

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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In the Matter of Application of Odd Fellows Sierra Recreation Association, a California corporation, and Sierra Park Water Company, Inc., a California corporation, for Certificate of Public Convenience and Necessity to Operate a Public Utility Water System near Long Barn, Tuolumne County, California and to Establish Rates for Service and For Sierra Park Water Company, Inc. to Issue Stock.

Application 13-09-023  
(Filed September 20, 2013)

And Related Matter.

Case 12-03-017  
(Filed March 14, 2012)  
(CONSOLIDATED)

**RESPONSE OF SIERRA PARK WATER COMPANY TO  
ADMINISTRATIVE LAW JUDGE'S RULING  
TO SUPPLEMENT THE RECORD**

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Pursuant to the February 10, 2017 ruling of Administrative Law Judge (“ALJ”) Eric Wildgrube to Supplement the Record (“Ruling”) as well as an extension of time to respond granted by email on February 27, 2017, Sierra Park Water Company (“Water Company”) hereby responds to the Ruling. This Response is accompanied by a Declaration of William Ordwein in Support of Response of Sierra Park Water Company to Administrative Law Judge’s Ruling to Supplement the Record (“Ordwein Decl”) and a Request for Official Notice (“RON”).

**1. Background**

On January 26, 2017, Sierra Park Water Company (“Water Company”) filed a Petition for Modification of Decision No. 16-01-047 (Decision Resolving a Complaint and Authorizing a Certificate of Public Convenience and Necessity as Modified) (“Petition”) seeking to modify Decision No. 16-01-047 (“Decision”) to permit certain properties to be transferred to Water Company from Odd Fellows Sierra Recreation Association (“Association”) by lease or easement. On February 10, 2017, Administrative

Law Judge Eric Wildgrube issued the Ruling, directing that Water Company respond to certain questions and provide further information regarding the Petition. On February 27, 2017, Water Company requested an extension of time until April 12, 2017 to respond to the ruling, and ALJ Wildgrube granted that extension on February 27, 2017 in an email ruling.

**2. Response to Inquiries Which Would Involve the Block Building/Shop and the Corp. Yard.**

The Ruling raises a number of questions about the sufficiency of long-term rent-free leases or easements as a way of transferring property used in providing water to customers that will not harm customers. These include the cost of surveying, filing and so forth involved in fee transfer; the number of properties to be sold or transferred; the total cost of doing so; and the issue of a deed of trust on the property. (Ruling, pp. 2, 3.)

After the Ruling was issued, Water Company and Association examined whether it might be possible to convey the property underlying the Block Building/Shop and Corp. Yard in a fashion that might be somewhat simpler and less expensive, and were able to accomplish a fee transfer of the property underlying each structure. Association transferred to Water Company the real property on which the Block Building/Shop and Corp. Yard were located on March 20, 2017. Those two buildings had already been transferred from Association to Water Company, but not the real property on which they were located.<sup>1</sup> Attached to the Ordwein Decl as Attachment C is a Conformed Copy of the Grant Deed conveying that real property, with a stamp showing it was filed and recorded in Official Records of the County of Tuolumne on March 21, 2017. Exhibit “A” to the Grant Deed calls the Corp. Yard the “Storage Yard Parcel” and the Block Building/Shop the “Repair Shop Parcel.” (Ordwein Decl. ¶5.) The transfer of property

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<sup>1</sup> See rejection without prejudice of Water Company’s Advice Letter 2 (Attachment A to Ordwein Decl), recognizing on page 2 that “the Shop Block building [and] the Corporate Yard metal building . . . were transferred but without land or legal access to them.” (Second sentence under heading “Assets Transferred to Water Company.”) See also Bill of Sale (Attachment B to Ordwein Decl), which transfers to Water Company “all right, title and interest in and to the assets set forth on **Exhibit ‘A’** hereto.” (Emphasis in original.) Lines 1-13 and 14-17 Exhibit A describe all assets concerning the Shop and the Corp. Yard Building that were transferred, including “Shop block building (but not land)” (line 1) and “Corporate yard metal building (but not land)” (line 14).

was effective upon its acceptance by Water Company,<sup>2</sup> which is confirmed in the Certificate of Acceptance appearing at the top of page 2 of the Grant Deed and signed on March 20, 2017 by William Ordwein. (Ordwein Decl. ¶ 5.)

With that transfer, questions related to the need to transfer the Block Building/Shop and Corp. Yard and the costs related to that have been resolved. Water Company now owns both the Shop and Corp. Yard buildings and the real property under them.

As to the deeds of trust that had encumbered the real property under the Block Building/Shop and Corp. Yard, on March 20, 2017, the beneficiaries of two deeds of trust dated May 12, 2016 and August 25, 2016 modified those deeds of trust in two documents, each entitled Modification of Deed of Trust (collectively referred to as “Modifications”).<sup>3</sup> Attached to the Ordwein Decl as Attachments D and E are Conformed Copies of the Modifications, each bearing a stamp showing it was filed and recorded in Official Records of the County of Tuolumne on March 21, 2017.<sup>4</sup> The Modifications release the encumbrance on the real property on which the Block Building/Shop and Corp. Yard are located. (¶ 1 on pp. 1-2 of each of the Modifications.) As with the Grant Deed, Exhibit “A” to each of the Modifications calls the Corp. Yard the “Storage Yard Parcel” and the Block Building/Shop the “Repair Shop Parcel.” (Ordwein Decl ¶ 6.) Recordation of each of the Modifications has occurred and thus the real property has been transferred to Water Company by the Trustor under the deeds of trust (that is, the Association) free and clear of the encumbrances of the two deeds of trust. The Modifications thus respond to and resolve the questions with respect to encumbrances on the real property fee title to which has now been transferred to Water Company.

### **3. Response to Inquiries Which Would Involve the “Lodge.”**

The other property in issue in the Petition for Modification is the Lodge. Water Company continues to believe that, given all the circumstances in the small community it

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<sup>2</sup> *Luna v. Brownell* (2010) 185 Cal.App.4th 668, 673.

<sup>3</sup> Water Company requests official notice of the Grant Deed and both Modifications in the RON filed at the same time as this Response.

<sup>4</sup> The Grant Deed and Modifications were deemed recorded when they were deposited in the Tuolumne County Recorder’s office. Civil Code § 1170.

serves, a lease of the Lodge, rather than a fee transfer, is preferable on balance for both Water Company and the community it serves.

**a. History and Use of the Lodge**

Understanding the history and use of the Lodge will assist in understanding why the Water Company believes that lease of the Lodge is preferable. This is explained in paragraphs 2-4 of the Ordwein Decl.

In summary, the Lodge is not a building that was used by the Association to physically convey water, nor is it used now to physically convey water, to Sierra Park residents. The Lodge is not like the Block Building/Shop, used for repair and maintenance of assets important to conveying water, or the Corp. Yard, used for storage of equipment. Instead, the Lodge was and is associated with provision of water service only because an office in the lodge was previously used by the Association for storage and office functions and a conference room was used for meetings, and the office and conference room are now used by the Water Company for the same things. In other ways, the Lodge historically has been analogous to a club house in a residential subdivision. Besides the office and conference room, the Lodge contains an auditorium and a kitchen. The community used the Lodge for family and social events such as birthday celebrations and weddings, and sometimes meetings of various sorts occurred there. The Association used it for board meetings, and today it is used for that purpose by the Association and Services Company, which are not utilities, and by the Water Company, which is. To require this structure with such varied use for the community to be deeded to the Water Company could lead to it not being available to the community anymore for those things for which it has been used for many years.

**b. It is Not Clear the Lodge must be Transferred.**

*(i) Utilities Lease Offices.*

The Commission understands that utilities do not own everything they use to provide service to their customers. This is actually reflected in the definition of “water system” found in Public Utilities Code section 240, which provides that “water system” includes “. . . all . . . structures . . . and all other real estate . . . owned, **controlled, operated, or managed** in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of

water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use.” (Emphasis added.) Real property that is not owned, but instead is controlled, operated or managed, by a water utility, can be part of its “water system.” A lessee of real property can be involved in doing all three: controlling, operating or managing that property.

Even assuming the Lodge has ever been used by the Association or the Water Company “to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, [or] carriage . . . of water,” its ownership (as opposed to leasing) is thus not required.

One simple example should suffice, although Water Company expects the Commission will know of others. In May 2009, California American Water Company announced it was moving its headquarters to Coronado, California. In doing so, Cal-Am’s president referenced its last headquarters location, stating “*When our lease was up, we seized the opportunity to move our offices into an area where we provide water service, with no additional costs to the Company.*”<sup>5</sup> (Emphasis added.) Thus Cal-Am leased the space for its headquarters before its move to Coronado in 2009.

There is therefore no issue legally in the Water Company leasing rather than owning the Lodge.

(ii) *The Lodge was not Used to Provide or to Facilitate Providing Water.*

The Lodge was used by the Association and is used now by the Water Company for storage of records (not of water), office functions, and Board Meetings. Those are incidental to providing water to customers. They neither facilitate nor provide such water. That is done through wells and distribution. It is therefore not clear that the Lodge is even within the scope of the Decision. Still, the Association and Water Company propose a lease of the Lodge to the Water Company in order to put this issue to rest.

**d. Inquiries in the Ruling Applicable to Leasing the Lodge**

The Ruling states the following with respect to use of a Lease rather than a fee

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<sup>5</sup> See press release at the following URL:  
[http://files.shareholder.com/downloads/AMERPR/4240115401x0x293771/D0371CA7-3A44-4926-9DD4-F9A95AFF90C5/CA\\_AWK\\_05\\_11\\_09.pdf](http://files.shareholder.com/downloads/AMERPR/4240115401x0x293771/D0371CA7-3A44-4926-9DD4-F9A95AFF90C5/CA_AWK_05_11_09.pdf).

transfer:

Water Company however, provides no details concerning the specific contractual rights, restrictions, or obligations which would apply to any contracting party for the applicable lease or easement.

Water Company must provide a proposed lease and proposed easement stating all specific contractual terms that would apply with respect to any applicable lease or easement, including rights, restrictions, obligations with respect to each contracting party, and the specific length of time that the proposed “long-term” lease or easement would remain in effect.

Water Company must specify how, if at all, under the proposed lease or easement terms, the Water Company would avoid additional costs or service impairment to customers once any applicable “long-term” lease or easement ends.

Rather than limiting the lease or easement term to a specific number of years, Water Company shall brief what legal or practical constraints, if any, would apply in extending a lease or easement “into perpetuity” without an end point as long as Water Company or any successor company continues to serve water customers.

(Ruling, p. 3.)

**e. Responses to Inquiries as to a Lease of the Lodge**

*(i) The Proposed Lease*

The Association and Water Company have agreed upon the terms to a rent-free lease that is as close to “perpetual” as permitted under California law. A true and correct copy of the proposed Lease is attached as Attachment F to the Ordwein Decl. It has not yet been executed because the Commission has not yet ruled on the Petition, but the parties are prepared to execute it promptly upon the Commission agreeing that it is acceptable. The lease will be effective as of March 31, 2016 when it is signed. (Lease, p. 7, paragraph beginning “IN WITNESS WHEREOF.”)

Under the Lease, both real property and the Lodge (called “recreation hall/office in the Lease [see, e.g. second WHEREAS clause & ¶¶ 1 & 4] are leased to Water Company rent free for perpetually-renewing 99-year terms. (Lease, ¶¶ 1-3.) Termination occurs only upon mutual agreement or upon Water Company’s failure to timely renew each 99-year term. (Lease, ¶ 19.) Water Company may use the Lodge in connection with provision of water, and has exclusive use of it, but the Association may permit others to use the Lodge from time to time upon reasonable notice. (Lease, ¶ 4.) Water Company provides and pays for certain insurance, maintains the leased property, pays for

utilities it uses, may make alterations at its cost, pays only a proportional share of taxes, and indemnifies against damages from hazardous substances it uses on the property. (Lease, ¶¶ 6, 7, 9, 11, 12 & 17.) If the property is sold, the agreement for such sale must specifically provide that the sale is subject to Water Company's right to perpetual 99-year terms. (Lease, ¶ 18.) In addition, the Lease and its terms "apply to and are binding on the heirs, successors, executors, administrators and assigns of the parties." (Lease, ¶ 21.) Upon the Lease's execution the Association must promptly record a memorandum of it. (Lease, ¶ 26.) Other commercially typical lease clauses are included that concern, for example, waste, assignment and subletting, holdover tenancy, default and remedies, attorney's fees, and notices. (See Lease, ¶¶ 10, 13, 14, 15, 16, 20, 23, & 25.)

(ii) *Restraints on Leases "Without an End Point" and the Parties' Solution to Them.*

Leases in California are not permitted to go on forever, and terms in leases that allow their unlimited extension must clearly and unequivocally establish the lessee has a right to unlimited extensions. In *Ginsberg v. Gamson* (2012) 205 Cal.App.4th 873, the court noted that lease provisions giving the tenant rights of perpetual renewal are disfavored. *Id.* at 884. Nonetheless, "courts will enforce a lease provision that grants a tenant the right to unlimited renewals, so long as the parties' intent to create that right is explicit and clear." *Id.* A "clause providing for perpetual renewals at the option of the lessee is held to be enforceable when it appears that it was clearly the intention of the parties that the lessee should have that right." *Id.* at 885. Paragraph 2 of the proposed Lease is carefully written with *Ginsberg* in mind, making it extremely clear it is the intent of the Association as Lessor and the Water Company as Lessee to allow perpetual renewals of 99-year terms, stating:

Lessor and Lessee without reservation acknowledge, agree and declare that it is their mutual intent that Lessee possesses and shall possess the unequivocal right to perpetually renew this Lease for successive ninety-nine (99) year terms as set forth in this paragraph 2, and that by so acknowledging, agreeing and declaring, they mutually intend to agree to a lease that shall be construed by a court as granting such an unequivocal right to perpetually renew this Lease for successive ninety-nine (99) year terms as set forth in this paragraph 2, and that such right shall continue to exist forever and for all time.

Thus, the Association and Water Company have drafted a lease that will permit the Water Company to use the Lodge for office use, storage and meetings virtually perpetually.



First, the lease term is 99 years. Second, there are unlimited renewals for successive 99-year terms, with the intent to grant such a right being clear and unequivocal. At the same time, the Lease also applies common sense. It is possible that at some point in the future, the Water Company may build or acquire a different building for office functions and meetings if that is appropriate, and for the same reason to permit the Lease to lapse. Paragraph 19 permits the Lease's termination on mutual agreement, or if the Water Company does not renew the Lease, thus giving the Water Company flexibility as to where it meets and has an office.

At the same time, this perpetual renewal provision will ensure that the community may still have access to a building that has served the entire community for over 50 years. The Commission should carefully consider this balance of interests, given the historical usage by varied parties of the Lodge.

*(iii) Costs and Service Impairments.*

The Lease does include some costs for Water Company, but those costs would exist even if it owned the Lodge and real property on which it is located. Such costs include insurance, maintenance, utilities, costs of alternations, taxes, and responsibility for hazardous materials. These are not "extra" costs imposed by the Lease.

As to additional costs and service impairments if the Lease ever ends (Ruling, p. 3), no service impairments would exist because as already pointed out, the Lodge is not used to physically provide water. Additional costs might arise if Water Company chose to move the office functions and meetings to a different place and terminate the Lease, but if it made that choice it would inform the Commission of its choice and why it was made.

#### **4. Conclusion and Requests for Relief**

Water Company has now demonstrated that it has obtained title to both the buildings and land underneath them known generally as the "Block Building/Shop" and the "Corp. Yard." Those properties no longer need to be subjects of the Petition. Water Company respectfully requests the Commission to permit withdrawal of the Petition as it applies to those properties.

Water Company has also demonstrated that even if the Decision requires transfer of the Lodge to Water Company, leases are appropriate for spaces used for office

functions and meetings, and Water Company has negotiated as perpetual a lease as is permitted in California, rent-free, with other typical commercial terms. Water Company respectfully requests the Commission to modify the decision to permit compliance with the Decision by entering into the Lease.

Finally, Water Company is aware there are a few other items that remain to be addressed in light of the rejection without prejudice of Advice Letter 2. Water Company intends to address those items, but they are not the subject of the Petition and thus should not stand in the way of granting the relief requested in this Response.

Water Company appreciates the Commission's consideration of the Petition and this Response.

Dated: April 11, 2017

Respectfully Submitted,  
Downey Brand LLP

        /s/ Dan L. Carroll        

By Dan L. Carroll  
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