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Regular Council Meeting
February 23, 2023

FRESNO CITY COUNCIL



Public Comment Packet

ITEM(S)

1-W (ID 23-317)

Install an Intertie/Pressure Valve Connecting the City of Fresno Water to the affordable housing project located within Fancher Creek to assist in the fire suppression efforts for the Brand Haven Facility

Contents of Supplement

Public Comment Received (1)

Supplemental Information:

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VIA EMAIL

February 21, 2023

Fresno City Council

President Tyler Maxwell (Tyler.Maxwell@fresno.gov)

Vice President Annalisa Perea (Annalisa.Perea@fresno.gov)

Councilmember Mike Karbassi (Mike.Karbassi@fresno.gov)

Councilmember Miguel Arias (Miguel.Arias@fresno.gov)

Councilmember Luis Chavez (Luis.Chavez@fresno.gov)

Councilmember Garry Bredefeld (Garry.Bredefeld@fresno.gov)

Councilmember Nelson Esparza (Nelson.Esparza@fresno.gov)

Re: ID 23-317; Install an Intertie/Pressure Valve Connecting the City of Fresno Water to the affordable housing project located within Fancher Creek to assist in the fire suppression efforts for the Brand Haven facility, February 23, 2023

Dear President Maxwell, Vice President Perea, and Councilmembers Karbassi, Arias, Chavez, Bredefeld, and Esparza:

I am counsel for Bakman Water Company (“Bakman Water”) and write this letter to address action item ID 23-317, which is on the agenda for the upcoming February 23, 2023 Fresno City Council meeting. Under consideration in ID 23-317 is whether the City of Fresno should install an intertie/pressure valve connecting the City of Fresno water to the affordable housing project. For the reasons discussed below, Bakman Water respectfully requests that agenda item ID 23-317 be withdrawn.¹

Bakman Water has been working since 2005 to ensure that safe and reliable water service is available to Fancher Creek, which is part of Bakman Water’s service area certificated by the California Public Utilities Commission (“CPUC”). By law, Bakman Water is the **exclusive** water provider to the Fancher Creek development, including the Brand Haven housing project. The City of Fresno may not provide water service to the Fancher Creek development and may not interfere with the facilities that Bakman Water uses to provide service to the development. With respect to the CPUC’s authority, the California Supreme Court has stated:

¹ Pursuant to Rule 11 (c) of the Rules of Procedure a copy of this letter is being provided via email to the City Clerk.

The commission is a state agency of constitutional origin with far-reaching duties, functions and powers. (Cal. Const., art. XII, § 1-6.) The Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. (Id., §§ 2, 4, 6.) The commission's powers, however, are not restricted to those expressly mentioned in the Constitution: 'The Legislature has *plenary power, unlimited by the other provisions of this constitution* but consistent with this article, to confer additional authority and jurisdiction upon the commission' (Cal. Const., art. XII, § 5.) (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905 [160 Cal.Rptr. 124, 603 P.2d 41], italics added.)

Pursuant to this constitutional provision the Legislature enacted, inter alia, the Public Utilities Act. (§ 201 et seq.) That law vests the commission with broad authority to "supervise and regulate every public utility in the State" (§ 701) and grants the commission numerous specific powers for the purpose. Again, however, the commission's powers are not limited to those expressly conferred on it: the Legislature further authorized the commission to "*do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient*" in the exercise of its jurisdiction over public utilities. (*Ibid.*, italics added.) Accordingly, "The commission's authority has been liberally construed" (*Consumers Lobby Against Monopolies v. Public Utilities Com.*, *supra*, 25 Cal.3d 891, 905, citing cases), and includes not only administrative but also legislative and judicial powers (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 630 [268 P.2d 723]). (*San Diego Gas and Electric Company v. Superior Court of Orange County*, 13 Cal.4th 893 at 914-915 (1996) ("Covalt")).

In short, the CPUC has very broad and far-reaching authority over the operations and facilities of the public utilities under its jurisdiction, including Bakman Water. CPUC General Order ("GO") 103-A sets forth the CPUC's rules governing water and sewer service and the minimum standards for design and construction of the systems. It applies to all water and wastewater utilities operating under the jurisdiction of the CPUC. GO 103-A states:

The purpose of these rules is to establish minimum standards to be followed in the design, construction, location, maintenance and operation of the facilities of water and wastewater utilities operating under the jurisdiction of the Commission. Each of these rules is subject to active oversight and enforcement by the Commission. (GO 103-A, Section I.1.A.)

The authority of local governments in this area is expressly limited. The California Constitution states that local governments, such as cities and counties, may not regulate matters over which the Legislature grants regulatory power to the CPUC. (*See*, California Constitution, Article XII, Section 8.) **The CPUC will be voting on a decision addressing Bakman Water's provision of service to the Fancher Creek development on February 23, 2023.** Given the

CPUC's jurisdiction over service to the Fancher Creek development and its upcoming vote, Bakman Water respectfully requests that agenda item ID 23-317 be withdrawn.

Bakman Water understands the City Council's interest in housing units for low-income seniors at the Brand Haven facility. Given the Bakman family's longstanding dedication to the community in Southeast Fresno, it supports the economic development and societal benefits that the Fancher Creek Town Center could bring to the area. It is important to realize, however, that any delays in the provision of water to the Fancher Creek Town Center are the result of actions by FCTC.

In 2006, the City issued Bakman Water the Conditional Use Permit ("CUP") for the operation of Well 16 to serve the Fancher Creek development, subject to Bakman Water and the City working cooperatively to implement "good neighbor" policies involving specific mitigation factors and liabilities effecting both parties for noncompliance. The project was originally designed and engineered for a two-well distribution system. During several meetings, City officials expressed concerns over draw down to City wells caused by Bakman Water wells in close proximity. In order to mitigate the concerns, Bakman Water agreed to re-engineer the design to utilize one new well, a tank with booster pumps, and mainline upsizing to achieve both pumping schedule management and comprehensive fire flow for the entirety of the project within Bakman Water's tariff boundaries, regardless of variances to land use or densities. This re-design was done at a considerable expense to Bakman Water, but resulted in approval of the CUP by the City of Fresno.

Bakman Water has invested considerable time, energy, and resources into ensuring that the water system improvements engineered for the mixed-use development as a whole would be reliable and sustainable. During the planning and design phases for the Fancher Creek Town Center, including the senior housing project, Bakman Water contributed engineering consultant costs and staff hours to accommodate the various changes proposed throughout the process. For example, Bakman Water tried to work with FCTC as part of the plan check process. To help minimize project delays while negotiations regarding the tank design, location and funding continued, Bakman Water signed off on the construction plans for the parking garages and the civil plans for the infrastructure serving the FCTC housing project. These conditional approvals clearly indicated, however, that they were subject to the tank requirement and predicated on FCTC's infrastructure obligations.

Bakman Water also spent many years attempting to come to mutually beneficial terms with FCTC with respect to the cost, design, and funding of the water tank. FCTC has been trying for years, however, to get Bakman Water's customers to subsidize the cost of its development. These efforts are particularly egregious given the fact that Bakman Water serves an area that is defined as a "disadvantaged community" pursuant to Cal. Code Regs. tit. 22 §64300. It is not appropriate for Bakman Water's customers to subsidize the cost of FCTC's housing project through their water rates – even if the project provides housing for low-income seniors.

FCTC further delayed this process by filing a complaint with the CPUC after Bakman Water indicated that it could only provide service to the FCTC development in compliance with the terms of Bakman's CPUC-approved tariff. The Presiding Officer's decision in that proceeding dismissed FCTC's complaint and found that it was reasonable for Bakman Water to condition its

service consistent with the terms of its tariff. In that decision, the Presiding Officer found that the construction of the water storage tank is needed only due to insufficient fire suppression water flows at the development, and no other Bakman Water system needs. Additionally, as part of that proceeding, Bakman Water presented evidence that an intertie with pressure valve would be unreliable for use in emergency purposes, as relying on a valve not in regular use would be unsafe, which the Presiding Officer relied upon in reaching his decision. The Presiding Officer concluded that FCTC should pay for the cost of the water storage tank equal to the percentage of the tank dedicated specifically to meeting minimum fire flow requirements. If Bakman Water adds additional capacity for its own purposes, it would be responsible for those costs. As noted above, the CPUC will be voting on the Presiding Officer's Decision addressing the provision of water service to the Fancher Creek development on February 23, 2023.

Despite the actions of FCTC, Bakman Water has done what it can to ameliorate any delay. The initial design for the facilities necessary to serve the housing development has been completed and Bakman Water has obtained the necessary permits, including from the City of Fresno Building Department. The plans have been competitively bid and Bakman Water has awarded the contract with a Notice to Proceed going out shortly. Because the developer continued to build the housing complex without an agreement for the tank in place, Bakman Water has continued to move forward with the tank design and permitting at our cost in order to minimize delays.

There is no temporary solution that will satisfy the needs of this project from a safety and reliability standpoint. The fact that the housing units are not available due to fire flow requirement issues is solely the fault of FCTC. If FCTC agrees to the reasonable terms set forth in Bakman Water's tariff and stops trying to have disadvantaged customers subsidize the costs of its developments, Bakman Water will be ready to move forward to have the necessary facilities constructed and online as soon as possible.

In the meantime, Bakman Water respectfully requests that item ID 23-317 be removed from the agenda for the February 23, 2023 meeting. If the City of Fresno moves forward to install an intertie/pressure valve connecting the City of Fresno water to the Fancher Creek development Bakman Water will not hesitate to take legal action against the City.

Sincerely,

Lori Anne Dolqueist
Nossaman LLP

cc: Mayor Jerry Dyer (Jerry.Dyer@fresno.gov)
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