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BEFORE THE ARIZONA CORPORATION COMMISSION  
Arizona Corporation Commission

DOCKETED

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DOCKETED BY 

1  
2 WILLIAM A. MUNDELL  
CHAIRMAN  
3 JIM IRVIN  
COMMISSIONER  
4 MARC SPITZER  
COMMISSIONER  
5

6 IN THE MATTER OF:  
7 DAN SALLOWAY and JANIS SALLOWAY, a  
married couple; JOHN and JOAN WINDFELDT, a  
8 married couple; CRATER LAND COMPANY,  
INCORPORATED, an Arizona Corporation,  
9  
Complainants,  
10 vs  
11 DONEY PARK WATER, an Arizona public service  
utility,  
12  
Respondent.

DOCKET NO. W-01416A-01-1011

DECISION NO. 65417

**OPINION AND ORDER**

13 DATE OF HEARING: May 30, 2002  
14 PLACE OF HEARING: Phoenix, Arizona  
15 ADMINISTRATIVE LAW JUDGE: Philip J. Dion III  
16 APPEARANCES: Dan Salloway, in propria persona, John  
17 Windfeldt, in propria persona and Mike  
18 Campbell, in propria persona, on behalf of  
Complainants;  
19 Martinez & Curtis by William P. Sullivan, on  
20 behalf of Respondent; and  
21 David Ronald, Legal Division, on behalf of the  
22 Utilities Division of the Arizona Corporation  
Commission.

23 **BY THE COMMISSION:**  
24 Dan and Janice Salloway receive domestic water service from Doney Park Water ("Doney  
25 Park", "Company" or "Respondent"). The Salloways have been customers of Doney Park since June,  
26 1997. John and Joan Windfeldt receive domestic water service from Doney Park. The Windfeldts  
27 have been customers of Doney Park since May, 2000. Crater Land Company, Inc. is an Arizona  
28 Corporation and is the owner and developer of the residential subdivision in which the Windfeldts

1 and the Salloways reside. Crater Land Corporation, Inc. owns various lots in the subdivision that it  
2 intends to develop in the future and those lots lie within the certificated service area of Doney Park.

3 Doney Park is a member owned, certified public service corporation. Doney Park provides  
4 water for public purposes, and its certificated service area includes the lands owned by the Salloways,  
5 Windfeldts and Crater Land Corporation, Inc. (hereinafter "Complainants"). Respondent has  
6 installed water meters and water lines at locations within public utility easements that serve  
7 individual homesites in the area, including the Complainants.

8 On April 14, 1999, Dan and Janice Salloway received a Notice of Intent to Terminate Water  
9 Service from Doney Park. Doney Park stated that the reason for the Notice was that a fence was  
10 placed in the utility easement on the Salloways' property in violation of Doney Park's rules,  
11 regulations and policies relating to maintaining unobstructed easements, and due to the breach of a  
12 written contract for service between Doney Park and the Salloways. On September 25, 2001, the  
13 Salloways received a Notice of Termination of Utility Service from Doney Park.<sup>1</sup> The stated reason  
14 was for the placement of a fence in the public utility easement. The fence was recently constructed  
15 and was not in the utility easement in July 1997 when the Salloways entered into the contract for  
16 water service from Doney Park.

17 On October 4, 2000, the Windfeldts received a Notice from Doney Park regarding the  
18 placement of objects, specifically a rock pile, in the utility easement on the Windfeldts' property.<sup>2</sup>  
19 The Windfeldts received the same type of notice as the Salloways. The rock pile was not in or  
20 adjacent to the utility easement in May of 2000 when the Windfeldts entered into the contract for  
21 water service with Doney Park.

22 On December 24, 2001, the Complainants filed a formal complaint against Doney Park  
23 alleging that Doney Park's actions were an arbitrary and capricious abuse of authority and/or that  
24 Doney Park was arbitrarily and selectively enforcing its policies.

25 On January 23, 2002, Doney Park filed an Answer to the Complaint in this matter. In the  
26 Answer, Doney Park denied that its actions were an arbitrary and capricious abuse of its authority or

27 <sup>1</sup> The Salloways' and the Windfeldts' service has not been terminated by Doney Park.

28 <sup>2</sup> The Windfeldts moved the rock pile out of the easement, however, it is now adjacent to the easement and Doney Park argues that the rock pile is still in violation of its policies.

1 that Doney Park was guilty of arbitrary and selective enforcement.

2 On May 14, 2002, the Commission issued a Procedural Order that set this matter for hearing  
3 on May 30, 2002.<sup>3</sup> On May 30, 2002, a full public hearing was held before a duly authorized  
4 Administrative Law Judge with the Commission at its offices in Phoenix, Arizona. At the conclusion  
5 of the hearing, the matter was taken under advisement pending submission of a final Recommended  
6 Opinion and Order to the Commission.

7 **Discussion**

8 The sole issue in dispute in this matter is whether or not a homeowner can place certain  
9 objects in their front yard within or adjacent to Doney Park's utility easement. Complainants argue  
10 that they should be allowed to put up decorative fencing and rocks in or adjacent to the utility  
11 easement. Respondent argues that the placement of fencing and rocks larger than the approved size,  
12 per Company policy, creates an unreasonable obstruction that poses a safety concern to the public  
13 and its employees, and violates the terms of a written contract between the Company and the  
14 Complainants.

15 **A. Complainants' Arguments.**

16 The Complainants in this case allege that Doney Park is arbitrarily enforcing its policies  
17 against the Complainants and that those policies are unreasonable. The Complainants argued that  
18 they were being singled out for prosecution by the Company. They offered into evidence several  
19 photographs of properties located within Doney Park's certificated area in which it appeared that  
20 fences, large rocks or other objects were placed adjacent to or within Doney Park's easement; yet,  
21 those residences or businesses have not been threatened with termination of service.

22 The Complainants also argued that Doney Park's policies regarding homeowner  
23 improvements within utility easements are unreasonable. The Complainants argued Doney Park  
24 acted unreasonably by failing to inquire, on a case by case basis, into the question whether the  
25 particular decorative landscaping improvements at each of the Complainants' property were in fact  
26 unsafe, unreasonable or hazardous to the utility's business and failed to make those inquiries before

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28 <sup>3</sup> In the Procedural Order, the Commission ordered that the Complainants service was not to be terminated by Doney Park pending resolution of this matter.

1 threatening to terminate service. The Complainants argued that the fence in the Salloways' front yard  
2 is simply a decorative, two rail, split wood, country-style fence not exceeding 36 inches in height,  
3 installed purely for the purpose of decorative home improvement to private property. It encloses  
4 nothing and does not enclose or obstruct access to a water meter. Additionally, the fencing is not  
5 permanently installed in the utility easement through the use of concrete or other anchoring system;  
6 rather, Mr. Salloway simply dug holes in the utility easement, placed the fence posts within those  
7 holes and secured the fence by filling in the holes with dirt. As for the Windfeldts, the landscaping in  
8 question is a large pile of earthen material that is a mix of rock and soil that is adjacent to the  
9 easement. While some of the rocks are large, they can all be moved by either hand and/or gardening  
10 tools.

11 The Complainants also asserted that the rules and the selective enforcement of the rules  
12 violate their "right to property." The Complainants explained that the utility easement runs along the  
13 front of their homes. Each of the Complainants has approximately 25 feet that they described as their  
14 front yard. Doney Park requires 8 feet for the easement, leaving only approximately 18 feet as a  
15 "front yard." Throughout the hearing, Complainants described the land denoted as the utility  
16 easement as "their property", and they did not feel that Doney Park had the right to tell them what  
17 they could or could not do on "their property."

18 The Complainants finally argued that since the decorative fence was not installed by means of  
19 anchors or concrete and since the rocks could be removed by hand, they did not create an  
20 unreasonable obstruction. Further, the Complainants stated that if there was a problem and the utility  
21 was forced to correct it through use of the easements, the Complainants understood that Doney Park  
22 would most likely have to remove, knock over or destroy the fence and rocks located in or adjacent to  
23 the easement. The Complainants said they understood that risk and would live with the consequences  
24 should a problem occur on the easement. At the conclusion of the hearing, the Complainants argued  
25 that Doney Park was acting unreasonably and that the fence and rock pile should be allowed to  
26 remain in or adjacent to the easement.

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**B. Respondent's Arguments**

1           **B. Respondent's Arguments**  
2           Respondent argued that its rules are not arbitrarily enforced. At the hearing, Respondent  
3 provided evidence that in each of the cases that the Complainants cited, the obstructions were either  
4 not in the utility's easement or that the obstructions in the utility easement had been grandfathered in  
5 because those obstructions were present prior to the water company putting in or acquiring water  
6 lines on the property.<sup>4</sup> However, Doney Park has indicated that, with the exception of trees, it is  
7 placing notices on the title of properties that have the grandfathered obstructions in the utility  
8 easement so that a new property owner will have notice that those obstructions will have to be  
9 removed before water service will be provided. Doney Park further stated that those type of  
10 obstructions would certainly not be allowed in any new construction projects.

11           Respondent also denied that the policies that it is enforcing are arbitrary. Respondent cited  
12 that it is shareholder owned and that the members of the Company help establish and enforce these  
13 rules and at any time those rules could be changed by the members of the cooperative.

14           Respondent argued that the fence and the rock pile create an unreasonable obstruction and are  
15 a safety concern. The Company argued that if there was a significant leak in the water system that  
16 had to be addressed in the easements in front of the Complainant's residences, then the time it would  
17 take to safely remove the fencing and rocks instead of using that time to address the water leak,  
18 creates significant safety concerns. The Company argued that its concerns are for the public's safety  
19 and also the safety of its employees in having to remove large and cumbersome objects from the  
20 utility easement.

21           The Company also argued that the Complainants signed a written contract with Doney Water  
22 in which Doney Water agreed to provide water service and the Complainants agreed to abide by  
23 certain conditions. One of the conditions was to not fence in or otherwise obstruct from access the  
24 way of the easement. Respondent argued that the Complainants' fence and rock pile obstruct the  
25 access of the easement. The Company argues that in the case of the Salloways, its access is  
26 obstructed by the placement of a fence in the middle of the easement. Respondent argued that in the

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28 <sup>4</sup> The Company gave examples of 100 year old pine trees and other obstructions that have not been removed because they  
existed prior to Doney Park's acquisition of the easement.

1 case of the Windfeldts, there is a large rock pile adjacent to the easement. If the Company was forced  
 2 to dig a trench close to the rock pile, the Company argued that it is possible that the rock pile would  
 3 tumble down into the easement, possibly injuring workers, and therefore obstructs its access to the  
 4 easement. At the conclusion of the hearing, Respondent argued that the Salloways' fence should be  
 5 removed and the Windfeldts' rock pile should be moved at least four to five feet away from the edge  
 6 of the easement or Doney Park should be allowed to terminate the Salloways' and/or Windfeldts'  
 7 water service.

### 8 C. Staff's Testimony

9 At the hearing, John LaPorta, a consumer service specialist at the Arizona Corporation  
 10 Commission ("Commission"), testified that he had handled this case as an informal complaint prior to  
 11 the hearing.<sup>5</sup> Mr. LaPorta testified that after his investigation, he closed the complaint because  
 12 Doney Park is a co-op and the customer had signed a written contract with the Company in which it  
 13 agreed not to obstruct access to an easement.

### 14 D. Analysis

#### 15 1. Easement – Arizona Corporation Commission Rules.

16 A.A.C. Rule R14-2-405(C), "Easements and Rights-of-Way", states that:

17 1. Each customer shall grant adequate easement and right-of-way  
 18 satisfactory to the utility to ensure that customer's proper service  
 19 connection. Failure on the part of the customer to grant adequate  
 20 easement and right-of-way shall be grounds for the utility to refuse  
 21 service.

22 2. When a utility discovers that a customer or his agent is performing  
 23 work or has constructed facilities adjacent to or within an easement or  
 24 right-of-way and such work, construction or facility poses a hazard or is  
 25 violation of federal, state or local laws, ordinances, statutes, rules or  
 26 regulations, or significantly interferes with the utility's access to  
 27 equipment, the utility shall notify the customer or his agent and shall take  
 28 whatever actions are necessary to eliminate the hazard, obstruction or  
 violation at the customer's expense.

a. The Salloways' Fence. The Salloways' fence is located within the utility easement in  
 their front yard. It is clear from the evidence that the fence interferes with the utility's right-of-way  
 and precludes the utility from adequate access to the easement.

<sup>5</sup> The informal Complaint was filed by the Salloways.

1           b.     The Windfeldts' Rock Pile. Although the Windfeldts' rock pile is not located within  
 2 the utility easement, it is "adjacent to" the easement. Its location does pose a hazard and significantly  
 3 interferes with the utility's access to its equipment. The large rock pile next to the utility easement in  
 4 the Windfeldts' yard poses a safety hazard to the utility's employees if those employees have to dig  
 5 within the utility easement to rectify a problem. A large rock pile next to the utility easement is  
 6 unreasonable as the possibility exists that the rock pile could injure workers as the ground next to the  
 7 rock pile is disturbed.

8           In each case, the amount of time it would take Doney Park employees to safely remove either  
 9 the fence or the rock pile could significantly delay the Company from addressing a water leak or  
 10 other problem and therefore, could pose a risk to the public. Additionally, although the Salloways  
 11 and the Windfeldts are agreeable to the destruction of their fence or removal of the rock pile if the  
 12 water company had to access its equipment in the utility easement, that agreement would not be  
 13 binding on the next homeowner.

14           2.     The Salloways' and the Windfeldts' Contract with Doney Park.

15           Since we have found that pursuant to R14-2-405(C), the fence and the rock pile must be  
 16 removed, we do not need to address the issue of whether or not the Salloways or Windfeldts have  
 17 breached a written contract for service with Doney Park.

18           3.     Doney Park is not arbitrarily enforcing its policies against the Complainants.

19           The Complainants argued that the Company was not enforcing its policies against other  
 20 homeowners or businesses in the area. During the hearing, the Company presented evidence that  
 21 refuted those arguments. The Company showed clear evidence that the obstructions were not located  
 22 in an easement or the obstructions were grandfathered in as they had existed previous to Doney  
 23 Park's acquisition of the easement. Further, Doney Park indicated that it is taking the measures  
 24 necessary to prevent the placement of obstructions in future easements and is proactively addressing  
 25 the removal of grandfathered obstructions before a piece of property within its service area is sold.

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1           4.     Property Rights.

2           Based on the evidence at the hearing, there is no infringement of the Complainants' "property  
3 rights." The properties in question, although on the Complainants' property, are dedicated utility  
4 easements which the Company has permission to access pursuant to A.C.C. R14-2-405(C).

5           5.     Doney Park is a Cooperative.

6           Doney Park is a cooperative. Since Complainants are also part owners of Doney Park, they  
7 have the ability to make changes to the existing rules, regulations and policies.

8           6.     Utility Box

9           In addition to the rock pile, the Windfeldts have some decorative rock around a utility box  
10 located in the easement. Mr. Windfeldt testified that he put the rocks next to the utility box to stop  
11 erosion that was taking place around the utility box. From the evidence presented at the hearing, the  
12 rocks appear to be placed as a border around the utility box. From the photographs, there appears to  
13 be approximately 20 rocks encircling the utility box, all of which could be easily removed by hand.  
14 Doney Park argued that while it encourages its customers to prevent erosion of their property, the  
15 decorative rocks surrounding the utility box are too large and are in violation of Doney Park's  
16 policies. Bill Linville, the general manager of Doney Park, testified that Doney Park only allows  
17 rocks that can pass through a 6-inch screen to be located on utility easement. Therefore, Doney Park  
18 indicated that the rocks around the utility box must be removed or it should be allowed to terminate  
19 the Windfeldts' service as the rocks in the easement violate the policies of Doney Park. Although the  
20 rocks may be in violation of Doney Park's stated policies, we do not find that the rocks create a  
21 hazard, obstruction or significantly interfere with the Doney Park's access to its easement. We do not  
22 find that such material violates A.C.C. R14-2-405(C)(1) or (2), A.C.C. R14-2-410(C)(1)(d) or (e) or  
23 R14-2-408(D). Therefore, we will not order the Windfeldts to remove those rocks. However, the  
24 Commission would urge the Windfeldts to contact the utility that owns the utility box. Such utility  
25 should be responsible for preventing erosion around its utility box.

26           7.     Remedy.

27           Regarding the remedy on this case, we find that although a utility may terminate service under  
28 A.C.C. 14-2-410(C)(1)(d) and (e) or refuse service under A.C.C. R14-2-405(C)(1), termination or

1 refusal of service is inappropriate in this matter. We find that the remedy in A.C.C. R14-2-405(C)(2)  
2 is appropriate in this matter. Therefore, we will give the Complainants a grace period of 30 days  
3 after the date of this Decision to remove the fence and rock pile from the respective easements. If  
4 they do not remove the obstructions in that time period, then the Company shall take whatever  
5 actions are necessary to remove the obstructions at the individual Complainant's expense.

6 The Company shall co-ordinate these efforts with the Complainants in order to minimize the  
7 costs and inconvenience. Further, we find that Doney Park should implement a customer education  
8 program to inform its customers of its easement and rights-of-way policies.

9 \* \* \* \* \*

10 Having considered the entire record herein and being fully advised in the premises, the  
11 Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

12 **FINDINGS OF FACT**

13 1. Dan and Janice Salloway are the owners of residential property located at 5775  
14 Campbell Avenue, Flagstaff, Arizona. The Salloways receive domestic water service from Doney  
15 Park Water.

16 2. John and Joan Windfeldt are the owners of residential property located at 11270 Zady  
17 Lane, Flagstaff, Arizona. The Windfeldts receive domestic water service from Doney Park.

18 3. Crater Land Company, Inc. is an Arizona Corporation and is the owner and developer  
19 of the residential subdivision in which the Windfeldts and the Salloways reside. Crater Land  
20 Corporation, Inc. owns various lots in the subdivision that it intends to develop and sell in the future  
21 and those lots lie within the certificated service area of Doney Park.

22 4. Doney Park is a member owned, certificated public service corporation as defined  
23 under Article XV, Section 2 of the Arizona Constitution. Doney Park provides water for public  
24 purposes, and its certificated service area includes the lands owned by the Salloways, Windfeldts and  
25 Crater Land Corporation, Inc.

26 5. Respondent has water meters and installed water lines at locations within the public  
27 utility easements that serve individual homesites in the area, including the Complainants.

28 6. On April 14, 1999, Dan and Janice Salloway received a Notice of Intent to Terminate

1 Water Service from Doney Park. Doney Park stated that the reason for the Notice was that a fence  
2 was placed in the utility easement on the Salloways' property in violation of Doney Park's rules,  
3 regulations and policies relating to maintaining unobstructed easements and due to the Salloways  
4 alleged breach of a written contract for service between Doney Park and the Salloways.

5 7. On September 25, 2001, Dan and Janice Salloway received a Notice of Termination of  
6 Utility Service from Doney Park. The stated reason was for the placement of a fence in the public  
7 utility easement.

8 8. On October 4, 2000, the Windfeldts received a Notice from Doney Park regarding the  
9 placement of objects, specifically rocks, adjacent to the utility easement. The Windfeldts received  
10 the same type of notice as the Salloways.

11 9. On December 24, 2001, the Complainants filed a formal complaint against Doney  
12 Park alleging that Doney Park's actions were an arbitrary and capricious abuse of authority and/or  
13 that Doney Park was arbitrarily and selectively enforcing its policies.

14 10. On January 23, 2002, Doney Park filed an answer to the Complaint in this matter. In  
15 the Answer, Doney Park denied that its actions were arbitrary and capricious abuse of authority or  
16 that Doney Park was guilty of arbitrary and selective enforcement.

17 11. On May 14, 2002, the Commission issued a Procedural Order that set this matter for  
18 hearing on May 30, 2002.

19 12. On May 30, 2002, a full public hearing was held before a duly authorized  
20 Administrative Law Judge with the Commission at its offices in Phoenix, Arizona. At the conclusion  
21 of the hearing, the matter was taken under advisement pending submission of a final Recommended  
22 Opinion and Order to the Commission.

23 13. The Commission has analyzed the issues and evidence as presented by the parties and  
24 has resolved the issues as stated in the discussion above.

25 14. The Commission hereby adopts and incorporates the Discussion and the  
26 Commission's resolution of issues therein.

27  
28

**CONCLUSIONS OF LAW**

1  
2 1. Doney Park Water is a public service corporation within the meaning of Article XV of  
3 the Arizona Constitution and A.R.S. §§ 40-301 and 40-302.

4 2. The Commission has jurisdiction over Doney Park and the subject matter of the  
5 Complaint.

6 3. The subject matter of this Complaint is governed by A.C.C. R14-2-405(C)(2) and the  
7 remedy, as stated in this Order, is appropriate in this matter.

8 **ORDER**

9 IT IS THEREFORE ORDERED that the Complaint filed by Dan and Janis Salloway, John  
10 and Joan Windfeldt and Crater Land Company, Incorporated against Doney Park Water is dismissed.

11 IT IS FURTHER ORDERED that pursuant to A.C.C. R14-2-405(C)(2), the Salloways shall  
12 have 30 days from the date of this Decision to remove the fence from the utility easement. If the  
13 Salloways do not remove the fence within the time period, then Doney Park Water shall take  
14 whatever actions are necessary to remove the fence at the Salloways' expense.

15 IT IS FURTHER ORDERED that the Windfeldts shall have 30 days from the date of this  
16 Decision to move the rock pile at least 5 feet from the edge of the utility easement on their property.  
17 If the Windfeldts do not remove the rock pile within the time period, then Doney Park shall take  
18 whatever actions are necessary to remove the rock pile at the Windfeldts' expense.

19 IT IS FURTHER ORDERED that Doney Park shall not terminate water service to Dan and  
20 Janice Salloway or John and Joan Windfeldt based upon the Salloways' fence or the Windfeldts' rock  
21 pile within or adjacent to the utility easement.

22 IT IS FURTHER ORDERED that the decorative rock surrounding the utility box on the  
23 Windfeldts' property does not create a hazard or significantly interfere with the utility's access to the  
24 easement and is not an unreasonable obstruction pursuant to A.C.C. R14-2-405(C)(2) or A.C.C. R14-  
25 2-410(C)(1)(d) or (e).

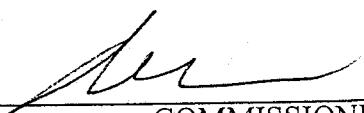
26 IT IS FURTHER ORDERED that Doney Park Water shall not terminate water service to John  
27 and Joan Windfeldt based upon the rocks surrounding the utility box located in the easement.

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1 IT IS FURTHER ORDERED that Doney Park shall implement a customer education program  
2 to inform its customers of its easement and rights-of-way policies.

3 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

4 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

5  \_\_\_\_\_  
6 CHAIRMAN COMMISSIONER  \_\_\_\_\_  
7 COMMISSIONER

8 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive  
9 Secretary of the Arizona Corporation Commission, have  
10 hereunto set my hand and caused the official seal of the  
11 Commission to be affixed at the Capitol, in the City of Phoenix,  
12 this 25<sup>th</sup> day of November, 2002.

11   
12 BRIAN C. McNEIL  
13 EXECUTIVE SECRETARY

13 DISSENT \_\_\_\_\_

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SERVICE LIST FOR:

DONEY PARK WATER

DOCKET NO.

W-01416A-01-1011

Crater Land Corporation, Inc.  
4800 E. Saddle Avenue  
Flagstaff, AZ 86004

John and Joan Windfeldt  
11270 Zady Lane  
Flagstaff, AZ 86004

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