

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of John W. Richardson as Receiver for the Alisal Water Corporation to Sell and Transfer the Water Systems in Monterey County to Pajaro Sunny Mesa Community Service District.

Application 05-03-003
(Filed March 4, 2005)

Application of JOHN W. RICHARDSON (ALISAL WATER CORPORATION), to sell and transfer the Moss Landing Water System in Monterey County to Pajaro Sunny Mesa Community Service District.

Application 05-03-006
(Filed March 4, 2005)

OPINION GRANTING APPLICATIONS

This decision grants the applications of John W. Richardson, as Receiver for certain of Alisal Water Corporation's (Alisal) water systems, to sell the specified water systems in Monterey County to Pajaro Sunny Mesa Community Service District (PSMCS D) subject to reimbursing Alisal or paying, as appropriate, certain charges and collected revenues.

1. Proposed Transaction

Alisal is a public utility consisting of a mid-size water system in Salinas County, as well as six water systems in Monterey County, five of which -- Moss Landing Water Service, Inc., North Monterey County Water System (Normco), Blackie Road Water System, Vierra Canyon Water System and Langley/Valle

Pacifico Water System (collectively referred to as the “small water systems”) -- are the subject of these applications.

PSMCSD is a public entity organized and existing under the Community Services District Law, Gov. Code §§ 61000 *et seq.*

Under the terms of the agreement for sale, the Receiver would convey to PSMCSD all of the real and personal property assets, bank accounts and water supplies of the five small water systems, and PSMCSD would pay the owners of Alisal \$15,000 each for Moss Landing and Normco, and \$1,000 each for Blackie Road, Vierra Canyon, and Langley/Valle Pacifico.

2. Background

By orders entered April 9, 2002, and June 26, 2002, in *United States of America v. Alisal Water Corporation et al.*, Case No. C97-20099, the United States District Court for the Northern District of California appointed John Richardson as Receiver to assume management of Alisal’s small water systems, and directed the Receiver to assess the feasibility of selling them. The District Court found that these actions were necessary in light of Alisal’s lengthy history of failing to provide healthful drinking water in compliance with the Safe Drinking Water Act, the clear potential for imminent violations of the Act by Alisal in the future, and the failure of less drastic remedies to secure Alisal’s compliance with the Act in the past. The Commission recognized the appointment in Resolution W-4346.¹

After holding public hearings on August 14 and December 17, 2003, to solicit views on the receivership and the disposition of the small water systems,

¹ Resolution W-4346, *Alisal Water Corporation (ALCO) Order Recognizing John W. Richardson as the Court-Appointed Receiver of ALCO’s Small Systems*, August 8, 2002.

hearing oral argument and considering the parties' comments on the Receiver's recommendations for sale of the small water systems, the District Court concluded that the proposed sale and transfer is in the public interest, and directed the Receiver to complete the transaction as soon as practicable.

Alisal appealed the District Court's orders to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court's orders. (*United States v. Alisal Water Corporation*, 2005 U.S. App. LEXIS 22062, October 13, 2005.)

Meanwhile, the Receiver and PSMCSD filed these applications for authority to sell and transfer the small water systems to PSMCSD as ordered by the District Court.

Alisal filed a protest to the applications.² Based on the applications, the protest, the Receiver's and California Water Service Company's³ (CWS) replies, the discussion at the prehearing conference, and legal briefs, the following issues were identified for resolution:

- Whether the Receiver lacks standing to file these applications;
- Whether the applications comply with Rule 35(c), which requires applications to provide detailed reasons for entering into the proposed transaction and the facts warranting it;

² The time for filing protests was April 7, 2005. Alisal requested, and was granted, a two-week extension of time to file its protest. With permission of the ALJ, Alisal filed its protest one day after the end of the extension already granted.

³ Pursuant to the District Court's order, CWS is the proposed purchaser of another Alisal water system subject to receivership. California Water Service Company participated on the issues regarding the validity of the District Court's orders and the Receiver's standing.

- Whether the applications comply with Rule 35(b) requiring a statement of the book cost and original cost of the property to be transferred;
- Whether Alisal's violations of law and fitness or lack thereof support an order that the utility divest itself of the water systems;
- Whether the sales prices are confiscatory;
- Whether the proposed transferee is fit;
- What is the rate impact of the proposed transfers; and
- Whether the applicant has transferred operational and managerial control without prior Commission approval in violation of Pub. Util. Code § 856.

Alisal requested hearings on (1) whether Alisal's violations of law and level of fitness support an order that the utility divest itself of the water systems, (2) whether the sale prices are confiscatory, and (3) the fitness of the proposed transferee. The Assigned Commissioner and Administrative Law Judge (ALJ) determined that, Alisal having litigated these issues before the District Court and the Ninth Circuit Court of Appeal, due process does not require, and the principles of *res judicata* militate against, allowing Alisal to present additional evidence on these issues.

The Assigned Commissioner's and ALJ's July 18, 2005, scoping memo and ruling consolidated these applications, affirmed their preliminary categorization as ratesetting proceedings and the preliminary determination of no need for hearing, directed the applicants to file additional information regarding the rate impact of the proposed transfers, directed Alisal to file information of the book cost and the original cost of the properties proposed for transfer, and directed the filing of opening briefs on September 7 and reply briefs on September 21, 2005.

On Friday, September 2, 2005, Alisal requested a two-week extension of the time for filing briefs, in part due to the fact that it had not yet received responses to data requests it had served on PSMCSD only eight days earlier. The ALJ granted the extension over the Receiver's objection.

On September 19, 2005, two days before the revised time for filing opening briefs, Alisal requested an additional extension of at least two weeks, in part due to the fact that it had only two days earlier received the last of the data responses and in part due to the press of other obligations. Although PSMCSD did not oppose the request, counsel for the Receiver was unavailable to respond to it. The ALJ denied the request.

The Receiver filed and served its opening brief, and Alisal served (but did not file) its opening brief, on September 21, 2005.⁴ The matter was submitted on October 5, 2005, upon the filing of concurrent reply briefs by the Receiver and Alisal. No other briefs were filed.

Meanwhile, pursuant to the District Court's orders of April 9, 2002 and June 26, 2002 appointing the Receiver, the Receiver filed with the District Court periodic status reports setting forth expenses incurred during specified time periods of the receivership, followed by *ex parte* applications for the District Court's order authorizing payment of the expenses set forth in the particular report. Alisal did not challenge the reports covering the periods through May 31, 2005. However, on November 14, 2005, Alisal filed objections to the status report covering the period June 1, 2005 through September 30, 2005, and

⁴ Alisal filed a request for acceptance of late-filed brief on September 27, 2005, which the Receiver opposed. We hereby grant the request and accept Alisal's opening brief for filing.

on the same date filed opposition to the Receiver's October 11, 2005, motion seeking contempt sanctions for failure to comply with the District Court's orders to pay expenses for the previous time periods.

The draft decision of the ALJ was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. The Receiver filed timely comments on January 9, 2006; the ALJ granted Alisal's request for acceptance of its late-filed comments, which were served on January 10, 2006. The Receiver and Alisal timely filed reply comments on January 17, 2006.

By petition accepted for filing on February 1, 2006,⁵ Alisal petitioned to set aside submission of the record to take additional evidence of alleged charges incurred by the small water systems after the Receiver transferred responsibility for their operations to PSMCSD. By joint ruling dated March 7, 2006, the assigned Commissioner and ALJ granted the petition with respect to the offer of evidence related to expenses incurred during the term of PSMCSD's operational responsibility, and modified the July 18, 2005, scoping ruling to set evidentiary hearing to take that evidence. The joint ruling denied the petition with respect to the offer of evidence related to future Department of Health Services (DHS) surcharge revenues that Alisal might collect if it continued to own and operate the small water systems, and the liability for contract advances Alisal received

⁵ By ruling dated January 12, 2006, the ALJ directed Alisal to file this petition, if any, by no later than January 20, 2006. Alisal tendered the document for filing on that date, but failed to comply with the filing and service requirements of Article 2 of the Rules of Practice and Procedure. The ALJ directed Alisal to file a request for acceptance of late-filing of the document by no later than January 25, 2006, which the Receiver opposed. The ALJ granted Alisal's request by electronic mail on February 1, 2006.

for main extensions constructed before PSMCSD assumed operational responsibility.

On March 14, 2006, the Receiver filed a request for judicial notice of the District Court's March 8, 2006, Order Re Pending Motions and Requests, which addressed Alisal's objections to the status reports and resolved the Receiver's motion for sanctions. By ruling dated March 20, 2006, the ALJ took official notice of the District Court order, continued the evidentiary hearing, and solicited comments on her proposal to revise the draft decision to defer to the District Court for adjudication and resolution of the issue of payment responsibility for the referenced charges. The Receiver timely filed comments on the ALJ's proposed revisions on April 6, 2006. Alisal filed its comments under cover of a motion to accept its late-filed comments, on April 10, 2006.⁶

We have reviewed the comments of the parties on the draft decision and on the proposed revisions to the draft decision and have taken them into account, as appropriate, in finalizing this decision. No additional public review and comment period is required.

3. Standing to File Applications

Alisal asserts that the Receiver lacks standing to file these applications seeking authority to sell and transfer the small water systems. We reject Alisal's assertion. The United States District Court appointed the Receiver, and the Commission recognized the Receiver's appointment in Resolution No. W-4346. As the Commission explained in Decision (D.) 00-07-014, "[a] receiver is an officer of the Court, invested with the custody, control, and management of

⁶ We hereby grant the request and accept Alisal's comments for filing.

property to the end of preserving that property for whatever disposition the Court may finally determine. (D.00-07-014, *mimeo.* at p. 5.) The District Court has ordered the Receiver to sell the small water systems as directed in its April 13, 2004 Order. The Receiver has filed these applications consistent with the authority vested in him by the District Court and recognized by the Commission.

4. Compliance with Rules 35(b) and (c)

Alisal asserts that the applications fail to comply with Rule 35(b), which requires them to provide detailed reasons for entering into the proposed transaction and the facts warranting it, and with Rule 35(c), which requires them to include a statement of the book cost and original cost of the property to be transferred.

The applications state that the Receiver has been ordered to dispose of the systems pursuant to the order of the District Court, and attach the District Court order. The statement and the order of the District Court constitute an adequate explanation of the reason for the proposed transactions.

The applications do not contain a statement of the book cost and the original cost of the property to be transferred. However, that deficiency was cured by Alisal's submittal of the information pursuant to the July 18, 2005 scoping memo and ruling. Although Alisal complains that its submittal "begs the issue," it does not state what it believes to be amiss. The record meets the Commission's requirements with respect to containing a statement of book cost and original cost, and Alisal, being the proprietor of the information, is not prejudiced by its untimely presentation.

5. The District Court's Divestiture Order

Alisal questions the District Court's jurisdiction and authority to order the divestiture of the small water systems, and asks for hearings on "*inter alia*, whether there have been violations of law or commission regulations that require divestiture [and] whether the District Court properly found that the utilities owners lack the managerial resources to own and operate the Small Utilities." Although the scoping memo adopts Alisal's statements of these issues (consolidating them into one issue statement), Alisal takes contradictory positions on them.

While Alisal argues, in its opening brief, that the District Court deferred to the Commission to decide whether or not to approve the transfers, Alisal asserts "the Commission does not have the authority to divest a public utility of its operating rights." Alisal cites *Citizens Utilities Co. v. Superior Court*, 56 Cal.App.3d 399, for the propositions that *neither* the District Court nor the Commission possesses the authority to order the transfer of utility ownership or to cancel a utility's franchise, and that the jurisdiction to determine adequacy of service rendered by a public utility is vested exclusively with the Commission. In fact, *Citizens* stands for the opposite proposition:

"We do not perceive the instant case to be one in which jurisdiction is exclusively with the Commission. The superior court has jurisdiction to cancel a franchise under certain circumstances and the Commission has no jurisdiction to cancel a franchise under any circumstance. (*People v. Northwestern Pac. R. Co.*, 20 Cal.App.2d 120, 122 [66 P.2d 697].) The instant case is one in which the law courts have jurisdiction unless the Commission has elected to act as to the particular subject matter and that, if it has elected so to act, the exercise of such jurisdiction by the Commission ousts respondent court of any jurisdiction assumed by it.

Petitioner [...] contends that the right to cancel its franchise in the instant case is dependent upon a finding by the Commission that petitioner's service is inadequate, a determination solely within the province of the Commission. This contention is without merit. As already pointed out a franchise may be cancelled or terminated because a utility authorized to furnish and supply water under a franchise is furnishing to consumers water that has become impure, unwholesome and unpotable." (At 407-408.)

The District Court found Alisal in violation of various public health and safety regulations under the Safe Drinking Water Act. The District Court, not the Commission, has the jurisdiction to order Alisal to divest itself of the small water systems. We properly defer to the District Court's determination on the need for divestiture, and to its exclusive jurisdiction to order divestiture.

6. The District Court's Sales Price Order

We also defer to the District Court with respect to the sales prices it orders. Having jurisdiction to order divestiture, the District Court reasonably has the authority to order terms to effectuate that divestiture, and Alisal offers no authority for us to conclude otherwise.

Instead, Alisal reiterates the challenges it made or could have made in the district court proceeding. Alisal challenges the court-ordered sales prices for not reflecting the real value of the property or Alisal's investments, and main extension contract advances and loans taken to make those investments, in the property. Alisal also objects to the process used by the District Court to conduct the bidding process, because it was excluded from the bidding process, not informed about how the Receiver identified qualified bidders, and not allowed to comment on the terms of the sale. Alisal raised these claims on appeal, and the Court of Appeals found that Alisal had waived its takings claim and that its due process rights were not violated. Alisal raises no new claims here that it did not

raise or could not have raised in the District Court. Pursuant to the doctrine of *res judicata*, we therefore give conclusive effect to the District Court's order.⁷

Alisal contends that District Court deferred to the Commission to identify the assets subject to the transfers and the respective rights and liabilities of the parties upon transfer, but offers no authority or citation to support its contention. To the contrary, the record shows that the proposed transfers represent bids that were made in the course of the sale process conducted by the Receiver pursuant to the District Court's order. Even if Alisal's claim were not barred by *res judicata*, we have no reason to conclude that the bids were made without regard to what assets were at stake or the terms for their transfer.

Alisal also invites us to consider evidence that the District Court excluded regarding the price Alisal contends it should receive. We decline this invitation to second-guess the District Court's evidentiary rulings. Further, there is no indication that, in declining to hear this evidence, the District Court was deferring the sale price issue: The District Court expressly set the sale prices for these properties.

⁷ See, e.g., D.03-04-038, *mimeo.* at p. 10. ("*Res judicata* precludes the relitigation of a final judgment on the merits between the same parties or parties in privity with them. It is applied to promote judicial and administrative economy, bring finality to adjudicated issues, and prevent wasteful multiple litigation. The doctrine of *res judicata* gives certain "conclusive effect" to a former court judgment in subsequent litigation on the same controversy. In order to preclude a new case from going forward, there must be an identity of parties and an identical cause of action. [Citations omitted.]")

7. Whether the Transfer is in the Public Interest

Notwithstanding our deference to the District Court orders regarding divestiture and sale prices, the Commission retains the authority and responsibility under Pub. Util. Code § 851 to approve the transfer:

Public Utilities (PU) Code Section 851 provides that no public utility other than a common carrier by railroad may sell the whole or any part of its system or property useful in the performance of its public duty without first obtaining authorization to do so from this Commission. In transfer proceedings the function of the Commission is to protect and safeguard the interests of the public. The concern is to prevent the impairment of the public service by the transfer of utility property into the hands of companies incapable of performing an adequate service at reasonable rates or upon terms which will bring about the same undesirable result (*So. Cal. Mountain Water Co. (1912) 1 CRRC 520*).

We address the two prongs of this evaluation – the fitness of the proposed transferee to provide adequate service, and the rate impact of the transfer on customers – separately below.

a. Fitness of the Transferee

The question, with respect to the fitness of the proposed transferee, is whether “the purchaser is financially capable of the acquisition and satisfactory operation thereafter. But where a municipal corporation or other public entity is the purchaser, these considerations are less compelling. Public agencies may be entitled to the presumption that they are creditworthy and will operate the public utility system in a manner consistent with the public interest. However, that presumption, if applied in any given matter, is rebuttable and we retain the vital and substantial authority of approving the transaction.” (*City of Redding, 19 CPUC2d 161 [D.85-11-018]*.)

PSMCSD is a public agency organized and existing under the Community Services District Law, Gov. Code §§ 61000 *et seq.* The presumption that it is creditworthy and will operate the public utility system in a manner consistent with the public interest is un rebutted.

We also note the customers' overwhelming support for the sale to PSMCSD, as described in the District Court's orders:

"The record in this case reflects that the customers of these systems suffered substantial inconvenience and risk to their health for many years as a result of defendants' non-compliance with the [Safe Drinking Water] Act. [Citations omitted.] In light of this, the Court has given great weight to the views of the customers of these systems which overwhelmingly favor sale of the systems to PSMCSD, a non-profit public agency. These views were expressed in letters, petitions and oral comments at the public hearings." (*United States v. Alisal Water Corporation*, No. C97-20099JF (EAI) (N.D. Cal., April 12, 2005) (order regarding sale of receivership assets).)

We find that PSMCSD has the financial and operational capability to provide adequate service.

Alisal asserts that PSMCSD is unfit because it is in violation of the California Environmental Quality Act (CEQA) for failing to seek "LAFCO approval."⁸ The Receiver responds that PSMCSD told it that Monterey County will not entertain a CEQA review until PSMCSD has title to the small water systems. We have no basis on this record to conclude either that the transfer is subject to CEQA or that PSMCSD is untimely in seeking LAFCO approval.

⁸ Although Alisal does not define it, we assume this acronym refers to the Local Agency Formation Commission of Monterey County.

Alisal further asserts that PSMCSD is unfit because, since it began operating the small water systems on behalf of the Receiver in February 2005, it has been in violation of the Commission requirement to collect and remit the Public Utilities Commission Reimbursement Account fee.⁹ Alisal also asserts that PSMCSD is charging a small water systems customer, the Manzanita Estates Homeowners' Association, a lower rate than permitted in the tariff. The Receiver responds, with respect to the Reimbursement Account fee, that PSMCSD does not have authority to collect the fee because it is not regulated by the Commission. With respect to the assertion that PSMCSD is charging an unauthorized rate, the Receiver explains that, according to PSMCSD, the discount is on the rate for a meter used only for landscaping and not human consumption, and that PSMCSD believed it would be better to charge a discount rather than lose revenues if the customer pulled the meter.

We are very concerned about these undisputed facts. First, until such time as this transfer is approved and consummated, the Receiver continues to bear the responsibility for collecting and paying the Reimbursement Account fee, and the Receiver's choice of an unregulated entity to operate the utility on its behalf does not relieve the Receiver of this responsibility. We address this issue further below.

Second, notwithstanding PSMCSD's "belief" that it was reasonable to offer a lower rate than the tariff rather than lose all revenues from the customer, it is

⁹ More precisely, Alisal states that PSMCSD "has not been collecting the PUC fee, which is established in the tariff at a rate of 1.4%." As evidence of this, Alisal refers to a copy of a utility bill that does not include a line item for the fee. We understand the referenced fee to be the 1.4% Public Utilities Commission Reimbursement Account fee established in Resolution M-4800 (July 6, 2000).

unlawful. Pub. Util. Code § 532 prohibits a public utility from charging or receiving a different rate for any commodity or service than specified in its tariffs; Sections 2107 and 2111 provide for the imposition of a penalty of not less than \$500 and up to \$20,000 for each offense. The Receiver is responsible for collecting only authorized revenues. The Receiver is not relieved of this obligation by virtue of having arranged for PSMCSD to operate and manage the system on its behalf. We direct the Receiver to immediately cease this violation, and put it on notice that it may be subject to penalties for any future violation.

We do not conclude from this, however, that PSMCSD lacks the financial and operational capacity to provide safe and reliable service. We have no basis to attribute PSMCSD's failure to collect and remit the Reimbursement Account fee, or to abide by Commission-approved tariffs, to anything other than its misunderstanding of its role and responsibilities under the operations and management agreement – a misunderstanding which is apparently shared by the Receiver, and the effect of which must be remedied as a condition to transfer. Nevertheless, upon transfer of the small water systems to PSMCSD, its unfamiliarity with Commission regulatory requirements and processes will not be an impediment to its ability to operate the systems.

b. Rate Impact of Transfer

The proposed transferee's status as a community services district likewise affects the Commission's review of the rate impact of the transfer:

In the common transfer proceedings between private parties, the function of the Commission is to prevent the impairment of the public service of a utility which could result from the transfer of utility property into the hands of parties incapable of performing an adequate service at reasonable rates or upon terms which would bring about the same undesirable result (Southern Cal. Mountain Water Co. (1912) 1 CRC 520). But such concerns are not the

determinant where a community services district is involved. If the Commission were to impose terms not acceptable to a district, the proposed sale could be abandoned and the district could resort to its eminent domain alternative (See *People ex rel. PUC v City of Fresno* (1967) 254 CA 2d 76; petition for hearing denied by Supreme Court 11/22/67). Furthermore, after transfer and sale to a district, the customers transferred must continue to receive service and rates that are “fair, reasonable, just, and nondiscriminatory.” (See *Hansen v City of San Buenaventura* (1985) 213 C[al.] Rptr. 859.)

In re Park Water, 29 CPUC2d 415 [D.88-10-030].¹⁰ Thus, for example, the Commission has found the standard to have been met upon a finding that the public entity will operate and maintain the system with the lowest rates possible consistent with providing reliable service to the community. (See, generally, D.03-08-055; D.02-10-050.)

By resolution adopted on July 28, 2005, the PSMCSD Board of Directors resolved that it would not seek any changes or increases in the rates or charges levied or collected from the customers of the small water systems until July 1, 2006, and that at such time, it would determine when to adjust the rates of the small water systems to conform to and correspond with the lower rates charged to PSMCSD’s current customers. We conclude that PSMCSD intends to

¹⁰ In its brief on the standard of review, CWS submits that this language (as it is similarly stated in *Bidwell Water Company, Inc.* (D.02-10-003, mimeo. at p. 3)) should not govern the standard of review because *Hansen v. City of San Buenaventura* was superseded by grant of review and then reversed by *Hansen v. City of San Buenaventura*, 42 Cal.3d 1172, 233 Cal. Rptr. 22 (1986). However, the particular language cited by the Commission is itself based on decisions that are still good law, and the premise that rates established by a public entity are presumed reasonable, fair and lawful is reiterated in the later, California Supreme Court decision reversing the earlier decision. (42 Cal.3d at 1180.)

operate and maintain the water system with the lowest rates possible consistent with providing reliable service to the community.

Alisal asserts that the transfer is contrary to the public interest because PSMCSD charges its customers higher rates than Alisal. Alisal provides a comparison of PSMCSD's charges and the tariffed charges for Normco¹¹ and Moss Landing showing that many of PSMCSD's charges are higher than Alisal's, and that PSMCSD imposes various charges, including late fees and charges for construction, connection, and meter systems, for which Alisal either does not charge or charges actual cost. Alisal asserts that PSMCSD raises its rates, fees and charges by 10% every year.

We cannot conclude from this comparison that PSMCSD's rates are therefore unreasonable. Alisal's rates were last set in February 1995. (Resolution W-3908, February 8, 1995.) PSMCSD's rates may reflect current costs, and it may be that, were Alisal to seek a rate adjustment, its revised rates would be comparable to PSMCSD's. Indeed, Alisal's putatively lower rates are for service that has been found to violate applicable water quality standards. It would be unfair to compare such rates to rates for service that meets those standards.

In addition, the Commission has authorized small water utilities, including Alisal, to charge facilities fees to fund replacement of plant upon the filing of an advice letter (Resolution No. W-4110), and connection charges to cover the actual costs of installing new service connections (*Rulemaking to Revise General Order 103*

¹¹ According to its tariff, the rates for Normco also apply to unspecified "North County" systems.

and Water Tariff Rules 15 and 16, 39 CPUC2d 594 [D.91-04-068].) Thus, notwithstanding the fact that Alisal has declined to seek a rate increase or to implement connection and facilities fees, we have no basis to conclude that higher rates or the implementation of Commission-authorized fees and charges are therefore unfair, unreasonable, unjust or discriminatory.

8. Transfer of Operational and Managerial Control

Alisal asserts that the Receiver transferred the small water systems to PSMCSD without Commission approval in violation of Pub. Util. Code § 854(a). Alisal points to the operations and management control agreements that the Receiver and PSMCSD entered into in or about February 2005, and asserts that they go beyond simply giving PSMCSD interim responsibility to operate the systems. Alisal asserts that the agreements improperly assign to PSMCSD the discretion and responsibility to operate and maintain the systems and bill customers, and to retain monthly receipts/revenues from customers to reimburse it for any and all expenses it incurs. The Receiver maintains that it did not transfer the systems to PSMCSD, but merely uses it to handle day-to-day operations.

We find that the agreements do not constitute a change in control requiring Commission approval under Section 854(a). First, the agreement does not transfer any ownership to PSMCSD, much less a controlling interest. For purposes of Section 854, the Commission generally defines “control” as a controlling percentage of stock ownership. (*See, e.g., D.03-02-071, mimeo.* at 10.) Second, under the plain language of the agreements, the Receiver retains actual control of the operations, and PSMCSD is required to abide by the Commission-approved tariff sheets. Specifically, the agreement provides that PSMCSD will operate and maintain the systems “on behalf of the Receiver,” that it has control

and discretion over the method of billing and bookkeeping only “unless otherwise directed by the Receiver,” and that it shall retain customer revenues to reimburse it for expenses “pursuant to existing CPUC-approved tariff sheets.”

Alisal’s and the Receiver’s discussions on this issue, however, raise other concerns. Alisal asserts, and the Receiver confirms, that PSMCSD has not remitted the Public Utilities Commission Reimbursement Account fee to the Commission. The Receiver asserts that, as an unregulated entity, PSMCSD does not have the authority to collect the Reimbursement Account fee in rates. The Receiver cannot have it both ways. As it attests, the Receiver has not transferred the systems to PSMCSD, but retains the authority and control over the revenues of the small water systems. (Resolution No. W-4346, “As the receiver, Mr. Richardson is responsible for the collection of revenues as authorized by the latest applicable Commission orders and must operate the water system [...]”) The Receiver’s delegation to another entity to operate the systems did not relieve him of control over revenues (and could not, without the Commission’s authority under Section 854). In particular, the Receiver’s selection of an unregulated entity for the job did not excuse the Receiver from collecting and paying the Public Utilities Commission Reimbursement Account fee. We therefore condition the transfer on the Receiver’s payment of the Public Utilities Commission Reimbursement Account fees incurred from the date that the right to revenues was assigned to PSMCSD through the date of transfer.

Alisal’s and the Receiver’s discussions also raise another issue, namely, the issue of payment responsibility for operational expenses incurred after PSMCSD assumed operational responsibility for the systems. Alisal complains that PSMCSD has been collecting, but not remitting to Alisal, the Department of Health Services surcharges authorized by the Commission to compensate Alisal

for costs incurred in 2003;¹² Alisal complains that it paid property taxes owed on the water systems as well as telephone charges, insurance costs, sewer costs, and county health department charges allegedly incurred after PSMCSD took over operation of the systems; and the Receiver requests, in its comments on the draft decision, that any compensation due Alisal for expenses incurred after PSMCSD assumed operational control be reduced by amounts allegedly incurred and paid by PSMCSD for water and/or soil testing associated with the systems.

The issue of payment responsibility for operational expenses incurred after PSMCSD assumed operational responsibility has been, and continues to be, litigated before the District Court, and we defer to the District Court's resolution of it. Specifically, pursuant to the District Court's orders appointing the Receiver, the Receiver files periodic status reports with the District Court setting forth expenses incurred during specified time periods of the receivership, and informing Alisal that it has 10 days in which to file any objections. After the 10-day periods run, the Receiver files *ex parte* applications for an order authorizing payment of the expenses set forth in the particular report.

In its order entered March 8, 2006, the District Court noted that Alisal declined to challenge the status reports addressing expenses covering the period up through May 31, 2005. The District Court addressed Alisal's challenge to the expenses identified in the status reports covering the periods June 1, 2005, through December 31, 2005, concluding as follows:

Put another way, Defendants [Alisal] argue that once the purchasers assumed operational control of the systems, they also assumed

¹² Resolution W-4327 (March 6, 2002) and Resolution W-4327 (March 6, 2002).

normal operating expenses, and that such expenses should not be charged to Defendants. The Court agrees with this basic division of expenses, *with the caveat that if a particular expense became necessary as a result of Defendants' neglect of the water systems, such expense is chargeable to Defendants even if the expense otherwise properly would be deemed an operational expense.* [...]

In summary, the Court concludes that Defendants are responsible for payment of *all* expenses set forth in the October 2005, December 2005 and January 2006 status reports [covering the period June 1, 2005 through December 31, 2005], *except* normal operating expenses incurred after the purchasers took over actual operation of the systems. The problem, of course, lies in determining which expenses belong in which box. The Court cannot make this determination based upon the record before it, because Defendants have failed to identify specific expenses that have been inappropriately charged to them within the framework set forth above. Accordingly, the Court will grant the Receiver's applications for payment of all the expenses set forth in the October 2005, December 2005 and January status reports, *without prejudice to Defendants' right to submit an itemization of any normal operating expenses incurred by the small water systems subsequent to the transfer of operations.* (Emphasis added.)

As evidenced by its March 8 order, the District Court is well ahead of the Commission in its consideration of this issue. Although apparently Alisal has yet to offer to the Court its itemization of operating expenses that it believes should be paid by the purchaser, the Receiver's status reports and requests for payment of the expenses set forth in them are in the record of that proceeding. Furthermore, having heard and resolved the underlying action regarding Alisal's failure to provide healthful drinking water in compliance with the Safe Drinking Water Act, at this juncture the District Court is better situated than the Commission to evaluate liability for expenses that became necessary as a result of Alisal's neglect of the small water systems. Pursuant to the doctrine of *res*

judicata as discussed earlier, we therefore reverse the March 7, 2006 joint ruling of the Assigned Commissioner and ALJ with respect to its partial grant of Alisal's petition to set aside submission, and defer to the District Court's resolution of this issue.

Alisal contends that the Commission may not defer to the District Court because the issue arises out of Commission rules and tariffs that are the Commission's responsibility to enforce and that are not before the District Court. Specifically, Alisal explains that the District Court "was silent on matters subject to the ongoing jurisdiction of the Commission, such as the recovery of commission surcharges, repayment of main contract extension advances [sic], or other ratemaking and regulatory issues."

Alisal's contention is without merit. The Commission's authority and jurisdiction to set rates and surcharges that may be collected from customers of the small water systems does not deprive the District Court of its jurisdiction and competence to determine payment responsibility and the right to revenues collected during the term of the receivership that it established.

9. Assignment of Proceeding

Dian M. Grueneich is the Assigned Commissioner and Hallie Yacknin is the assigned ALJ in this proceeding.

Findings of Fact

1. Alisal is a public utility consisting of several water systems, including the five systems that are the subject of this proceeding: Moss Landing Water Service, Inc., North Monterey County Water System, Blackie Road Water System, Vierra Canyon Water System and Langley/Valle Pacifico Water System.

2. PSMCSD is a public entity organized and existing under the Community Services District Law, Gov. Code §§ 61000 *et seq.*

3. John W. Richardson is the Receiver for the small water systems that are the subject of this proceeding, appointed by the United States District Court for the Northern District of California.

4. Pursuant to order of the District Court, the Receiver proposes to transfer to PSMCSD all of the real and personal property assets, bank accounts and water supplies of the five small water systems, and PSMCSD would pay the owners of Alisal \$15,000 each for Moss Landing and Normco, and \$1,000 each for Blackie Road, Vierra Canyon, and Langley/Valle Pacifico.

5. The applications state that the Receiver has been ordered to dispose of the systems pursuant to District Court order, and attach the order.

6. Pursuant to the ruling of the ALJ, Alisal filed a statement of the book cost and the original cost of the properties to be transferred.

7. Alisal litigated the issues of whether it should be divested of the small water systems and the terms and sale prices for their transfer in District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

8. PSMCSD is creditworthy and will operate the small water systems consistent with the public interest.

9. PSMCSD intends to operate and maintain the water systems with the lowest rates possible consistent with providing reliable service to the community.

10. The Receiver used Alisal for the day-to-day operations of the small water systems until February 2005, when the Receiver entered into operations and management control agreements with PSMCSD for it to perform the day-to-day operations, collect revenues and pay the expenses of the small water systems on behalf of the Receiver.

11. The operations and management control agreements between the Receiver and PSMCSD do not transfer the small water systems to PSMCSD.

12. PSMCSD, on behalf of the Receiver, charged the Manzanita Estates Homeowners' Association less than tariffed rates.

13. Since entering into the operation and management agreements, PSMCSD, on behalf of the Receiver, has neglected to collect and remit to the Commission the Public Utilities Commission Reimbursement Account fee.

14. Through the procedure established by the District Court for its review and authorization of payment of expenses incurred by the small water systems while in receivership, Alisal has the opportunity to challenge, and has challenged, responsibility for payment of expenses charged to it.

15. PSMCSD, on behalf of the Receiver, has neglected to pay the real and personal property taxes and telephone charges incurred after entering into the operation and management control agreements.

16. Since entering into the operation and management agreements, PSMCSD, on behalf of the Receiver, has collected and retained the Department of Health Services surcharge authorized by the Commission to compensate Alisal.

Conclusions of Law

1. The Receiver has standing to file these applications.

2. The applications comply with Rule 35(b) of the Commission's Rules of Practice and Procedure.

3. Alisal's filing of the statement of the book cost and the original cost of the properties to be transferred brings the applications into compliance with Rule 35(c). Alisal is not prejudiced by the late compliance with the requirement of Rule 35(c) that the applications include a statement of the book cost and the original cost of the properties to be transferred.

4. The Commission properly defers to the District Court's determination that Alisal should be divested of the small water systems, and to its exclusive jurisdiction to order it.

5. The Commission properly gives conclusive effect to the District Court's determination of terms and sale prices for the transfers.

6. The Receiver did not transfer control of the small water systems to PSMCSD in violation of Pub. Util. Code § 854(a).

7. The Receiver violated Pub. Util. Code § 532 by charging Manzanita Estates Homeowners' Association a different rate for water service than specified in the water utility's tariffs.

8. The applications to transfer the small water systems to PSMCSD should be authorized upon the Receiver's payment of Public Utilities Commission Reimbursement Account fees incurred in association with the small water systems since February 2005.

9. The Commission properly gives conclusive effect to the District Court's determination of the payment responsibility for operational expenses incurred after PSMCSD assumed operational responsibility for the small water systems.

10. The following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Receiver John W. Richardson is authorized to transfer the Moss Landing Water Service, Inc., North Monterey County Water System, Blackie Road Water System, Vierra Canyon Water System, and Langley/Valle Pacifico Water System to Pajaro Sunny Mesa Community Service District in conformity with the

agreement for sale of water company assets (Exhibit B to the applications), subject to the terms and conditions set forth below.

2. The Receiver shall file in this docket, within 30 days of the effective date of this order, proof of payment of Public Utilities Commission Reimbursement Account fees associated with the specified water systems since February 2005. The Receiver may not execute the transfer until proof of payment is on file.

3. The March 7, 2006, joint ruling of the Assigned Commissioner and Administrative Law Judge setting aside submission and setting evidentiary hearing is affirmed with respect to the disposition of the offer of evidence of Commission surcharges and main contract extension advances. The ruling is reversed in all other respects, and the February 1, 2006, petition of Alisal Water Corporation to set aside submission is denied.

4. Application (A.) 05-03-003 and A.05-03-006 are closed.

This order is effective today.

Dated _____, at San Francisco, California.