1998 Cal. PUC LEXIS 526 *7; D.98-02-005, 1998 Cal. PUC LEXIS 320 *8; D.97-12-086, 1997 Cal. PUC LEXIS 1168 *8; and San Jose Water Co. (1916) 10 CRC 56, 63.

period of time prior to the effective date of this decision. The Applicants are at risk for any adverse consequences that may result from their having completed the transfer without Commission authority.

In its comments, Aspen and LAWC argue we have not provided our basis for denial of nunc pro tunc treatment of Aspen's acquisition of 50% of the common stock of LAWC. Aspen and LAWC state that they provide evidence in support of nunc pro tunc treatment, which they state was not addressed in our proposed decision. Our discussion of the issue here, provides our reasoning for denying nunc pro tunc treatment of the transfer.

In the past, we have both granted and denied nunc pro tunc treatment. Accordingly, we consider past decisions that provide guidance to us: 1) In D.00-09-035, we authorized nunc pro tunc treatment, but cautioned utilities that in the future we may deny such a request; and 2) In D.07-05-004, we state that the Commission has no policy in favor of nunc pro tunc treatment, and in recent years has generally declined to grant nunc pro tunc requests.²² It is true that we granted nunc pro tunc treatment in D.09-03-032 for a sale that had occurred 12 years earlier, but that was in the unusual situation of the seller having passed away in the intervening years. In light of our strong and recent precedent that we will deny nunc pro tunc treatment of a Pub. Util. Code §854 approval except in exceptional circumstances, as discussed above, we will not grant such authority here. The facts recited in Aspens Opening Comments²³ are no different

²² D.07-5-004 at 13-14 "In recent years we have generally declined to grant *nunc pro tunc* approvals of applications for the transfer of control of a public utility. Applicants and other public utilities have therefore been given notice that the Commission will require compliance with the requirements of §854(a) and may impose penalties for violations."

²³ Aspen's Opening Comments at 14.

than those typically present in a situation where approval is given on a going forward basis. Since retroactive authority will not be granted, Aspen's acquisition of 50% of LAWC's common stock is void under Pub. Util. Code § 854(a) for the period of time prior to the effective date of this decision. The Applicants are at risk for any adverse consequences that may result from their having completed the transfer without Commission authority.

Both J&M Orvis and Aspen desire the transfer of 50% of the common stock in LAWC. Aspen has the experience, ability, and financial resources to own 50% of the common stock in LAWC. The terms and conditions of service have remained unchanged as a result of the acquisition. The sale of 5,000 shares of LAWC stock relieves J&M Orvis of their duty to provide public utility water service to the customers of LAWC. The authority granted herein is not a finding of the value of the rights and property being sold. We also find that Aspen should be bound by all Commission decisions, rules, and regulations applicable to the owner of a regulated water utility.

5.4. Should Applicants be Fined for their Failure to Comply with Pub. Util. Code § 854(a)?

Applicants failed to comply with Pub. Util. Code § 854(a) by Aspen's 2003 acquisition of 50% of the common shares in LAWC without Commission authorization. Violations of Pub. Util. Code § 854(a) are subject to monetary penalties under Pub. Util. Code § 2107, which states as follows:

Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not

less than five hundred dollars (\$500), nor more than twenty thousand dollars (\$20,000) for each offense.

As Applicants violated Pub. Util. Code § 854(a), we must determine if a fine is applicable to this violation. In order to receive and consider evidence regarding this issue, we direct the assigned Administrative Law Judge (ALJ) to open a second phase of the current application. The scope of this phase will be limited to: 1) whether a fine should be levied; and 2) if so, what amount that fine should be. In determining fines, the Commission looks to past decisions for guidance, including but not limited to D.98-12-075, which provides the criteria by which the size of a fine is determined. The assigned Commissioner to this proceeding will determine the categorization and need for hearing of the second phase of this proceeding in their Amended Scoping Memo.

6. Is a CEQA Review Required by the Proposed Transfer of Stock?

We have reviewed the current application to determine whether CEQA applies to this transaction. CEQA applies to a “project” or action “which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change...[and involves] the issuance to a person of a lease, permit, license, certificate, or entitlement for use by one or more public agencies.”²⁴ If an application does involve a project under CEQA, our Rule 2.4 and the CEQA Guidelines,²⁵ imposes other procedures and requirements on the applicant.

²⁴ CEQA Guidelines, CALIFORNIA CODE OF REGULATIONS TITLE 14, § 15378(a) (2003).

²⁵ CEQA Guidelines, CALIFORNIA CODE OF REGULATIONS TITLE 14, § 15378(a) (2003).

This application involves only a proposed change in control and operation of existing water facilities. No new construction or changes in the source of water supply are being proposed. As discussed in Sections 5.1 and 5.2 above, construction that has occurred over the past nine years has involved both Aspen and the Orvis Family. As such construction cannot be attributable to Aspen alone, the transfer did not and does not involve a “change in the environment.” Accordingly, this application “is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.” Therefore, the sale of 50% of common stock in LAWC from J&M Orvis to Aspen is exempt from CEQA, and no further environmental review is required..

7. Has Aspen Received Permits Required by other Agencies to Operate LAWC?

Pursuant to the provisions of California Health and Safety Code (CH&S) § 116525(a), any person or entity operating a public water system must have a permit to operate that system from CDPH. A change in ownership of a public health system requires the prospective new owner to apply to the CDPH and satisfy their requirement that the new owner “possesses adequate financial, managerial, and technical capability to ensure the delivery of pure, wholesome, and potable drinking water.”²⁶

Accordingly, in addition to the authorization from the Commission for the acquisition of 50% of the common stock in LAWC, Aspen must also determine if

²⁶ CH&S Code § 116540(a).

it requires a CDPH permit to operate LAWC. Once Aspen determines if it requires such a permit, it must file a compliance filing in this docket (that will not reopen the docket) informing the Commission whether it is required to receive a permit from CDPH. If such a permit is required, it must apply for such permit and file a copy of that permit within 30 days of receipt of such, as a compliance filing in this docket.

8. Procedural Issues

Resolution ALJ-176-3273 preliminarily determined that this proceeding was ratesetting and that hearings would be necessary. Orvis and RLAWC filed protests to the current application.

On July 8, 2011, a PHC took place in San Francisco to establish the service list for the proceeding, discuss the scope of the proceeding, and develop a procedural timetable for the management of the proceeding.

On August 12, 2011, a *Scoping Memo and Ruling of Assigned Commissioner* (Scoping Memo) was issued, which set forth the procedural schedule, assigned the Presiding Officer, and addressed the scope of the proceeding. In the Scoping Memo, the assigned Commissioner stated that the scope of the current proceeding would be to determine, pursuant to Pub. Util. Code §§ 851-854, whether the Commission should authorize the sale of 50% of the outstanding shares of LAWC.

On September 14, 2011, an *Assigned Commissioner's Ruling Granting September 9, 2011 Motion and Requiring Parties to Meet to Discuss Feasibility of Alternative Dispute Resolution or in the Alternative, to Commence Mediation* (ACR 9/14) was issued; and on December 1, 2011, a *Revised Scoping Memo and Ruling of the Assigned Commissioner and Administrative Law Judge* (Revised Scoping

Memo) was issued, which included a revised schedule for the balance of the current proceeding.

On August 18, 2011, the assigned ALJ issued a ruling which made a preliminary finding that RLAWC is eligible to request intervenor compensation. This ruling was affirmed in an ALJ ruling dated August 30, 2011, in which the assigned ALJ also denied LAWC's request to respond to RLAWC's response dated August 25, 2011.

On January 24, 2012, the assigned ALJ issued a ruling which denied a motion to disqualify Thomas MacBride from representing LAWC, and granted party status to LAWC. On February 28, 2012, the assigned ALJ issued two electronic rulings, in which she denied with prejudice the motion of RLAWC to reconsider her January 24th ruling granting LAWC's party status; and the motion of Orvis to reconsider her January 24th ruling denying disqualification of MacBride from representing LAWC.

On March 29, 2012, the assigned ALJ issued a ruling formalizing her electronic rulings of March 16, 2012, in which she, with prejudice, denied in part and granted in part, the motions of Aspen and LAWC, to strike the prepared testimonies of Phillip Coffman, Gloria Dralla, and Paula Orvis; and denied Aspen's and LAWC's motion to compel response by Orvis to a February 14, 2012 data request.

In its Reply Brief, Applicants and LAWC request that portions of RLAWC and Orvis' joint Opening Brief at pages one and two, footnote three, and at 89 be stricken, as they discuss information that had previously been stricken by the assigned ALJ. The information on page 89 references text that was not stricken from Exhibit P-1, therefore we deny Applicants and LAWC's request to strike such text. As the following sentences at pages one and two, and footnote three of

RLAWC and Orvis' joint Opening Brief do reference text that was stricken, we grant Applicants and LAWC's request to strike: 1) the second and third sentences of the second paragraph at page one that continues onto page two; and 2) footnote three, of RLAWC and Orvis' joint Opening Brief. It has also come to light that Exhibit Deposition-1 (deposition of Roma Orvis), also contains information that was stricken from Exhibit P-1. In an effort to synchronize the information presented in the exhibits of this proceeding, we order that all text of Exhibit Deposition-1 that discusses information that has been stricken from the record, should also be stricken.

We affirm all rulings made by the assigned Commissioner and assigned ALJ in this proceeding, whether listed above or not.

8.1. Confidential Exhibits

During evidentiary hearings, the parties requested confidential treatment of Exhibits P-2C, P-4C, P-6C, R-1C, R-4C, R-5C, R-11C, and A-37C (See Attachment A). General Order (GO) 66 provides definitions and guidance regarding public and confidential records provided to and requested from the Commission. As market sensitive information is included in Minutes of Board Meetings, a Promissory Note and related documents, a Management Agreement, and the Organization Chart of a company that Aspen owners are involved in, we grant the parties requests to treat the above referenced exhibits as confidential.

9. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Opening and Reply Comments were filed on February 7, 2013 and February 12, 2013 respectively, by Orvis, RLAWC, and jointly by Applicants and LAWC. The

issues raised in these comments have been discussed in the text above as necessary.

In their comments to the proposed decision, both Orvis and RLAWC state that the proposed decision does not address certain evidence advanced by them. The evidentiary record in this case is voluminous, and it is not necessary for us to recite every individual piece of evidence. Rather, we have described the most important pieces of evidence on each issue, and how we have resolved that issue. To the extent this evidence has been introduced into the record, even though it is not specifically identified, we have considered all evidence in the record of A.11-04-013 in our determination herein.

In their opening comments, Orvis identifies the stalemate between the Aspen and Orvis Family board members as a “conflict” that the Commission should resolve. From Aspen’s purchase of half of LAWC stock in 2003 until Bruce Sr.’s passing in 2010, the evidence shows that even though there was the potential for a stalemate, Aspen and Orvis Family board members were in agreement. The LAWC board members appointed by Aspen and the Orvis Family should work together to appoint a fifth board member. If the Aspen and Orvis Family board members are unable to agree on a fifth board member, the Commission will appoint one for them. Aspen and Orvis Family board members must jointly notify the assigned ALJ via a joint compliance filing in this proceeding, within 60 days of this decision, if the LAWC board has not appointed a fifth board member by that time.

10. Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and Seaneen M. Wilson is the assigned ALJ and presiding officer in this proceeding.

Findings of Fact

1. In February 2003, Aspen purchased 5,000 shares of common stock (which represents a 50% of the total common stock) of LAWC from J&M Orvis.
2. On April 15, 2011, J&M Orvis and Aspen filed their application requesting authority for the sale.
3. Orvis and RLAWC filed protests to the current application.
4. On August 12, 2011, a Scoping Memo was issued, which set forth the procedural schedule, assigned the Presiding Officer, and addressed the scope of the proceeding. In the Scoping Memo, the assigned Commissioner stated that the scope of the current proceeding would be to determine, pursuant to Pub. Util. Code §§ 851-854, whether the Commission should authorize the sale of 50% of the outstanding shares of common stock of LAWC.
5. J&M Orvis and Aspen (jointly, Applicants) did not file an application for authority for the February 2003 transaction based on their belief that none was required pursuant to Pub. Util. Code §§ 851 through 854.
6. Based on Commission staff's recommendation, Applicants filed this application on April 15, 2011.
7. Applicants request that the transfer of stock be granted on a nunc pro tunc basis, i.e., retroactively.
8. Protests were filed by Orvis and RLAWC, asserting that the 2003 agreement is null and void for failure to have obtained Commission approval, and that the application should be denied for being against the public interest.
9. On January 24, 2012, the assigned ALJ issued a ruling which denied a motion to disqualify Thomas MacBride from representing LAWC, and granted party status to LAWC.

10. On February 28, 2012, the assigned ALJ issued two electronic rulings in which she denied with prejudice the motion of RLAWC to reconsider her January 24, 2012 ruling granting LAWC's party status; and the motion of Orvis to reconsider her January 24, 2012 ruling denying disqualification of MacBride from representing LAWC.

11. On March 29, 2012, the assigned ALJ issued a ruling formalizing her electronic rulings of March 16, 2012, in which she, with prejudice, denied in part and granted in part, the motions of Aspen and LAWC, to strike the prepared testimonies of Phillip Coffman, Gloria Dralla, and Paula Orvis; and denied Aspen's and LAWC's motion to compel response to a February 14, 2012 data request by Orvis.

12. LAWC is a Class D water utility subject to the jurisdiction of this Commission, providing water service to approximately 488 metered customers in Bear Valley, Alpine County.

13. The information on page 89 of RLAWC and Orvis' joint Opening Brief references text that was not stricken from Exhibit P-1.

14. LAWC was started in 1964 by Bruce Orvis, Sr. and his wife Roma Orvis during the development of the Bear Valley Community.

15. Up until the transaction that is the subject of this application, the LAWC Board of Directors consisted of Bruce Orvis, Sr., Bruce Orvis III, and James L. Orvis.

16. In the current case, the Applicants, neither of which are public utilities, request authority to transfer 5,000 shares of common stock in LAWC from J&M Orvis to Aspen.

17. Title to assets owned by LAWC prior to the transfer of stock is still held by LAWC (unless LAWC itself has sold the assets). Regardless of whether LAWC's

sale of equipment was subject to Pub. Util. Code §§ 851 and 852, it is irrelevant to the question of whether the transfer of common stock in LAWC between J&M Orvis and Aspen is subject to these statutes.

18. In determining fines, the Commission looks to past decisions for guidance, including but not limited to D.98-12-075, which provides the criteria by which the size of a fine is determined.

19. Historically, the Commission has assessed the applicability of Pub. Util. Code § 854 on a case by case basis.

20. As we discussed in D.03-06-069, the Commission has asserted jurisdiction to review transactions under Pub. Util. Code § 854 in cases where a 50% interest has been transferred.

21. The California Corporations Code Section 160 states in part “a) except as provided in subdivision (b), “control” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a corporation.”

22. In the current case, a 50% split in ownership of LAWC’s common stock means that both parties have control, i.e., can create a stalemate.

23. Under the SVA, Aspen appoints two members of the five-member Board, while the Orvis Family also appoints two Board Members, and the Fifth Board Member is voted on by the other four Board Members. Since both the Aspen and Orvis Family Board Members have the power to control appointment of the Fifth Board Member, both have control – i.e., the ability to create a stalemate.

24. Bruce Orvis, Sr. remained as President and Chairman of LAWC until his death in 2010, Bruce Orvis III remained in charge of the day to day operations of LAWC until late 2008, and Roma Orvis remains as the Secretary/Treasurer to this day.

25. In 2007, Kimi Johnson was hired as Office Manager of LAWC.

26. The Commission requires a test of ratepayer indifference test when evaluating the sale of a public utility. As part of this test, the Commission normally evaluates several key metrics including: (1) service quality; (2) continuity of service; and (3) the impact of the purchase price on ratebase. When assessing this transaction, we also consider the financial ability of the owner/operator of a public utility.

27. When assessing the sale or transfer of control of a water utility, we assess whether the transaction is in compliance with CEQA requirements, and whether all required approvals of other agencies have been received.

28. The purchase price of the shares acquired by Aspen does not affect the value of LAWC's rate base and therefore does not affect rates. Therefore, we do not consider the purchase price criteria in our assessment of Aspen's compliance with Pub. Util. Code § 854.

29. Aspen has a net worth in excess of \$1 million.

30. Aspen's managing member, Toeniskoetter, has experience in management of businesses in Bear Valley, and was also a member of the Board of Directors of SJW Corp. and San Jose Water Company from 1991-2012.

31. Since Aspen purchased 50% of the common stock in LAWC approximately nine years ago, Aspen has been part of the operational and management team that has continued to provide safe and reliable water service to the customers of LAWC.

32. The sale of LAWC common stock by J&M Orvis to Aspen is supported by the Bear Valley Residents Association, Inc. and the Bear Valley Business Association.

33. Pursuant to Resolution W-4766, we authorized LAWC's request to enter into an unsecured note, replacing the void unsecured note executed without prior Commission approval (Bridge Bank loan).

34. Based on the minutes of the November 1, 2004 LAWC Board Meeting, the Bridge Bank loan was approved by the Board.

35. Signatures of both Aspen and an Orvis Family member (Roma Orvis) are on the Bridge Bank loan documents.

36. Resolution W-4911, resolved the concerns regarding over-collection of the SDWSRF surcharge and determined that the over-collection did not violate the terms of the loan agreement.

37. Since SDWSRF surcharge funds are kept separate from other funds used by LAWC in its operations, such funds cannot be used for other purposes.

38. Information about LAWC can be accessed by customers via LAWC's website or its newsletter. LAWC also has office hours Monday through Friday, and on weekends the Plant Operator can be reached via a cell phone. LAWC staff includes a Plant Manager and Operator as well as an Office Manager.

39. Concerns regarding LAWC's service quality are reviewed in GRC's, and the quality has not been found wanting.

40. In Exhibit R-9, Stillman, on behalf of RLAWC complains about the taste and quality of the water. Stillman also compliments the customer service of the operations personnel of LAWC. In hearings, he reiterated this compliment, adding that he was pleased with the office manager's efforts as well.

41. In Exhibit R-10, Gloria Dralla, on behalf of RLAWC, also complains about the taste of the water.

42. Customer rates have risen since Aspen's acquisition of 50% of LAWC's common stock.

43. While California Water Code § 527 requires metering by January 1, 2025, the Commission's 2010 and 2005 Water Action Plans encourage water utilities to accelerate their metering program.

44. Issues such as increasing capacity and revenues as well as acquisition of water rights, and construction of plant, which have occurred over the past nine years, are all matters that have been addressed in previous Commission proceedings and been found reasonable and required in order to provide service to existing customers, during a period in which both Aspen and Orvis Family members have been actively involved in the operation of LAWC.

45. Commission resolutions regarding LAWC's requests to the Commission did not state that the approved requests would benefit development in Bear Valley or any interests of Aspen but authorized reasonable requests that are part of the proper operation of LAWC.

46. Outstanding expenses incurred because of the current proceeding will be addressed in LAWC's next GRC.

47. LAWC's new water rights are not being paid for by existing customers, but are paid for by future customers through facilities fees.

48. Bruce Orvis, Sr. supported LAWC's acquisition of new water rights prior to Aspen's purchase of LAWC common stock.

49. The construction of the new treatment plant was necessary to comply with CDPH citations and compliance orders in existence prior to the transfer. Resolutions W-4480 and W-4508 determined that the treatment plant financed by the SDWSRF loan was permanently excluded from rate base and ratepayers would only have to pay the surcharge for the loan.

50. Bruce Orvis, Sr. was the signatory for LAWC on a construction management contract with TBI, the agreement between LAWC and BVASC for the purchase of water, and the SDWSRF loan.

51. LAWC entered into a construction management contract with TBI without putting such contract out for bid.

52. Prior to January 1, 2004, TBI was known as Toeniskoetter & Breeding Inc. Construction and was owned by Breeding and Toeniskoetter. Breeding later became an employee of TBI.

53. Pursuant to Resolution W-4856, LAWC has no outstanding compliance orders from CDPH, which supports the position that LAWC provides safe and healthy water to its customers.

54. Since the transfer in 2003, instead of paying out dividends on a regular basis, LAWC has used these funds to pay for capital investments.

55. Notice of the current application was not provided to customers by Applicants.

56. There is no requirement that Applicants provide notice to customers of the current proceeding.

57. If there was a change in Orvis Family philosophy regarding the operation of LAWC after the transfer of common stock to Aspen, Bruce Orvis, Sr., his wife Roma, and son Bruce Orvis III were involved in it. Bruce Orvis, Sr. was intimately involved in such things as the construction of the water treatment plant, purchase of water rights, and rate agreements with the BVASC. Bruce Orvis, Sr. also held positions as President, Chairman, and Member of the LAWC Board. Roma was a member of the Board and Bruce Orvis III continues to be a member of the Board. Bruce Orvis III was in charge of day to day operations until 2008.

58. Both J&M Orvis and Aspen desire the transfer of 50% of the common stock in LAWC

59. This application involves only a proposed change in control of 50% of the common stock of LAWC for an existing water system. No new construction or changes in the source of water supply are being proposed.

60. Construction that has occurred over the past nine years has involved both Aspen and the Orvis Family. As such construction cannot be attributable to Aspen alone. The transfer did not and does not involve a “change in the environment”.

61. Pursuant to the provisions of CH&S § 116525(a), any person or entity operating a public water system must have a permit to operate that system from CDPH. A change in ownership of a public health system requires the prospective new owner to apply to and satisfy the CDPH requirement that the new owner “possesses adequate financial, managerial, and technical capability to ensure the delivery of pure, wholesome, and potable drinking water.”

62. In deciding whether to grant nunc pro tunc treatment, we look to past Commission decisions for guidance.

63. In D.00-09-035, we authorized nunc pro tunc treatment, but cautioned utilities that in the future we may deny such a request.

64. In D.07-05-004, we state that the Commission has no policy in favor of nunc pro tunc treatment, and in recent years have generally declined to grant nunc pro tunc requests.

65. We granted nunc pro tunc treatment in D.09-03-032 for a sale that had occurred 12 years earlier, but that was in the unusual situation of the seller having passed away in the intervening years.

66. Portions of RLAWC and Orvis' joint Opening Brief reference testimony that has already been stricken from the record of this proceeding. These portions include: 1) the second and third sentences of the second paragraph at page one that continues onto page two; and 2) footnote three, of RLAWC and Orvis' joint Opening Brief.

67. Exhibit Deposition-1 (deposition of Roma Orvis) contains information that was stricken from Exhibit P-1.

68. Throughout our assessment of these issues, we consider both the evidence detailed herein, as well as other similar evidence presented in the record of this proceeding, which we have not detailed because it is cumulative.

69. During evidentiary hearings, the parties requested confidential treatment of Exhibits P-2C, P-4C, P-6C, R-1C, R-4C, R-5C, R-11C, and A-37C (*See Attachment A*).

70. GO 66 provides definitions and guidance regarding public and confidential records provided to and requested from the Commission.

Conclusions of Law

1. We should affirm all rulings made by the assigned Commissioner and assigned ALJ in this proceeding.
2. Aspen has the experience, ability, and financial resources to own 50% of the common stock in LAWC.
3. The proposed transfer of 50% of the common stock in LAWC passes the ratepayer indifference test and is reasonable.
4. Aspen should be bound by all Commission decisions, rules, and regulations applicable to the owners of regulated water utilities, in its 50% ownership of LAWC.

5. The sale of 5,000 shares of LAWC common stock relieves J&M Orvis of their duty to provide public utility water service to the customers of LAWC.

6. Once Aspen determines if it is required to hold a CDPH permit to operate LAWC, it should file a compliance filing in this docket (that will not reopen the docket) informing the Commission whether it is required to receive a permit from CDPH or not. If such a permit is required, it should apply for such permit and file a copy of that permit within 30 days of receipt of such, as a compliance filing in this docket.

7. Authority for J&M Orvis to sell and Aspen to buy 50% of the common stock in LAWC should be conditioned on Aspen's receipt of any CDPH permits required to operate LAWC.

8. J&M Orvis should be conditionally authorized to sell and Aspen should be conditionally authorized to buy 50% of the common stock in LAWC.

9. Applicants and LAWC's request to strike footnote three on page two and the second and third sentences of the second paragraph on page one (that continues onto page two) of RLAWC and Orvis' joint Opening Brief should be granted.

10. Since Exhibit Deposition-1 (deposition of Roma Orvis) also contains information that was stricken from Exhibit P-1, the text of Exhibit Deposition 1 that discusses information that has been stricken from the record, should also be stricken.

11. Pub. Util. Code § 851 requires in part, that a public utility not sell, lease, assign, mortgage, dispose of, encumber, merge, or consolidate, the whole or any part of its assets that are necessary or useful in the performance of its duties to the public, without first having either secured an order from the Commission authorizing it to do so for qualified transactions.

12. Since market sensitive information is included in the minutes of Board meetings, a promissory note and related documents, a management agreement, and the organization chart of a company that Aspen owners are involved, the parties requests to treat Exhibits P-2C, P-4C, P-6C, R-1C, R-4C, R-5C, R-11C, and A-37C as confidential should be granted.

13. Pub. Util. Code § 852 requires that a public utility, its subsidiary or affiliate, or corporate holding company receive authority from the Commission before it purchases or acquires, takes or holds, any part of the capital stock of any other California public utility.

14. As Aspen is not a public utility or its subsidiary or affiliate, or corporate holding company, Pub. Util. Code §§ 851 and 852 are not applicable in the current proceeding.

15. Since the Bridge Bank Loan was approved by the LAWC Board and signed by an Aspen board member and Roma Orvis, responsibility for it is shared by both Aspen and Orvis Family owners. Therefore any lack of compliance with Commission regulations or agreement to selected terms is shared by both Aspen and Orvis Family owners.

16. Pursuant to Pub. Util. Code § 853, the Commission may exempt a public utility from Pub. Util. Code § 854, as long as such transfer is in the public interest.

17. This transaction is not exempt from Pub. Util. Code § 854 review.

18. Pub. Util. Code § 854 requires, in part, that the Commission must authorize the merger, acquisition, or change of control of a public utility.

19. The purpose of Pub. Util. Code § 854(a) is to enable the Commission to review a proposed acquisition, *before it takes place*, in order to take such action as the public interest may require.

20. Granting the current application on a nunc pro tunc, or retroactive basis, would thwart the purpose of Pub. Util. Code § 854(a).

21. In light of our strong and recent precedent that we deny nunc pro tunc treatment of Pub. Util. Code §854 approval, except in exceptional circumstances, we should deny nunc pro tunc treatment of the current request.

22. Since retroactive authority is not be granted herein, Aspen's acquisition of 50% of LAWC's common stock is void under Pub. Util. Code § 854(a) for the period of time prior to the effective date of this decision. The Applicants are at risk for any adverse consequences that may result from their having completed the transfer without Commission authority.

23. As Applicants violated Pub. Util. Code § 854(a), the assigned ALJ is be directed to open a second phase of the current application limited to: 1) whether a fine should be levied; and 2) if so, what amount that fine should be. The assigned Commissioner to this proceeding will determine the categorization and need for hearing of the second phase of this proceeding in their Amended Scoping Memo.

24. Applicants failed to comply with Pub. Util. Code § 854(a) by Aspen's acquisition of 50% of the common shares in LAWC without Commission authorization.

25. Violations of Pub. Util. Code § 854(a) are subject to monetary penalties under Pub. Util. Code § 2107.

26. Pub. Util. Code § 451 requires in part that all charges demanded or received by a public utility be just and reasonable.

27. CEQA applies to a "project" or action "which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change . . . [and involves] the issuance to a person

of a lease, permit, license, certificate, or entitlement for use by one or more public agencies.”

28. The sale of 50% of common stock in LAWC from J&M Orvis to Aspen is exempt from CEQA, and no further environmental review is required.

29. Lack of notice to customers in the current proceeding does not violate any legal requirement.

30. As Bruce Orvis, Sr. was the signatory for LAWC on the agreement between LAWC and BVASC for the purchase of water, the responsibility for this contract lies with Bruce Orvis, Sr., and not Toeniskoetter. Therefore, the agreement with BVASC does not support the claim of self-dealing.

31. Since both Aspen and Bruce Orvis, Sr. were involved in the TBI contract, and the contract was discussed at LAWC Board meetings, this violation of Commission requirements does not support a claim of self-dealing by Toeniskoetter.

32. The LAWC board members appointed by Aspen and the Orvis Family should work together to appoint a fifth board member. If the Aspen and Orvis Family board members are unable to agree on a fifth board member, the Commission should appoint one for them. Aspen and Orvis family board members must jointly notify the assigned ALJ via a joint compliance filing in this proceeding, within 60 days of this decision if the LAWC board has not appointed a fifth board member by that time.

33. The authority granted herein is not a finding of the value of the rights and property being sold.

34. A.11-04-013 should remain open.

O R D E R**IT IS ORDERED** that:

1. James L. and Marianne S. Orvis are conditionally granted the authority to sell, and Aspen Forest Investment Co., LLC, is granted the conditional authority to buy, 5,000 shares of common stock in Lake Alpine Water Company, Inc., subject to the conditions in Ordering Paragraphs 4.

2. Application 11-04-013 is denied to the extent it requests nunc pro tunc authority under Public Utilities Code Section 854(a).

3. In order to determine whether a fine should be imposed on James L. and Marianne S. Orvis and Aspen Forest Investment Co., LLC for violation of Public Utilities Code Section 854(a) by not filing an application requesting authority to transfer stock prior to the 2003 transaction, we direct the assigned Administrative Law Judge to open a second phase of the current application. The scope of this phase will be limited to: 1) whether a fine should be levied; and 2) if so, what amount that fine should be. The assigned Commissioner to this proceeding will determine the categorization and need for hearing of the second phase of this proceeding in their Amended Scoping Memo.

4. Aspen Forest Investment Co., LLC (Aspen) must file in this docket, as a compliance filing, all required California Department of Public Health permits to operate. This compliance filing shall be filed within 30 days of receipt of such permit. If such permits are not required, documentation that such permits are not required, must be filed in this docket as a compliance filing within 30 days of receipt of such information.

5. The authority granted in Ordering Paragraph 1 is conditioned on:
1) Aspen Forest Investment Co., LLC's receipt of all permits required by the California Department of Public Health to operate Lake Alpine Water Company,

Inc.; and 2) provision of documentation required pursuant to Ordering Paragraph 4.

6. All rulings made by the assigned Commissioner and assigned Administrative Law Judge in this proceeding are affirmed.

7. Aspen Forest Investment Co., LLC is bound by all outstanding Commission decisions, directives, rules, regulations, and filed tariffs involving Lake Alpine Water Company, Inc.

8. After the sale of the 50% of Lake Alpine Water Company, Inc. (LAWC) stock from James and Marianne Orvis to Aspen Forest Investment Co., LLC is final, James and Marianne Orvis are no longer required to provide regulated water service to customers of LAWC.

9. The request by James L. and Marianne S. Orvis, Aspen Forest Investment Co., LLC, and Lake Alpine Water Company, Inc. to strike the information on page 89 of the Ratepayers of Lake Alpine Water Company's and Paula D. and Bruce Orvis III's joint Opening Brief is denied.

10. The request by James L. and Marianne S. Orvis, Aspen Forest Investment Co., LLC, and Lake Alpine Water Company, Inc. to strike footnote three on page two and the second and third sentences of the second paragraph on page one (that continues onto page two) of the Ratepayers of Lake Alpine Water Company's and Paula D. and Bruce Orvis III's joint Opening Brief is granted.

11. Since Exhibit Deposition-1 (deposition of Roma Orvis) also contains information that was stricken from Exhibit P-1, the text of Exhibit Deposition-1 that discusses information that has been stricken from the record, is also stricken.

12. Exhibits P-2C, P-4C, and P-6C will be sealed, pursuant to General Order 66-C. The information will remain under seal for a period of three years from the date of this order. During this three-year period, this information may not be

viewed by any person other than the assigned Commissioner, the assigned Administrative Law Judge (ALJ), the Assistant Chief ALJ, or the Chief ALJ, except as agreed to in writing by Paula D. Orvis and Bruce Orvis III, or as ordered by a court of competent jurisdiction. If Paula D. Orvis and Bruce Orvis III believe that it is necessary for this information to remain under seal for longer than three years, Paula D. Orvis and Bruce Orvis III shall file a motion providing a justification for a further extension at least 30 days before the expiration of the three-year period granted by this order.

13. Exhibits R-1C, R-4C, R-5C, and R-11C will be sealed, pursuant to General Order 66-C. The information will remain under seal for a period of three years from the date of this order. During this three-year period, this information may not be viewed by any person other than the assigned Commissioner, the assigned Administrative Law Judge (ALJ), the Assistant Chief ALJ, or the Chief ALJ, except as agreed to in writing by the Ratepayers of Lake Alpine Water Company (RLAWC), or as ordered by a court of competent jurisdiction. If the RLAWC believes that it is necessary for this information to remain under seal for longer than three years, the RLAWC shall file a motion providing a justification for a further extension at least 30 days before the expiration of the three-year period granted by this order.

14. Exhibit A-11C James L. and Marianne S. Orvis, Aspen Forest Investment Co., LLC, (Aspen) and Lake Alpine Water Company, Inc. (LAWC) will be sealed, pursuant to General Order 66-C. The information will remain under seal for a period of three years from the date of this order. During this three-year period, this information may not be viewed by any person other than the assigned Commissioner, the assigned Administrative Law Judge (ALJ), the Assistant Chief ALJ, or the Chief ALJ, except as agreed to in writing by James L. and Marianne S.

Orvis, Aspen, and LAWC, or as ordered by a court of competent jurisdiction. If James L. and Marianne S. Orvis, Aspen, and LAWC believe that it is necessary for this information to remain under seal for longer than three years, James L. and Marianne S. Orvis, Aspen, and LAWC shall file a motion providing a justification for a further extension at least 30 days before the expiration of the three-year period granted by this order.

15. The current Lake Alpine Water Company (LAWC) board members, including the two appointed by Aspen Forest Investment Co., LLC., and Paula and Bruce Orvis, must work together to appoint a fifth board member. If the four current LAWC board members are unable to agree on a fifth board member, the Commission will appoint one for them.

16. If the current Lake Alpine Water Company (LAWC) board members do not appoint a fifth board member, the four current LAWC board members must jointly notify the assigned Administrative Law Judge of such via a joint compliance filing in this proceeding, within 60 days of this decision.

17. The authority granted herein is not a finding of the value of the rights and property being sold.

18. Application 11-04-013 remains open.

This order is effective today.

Dated _____, at San Francisco, California.