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BEFORE THE ARIZONA CORPORATION COMMISSION

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1 WILLIAM A. MUNDELL Arizona Corporation Commission
2 Chairman
3 JIM IRVIN Commissioner
4 MARC SPITZER Commissioner

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AZ CORP COMMISSION
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5 IN THE MATTER OF THE APPLICATION
6 OF RED ROCK WATER COOPERATIVE,
7 INC. FOR ADJUDICATION THAT IS NOT
A PUBLIC SERVICE CORPORATION.

DOCKET NO. WS-04052A-01-0794

STAFF'S BRIEF

8 Pursuant to the June 26, 2002 Procedural Order in this matter, Staff hereby files its brief
9 in this matter. Staff's position remains the same as set forth in its January 11, 2001 Staff Report
10 and in Staff's testimony in this matter. Staff recommends that the Commission grant Red Rock's
11 Application for Adjudication Not a Public Service Corporation. The first section of Staff's brief
12 addresses the legal and policy issues surrounding the granting of an application for adjudication
13 not a public service corporation. The second section of Staff's brief addresses the Commission's
14 historical practice in similar matters. The third section of Staff's brief addresses the additional
15 issues raised by the intervenor, such as the access to the books and records of the applicant.

16 **I. Red Rock is not a public service corporation as defined in Article XV § 2 of the**
17 **Arizona Constitution.**

18 The Arizona Constitution defines a public service corporation as:

19 All corporations other than municipal engaged in furnishing gas, oil, or electricity
20 for light, fuel, or power; or in furnishing water for irrigation, fire protection, or
21 other public purposes; or in furnishing, for profit, cold air or steam for heating or
22 cooling purposes; or engaged in collecting, transporting, treating, purifying and
23 disposing of sewage through a system, for profit; or in transmitting messages or
furnishing public telegraph or telephone service, and all corporations other than
municipal, operating as common carriers, shall be deemed public service
corporations.

24 Ariz. Const. art. XV § 2. One might think that this one sentence would be simple to apply. But,
25 "condemned to the use of words, we can never expect mathematical certainty from our
26 language"¹ Indeed, experience has shown that we can expect a great deal of uncertainty in

27
28 ¹ *Webb v. State ex rel. Arizona Board of Medical Examiners* 376 Arz. Adv. Rep. 11, 14 ¶ 26,
(App. 2002) quoting *State v. Baldwin*, 184 Ariz. 267, 270, 908 P.2d 483, 486 (App. 1995).

1 applying § 2.

2 In construing the term public service corporation, courts have looked broadly at the
3 purpose of § 2. For example, in *Van Dyke v. Geary*, the Supreme Court, in an opinion by Justice
4 Brandeis, found that determining whether an entity is a public service corporation under Article
5 XV § 2 depends on “the character of the service, that is, whether it is public or private.”² The
6 court declined to give the term public service corporation a “technical meaning”; instead finding
7 that it should be interpreted “in the broad popular sense as embracing all public utilities.”³ The
8 court thus concluded that an individual operating as a sole proprietor (providing service to the
9 town of Miami, Arizona) could be a public service corporation, despite not being a corporation.⁴
10 Arizona courts have adopted this approach as a matter of state law.⁵

11 *Van Dyke* relied on the well-known case of *Munn v. Illinois*, which held that “Property
12 becomes clothed with a public interest when used in a manner to make it of public consequence
13 and affect the community at large.”⁶ This factor was on the minds of the framers of the Arizona
14 constitution. When the wording of § 2 was changed from “private corporations” to “public
15 service corporations”, the delegate who seconded the motion remarked that “I do not believe the
16 members really mean that this corporation commission shall have charge of private corporations.
17 The intent certainly must be these public service corporations in which the public is interested.”⁷

18 Arizona cases have thus repeatedly found corporations to not be public service
19 corporations when the business they were operating was not sufficiently a matter of public
20 concern. For example, in *General Alarm v. Underdown*, the Arizona Supreme Court found that a
21 company that provided monitored alarm service was not a public service corporation.⁸ The court
22 stated that to “be a public corporation, its business and activities must be such as to make its
23 rates, charges, and methods of operation a matter of public concern. It must be, as the courts

24 ² *Van Dyke v. Geary*, 244 U.S. 39, 44 (1917)(emphasis added).

25 ³ *Id.*, 244 U.S. at 45.

26 ⁴ *Id.*

27 ⁵ See, e.g. *Arizona Corporation Commission v. Nicholson*, 108 Ariz. 317, 319, 497 P.2d 815, 817
(1972).

28 ⁶ *Van Dyke*, 244 U.S. at 47, quoting *Munn v. Illinois*, 94 U.S. 113, 126 (1876).

⁷ Remarks of Delegate Lynch, reprinted in *The Records of the Arizona Constitutional
Convention of 1910* at 613-615 (John S. Goff, ed., 1991).

⁸ *General Alarm v. Underdown*, 76 Ariz. 235, 238-240, 262 P.2d 671, 672-73 (1953).

1 express it, clothed with a public interest....”⁹ Likewise, in *Arizona Corp. Comm’n v. Nicholson*,
2 the court found that a mobile home park was not a public service corporation despite the fact that
3 it provided water to its renters as part of their rent.¹⁰ The court stated the power to regulate is
4 “wholly dependant upon the dedication of private property to a public use with a public
5 interest.”¹¹

6 In applying these concerns, the Arizona Supreme Court has developed the 8-factor
7 “*Serv-Yu*”¹² test:

- 8 1. What the corporation actually does.
- 9 2. A dedication to public use.
- 10 3. Articles of incorporation, authorization, and purposes
- 11 4. Dealing with the service of a commodity in which the public has been
generally held to have an interest.
- 12 5. Monopolizing or intending to monopolize the territory with a public
service commodity.
- 13 6. Acceptance of substantially all requests for service.
- 14 7. Service under contracts and reserving the right to discriminate is not
always controlling.
- 15 8. Actual or potential competition with other corporations whose business is
clothed with public interest.

16 **A. What the corporation actually does**

17 This factor looks at the corporation’s actual practices, rather than its stated intentions. In
18 applying this factor, the court in *Serv-Yu* noted that this factor points in favor of the corporation
19 being a public service corporation when the corporation’s service affects “so considerable a
20 fraction of the public that it is public in the same sense in which any other may be called so....
21 The public does not mean everybody all the time.”¹³ Here, Red Rock serves only 9 customers at
22 present.¹⁴ While it is not clear how big a fraction of the public a company must serve to
23

24 ⁹ *Id.*

25 ¹⁰ *Arizona Corp. Comm’n v. Nicholson*, 108 Ariz. 317, 319-320, 497 P.2d 815, 817-818
(1972).

26 ¹¹ *Id.*

27 ¹² *Natural Gas Service Co. v. Serv-Yu Cooperative*, 70 Ariz. 235, 219 P.2d 324 (1950).

28 ¹³ *Id.*, 70 Ariz. at 240, 219 P.2d at 327

¹⁴ Declaration of Jay Elmer at ¶ 12, attached as Exhibit B to Applicant’s Second
Supplemental Submission, dated July 11, 2002.

1 trigger this factor, service to a mere 9 customers cannot be characterized as service to a
2 “considerable fraction of the public”.

3 **B. A dedication to public use.**

4 Dedication to public use is shown by the “circumstances of each case”, looking to
5 “substance not form”.¹⁵ Red Rock’s service is limited to its members, and membership is strictly
6 limited. Accordingly, there is no dedication to public use.

7 **C. Articles of incorporation, authorization, and purposes.**

8 Red Rock has carefully crafted its articles and bylaws to comply with this Commission’s
9 prior decisions and to avoid becoming a public service corporation. Red Rock’s Articles
10 specifically provide that “The character of affairs of the corporation will be to... maintain and
11 manage a private well and domestic water supply which shall not be a public service
12 corporation.”¹⁶ Red Rock’s bylaws provide that:

13 It being the intention of the incorporators, directors and members that the
14 corporation shall continue to be a non-profit, member-owned, cooperative,
15 no officer, director or member shall take any action whatsoever which
16 would cause the corporation to become a “Public Service Corporation” as
17 that term is defined in the Arizona Constitution... and any such action
18 shall be null, void and of no force or effect. Accordingly, the corporation
shall have a fixed number of taps, which shall not exceed 14 and shall
never serve more than 24 persons.... The service area of the corporation
shall not encompass any portion of the service area of a municipal utility
or public service corporation providing water.¹⁷

19 Red Rock’s articles and bylaws clearly demonstrate an intention not to become a public service
20 corporation.

21 **D. Dealing with the service of a commodity in which the public has been**
22 **generally held to have an interest.**

23 Water is indisputably a commodity in which the public has been generally held to have
24 an interest. However, this factor alone is not controlling.¹⁸

25 ...

26 ¹⁵ *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818.

27 ¹⁶ Article 3 of Red Rock’s Articles, attached as Exhibit 1 to Red Rock’s Application.

28 ¹⁷ Article I, Section 7 of Red Rock’s Bylaws, attached as Exhibit 2 to Red Rock’s
Application.

¹⁸ *See, e.g., Nicholson*, 108 Ariz. at 320-321, 497 P.2d at 818-819.

1 **E. Monopolizing or intending to monopolize the territory with a public**
2 **service commodity.**

3 There is no indication that Red Rock intends to monopolize service in the area.¹⁹

4 **F. Acceptance of substantially all requests for service.**

5 As shown above, Red Rock's bylaws strictly limit the service to 14 taps and 24 persons.

6 **G. Service under contracts and reserving the right to discriminate are**
7 **not always controlling.**

8 These factors are not present in this case.

9 **H. Actual or potential competition with other corporations whose**
10 **business is clothed in the public interest.**

11 Red Rock's Bylaws, as cited above, clearly prohibit the company from competing with
12 a public service corporation or with a municipal corporation that provides water.

13 Of the 8 *Serv-Yu* factors, only one points in favor of finding Red Rock to be a public
14 service corporation. Therefore, on balance, the *Serv-Yu* test indicates that Red Rock is not a
15 public service corporation.

16 This conclusion is reinforced by the more recent cases that have applied *Serv-Yu*. In
17 *Nicholson*, the Arizona Supreme Court again looked to the size of the business, holding that a
18 "sizable portion of the public" or a "substantial part of the public" must be served for the
19 business to be a public service corporation.²⁰ In *Arizona Water Co. v. Arizona Corp. Comm'n*,
20 the Court of Appeals upheld the Commission's determination that an unincorporated group
21 serving 9 customer-owners from a common well was not a public service corporation.²¹ In
22 *Southwest Gas Corp. v. Arizona Corp. Comm'n* the Court of Appeals upheld the Commission's
23 determination that El Paso Natural Gas Company was not a public service corporation, even
24 though it served 10 direct sale customers in Arizona, but would take no new customers.²² Red
25 Rock's size and activities are comparable to the entities described in the *Southwest Gas* and
26 *Arizona Water* cases.

27 ¹⁹ See Tr. at 23 (Testimony of Jay Elmer)(stating that a member can leave at any time and
28 obtain service from any other available source).

²⁰ See, e.g., *Nicholson*, 108 Ariz. at 319-320, 497 P.2d at 817-818.

²¹ *Arizona Water Co. v. Arizona Corp. Comm'n*, 161 Ariz. 389, 392, 778 P.2d 1285,
 1288 (App. 1989).

²² *Southwest Gas Corp. v. Arizona Corp. Comm'n*, 169 Ariz. 279, 286-288, 818 P.2d 714,
 721-723 (1991).

1 **II. Prior Commission practice.**

2 The Commission has on numerous occasions granted applications by companies to determine
3 that they are not public service corporations. Some of these decisions are:

- 4 (a) *Show Low Crossroads HOA*, Decision 54922 (3/6/1986)(90 lots, adjudication granted)
5 (b) *Rancho Tierra Blanca POA*, Decision 54641 (8/7/1985)(up to 45 lots on 600 acres, adjudication granted)
6 (c) *Verde Glen Water Co/ Verde Glen POA*, Decision 55235 (10/16/86)(54 lots, adjudication granted)
7 (d) *Pantano Property HOA*, Decision 55347 (12/17/86)(60 lots/300 acres, adjudication granted)
8 (e) *Show Low Condo OA*, Decision 55412 (2/12/87)(132 condos, adjudication granted)
9 (f) *Cathedral Vista Water Co.*, Decision 55539 (4/23/87)(76 lots, adjudication granted)
10 (g) *Maricopa Mountain Water Co.*, Decision 48702 (4/20/78)(401 members, water hauling only – no distribution, adjudication granted)
11 (h) *Country Farms Irrigation and Management Co*, Decision 50917 (5/6/1980)(147 potential customers, adjudication granted) reversing
12 Decision 46501 (10/23/75).
13 (i) *Lakeside Irrigation Co.*, Decision 41040 (12/11/1970)(50 customers, adjudication granted).
14

15 These decisions demonstrate that granting Red Rock's application would be well within prior
16 commission practice.

17 The *Country Farms* and *Lakeside* cases make clear that when an adjudication is granted,
18 the Commission retains the authority to revisit the issue if circumstances change. In *Lakeside*,
19 the Commission noted that:

20 In the future, however, should the company seek additional sources of
21 water and undertake to furnish or distribute water to additional persons
22 (whether as additional members or not), the situation might be so
23 materially changed that the Company would thereby achieve the status of
24 a public service corporation. But at present, the static nature of the
25 situation... and the likely prospect that the nature and extent of service
26 will remain static, weigh heavily, in our opinion, toward compelling a
27 finding that the Lakeside Irrigation Company is not a public service
28 corporation.²³

²³ *Lakeside Irrigation Co.*, Decision 41040 (12/11/1970) at 7-8.

1 Similarly, in *Country Farms* the Commission noted that "we do not wish our opinion to be
2 construed as forever foreclosing a redetermination of the status of the applicant if there occurs a
3 sufficient change in circumstances."²⁴

4 In Decision No. 55568 (5/7/1987), the Commission issued a Policy Directive regarding
5 applications for adjudications not a public service corporation. The Commission directed Staff
6 to review the following factors when preparing its recommendations:

- 7 (a) adjudication applications must be submitted by non-profit homeowner
8 associations
- 9 (b) the application for adjudication not a public service corporation is a bona
10 fide request by a majority of the membership of the association through a
11 petition signed by 51% or more of the then existing members
- 12 (c) that all such associations making such applications have complete
13 ownership of the system and necessary assets
- 14 (d) every customer is a member/owner with equal voting rights and that each
15 member is or will be a customer
- 16 (e) the service area involved encompasses a fixed territory which is not within
17 the service area of a municipal utility or public service corporation or if in
18 such territory, that the municipal utility or public service corporation is
19 unable to serve
- 20 (f) there is a prohibition against further sub-division evidenced by deed
21 restrictions, zoning, water regulations or other enforceable governmental
22 regulations
- 23 (g) membership is restricted to a fixed number of customers actual or
24 potential.

25 Red Rock has satisfied all of the requirements of this policy directive.²⁵

26 Shortly after the Commission issued this directive, the Commission directed Staff to
27 resolve future requests for adjudications by issuing advisory letters. Various Staff members have
28 issued such letters over the years.²⁶ However, upon reviewing this practice, in Staff's view it is a
better practice for these matters to be resolved by the Commission in a formal proceeding,
especially in light of the difficult legal and policy issues that are involved in such determinations.

²⁴ *Country Farms Irrigation and Management Co.*, Decision 50917 (5/6/1980) at Finding
of Fact No. 3, quoting Decision 46501.

²⁵ Staff Report dated January 10, 2002, at 1-2; Tr. at 26-28 (Testimony of Jim Fisher).

²⁶ See, e.g., July 13, 1998 letter from Patrick C. Williams to Jim Talbert, August 6, 2001
regarding The Ranches at Maricopa Homeowners Association; letter from Jim Fisher to
Richard L. Sallquist, Esq., regarding Sedona National Property Owners Association and
August 31, 2001 letter from Christopher C. Kempley, Esq. to Donald S. Mills, Q.C.. regarding
Alex Mills Development Corporation. These letters are attached as Exhibit A.

1 **III. Issues raised by the Intervenor**

2 Ms. Dobson raises a number of issues, such as availability for inspection of the books and
3 records of the company, availability of regular financial reports of the company, and the reason
4 for the increase in assessments by the company. These matters are addressed more fully in Red
5 Rock's First and Second Supplemental Submissions. In Staff's view, the declarations contained
6 in these submissions fully address these issues. For example, the Declaration of Kay Holland,
7 Red Rock's Secretary/Treasurer, demonstrates that Red Rock has made the financial reports,
8 books, and records of the company available to all members, including Ms. Dobson.²⁷ Similarly,
9 with respect to Red Rock's assessments, the Exhibit A to Ms. Holland's Declaration
10 demonstrates the notice and explanation of the \$300 assessment.²⁸ Moreover, Ms. Dobson
11 previously raised these issues by contacting the Commission's Consumer Services Section. Ms.
12 Woller, of the Consumer Services Section, testified at the hearing that she had reviewed these
13 informal complaints and that these matters should not bar the granting of Red Rock's
14 application.²⁹ Ms. Dobson did not appear at the hearing or offer contradictory testimony.

15 **IV Conclusion**

16 In light of the cases described above, especially *Serv-Yu*, *Arizona Water* and *Southwest*
17 *Gas*, Staff reaffirms its opinion that this small, strictly limited non-profit company is not a public
18 service corporation. Moreover, granting Red Rock's application would be consistent with the
19 Commission's prior actions on similar matters. Lastly, the Company has adequately addressed
20 the concerns raised by Ms. Dobson in the submissions. Accordingly, Staff requests that the
21 Commission grant Red Rock's application.
22
23 ...
24 ...
25 ...
26 ...

27 ²⁷ Declaration of Kay Holland, dated July 3, 2002, attached as Exhibit A of Red Rock's
Second Supplemental Submission.

28 ²⁸ *Id.*

29 ²⁹ Tr. at 29-30 (Testimony of Janie Woller).

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RESPECTFULLY SUBMITTED this 18th day of July, 2002



Timothy J. Sabo
Attorney, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007
(602) 542-3402

The original and ten (10) copies of the foregoing
were filed this 18th day of July, 2002 with:

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Phoenix, Arizona 85007

Copies of the foregoing were mailed/hand-delivered
this 18th day of July, 2002 to:

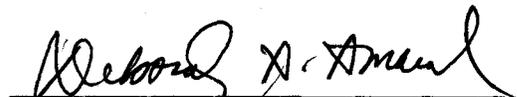
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MARC SPITZER

COMMISSIONER



BRIAN C. McNEIL
EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

August 31, 2001

Via first class mail

Donald S. Mills, Q.C.
Mills & Mills, LLP
2 St. Clair Ave. West
Toronto, Ontario
M4V 1L5

Re: Alex Mills Development Corporation ("AMDC")

Dear Mr. Mills:

I have received your letter dated August 29, 2001. Thank you for your prompt reply to my letter of August 14 and for your willingness to work with us on this matter. I have reviewed the letter, and I think that you will be pleased with the conclusion that the Commission's staff has reached.

Based on the representations contained in the August 29th letter, it is the view of the Commission's staff that AMDC is not currently a public service corporation, as that term is defined in Article XV § 2 of the Arizona Constitution. This view is contingent on AMDC not connecting any new customers and AMDC continuing to operate the ranch as a ranch and not as a development property. If additional customers are connected or it appears that development of the property is again underway, it is the staff's position that AMDC would likely become a public service corporation and would have to file for a Certificate of Convenience and Necessity (CC&N) pursuant to A.R.S. § 40-281 *et seq.*

A similar combination of a small number of existing customers, a primary business other than utility service, and a commitment not to take new customers has been used by the Arizona Court of Appeals to affirm the Commission's determination that a gas pipeline company with nine direct sale customers was not

a public service company. See Southwest Gas Corp. v. Arizona Corp. Comm'n, 169 Ariz. 279, 287, 818 P.2d 714, 721 (App. 1991).

The term "customers" as used in this letter should be taken to include those to whom AMDC now provides water service, notwithstanding the statement to contrary in your letter. I do not think that I can agree with the interpretation of the terms "customers" "sale" or "contract" in the letter. It may be the case that AMDC has implied contractual obligations to continue to serve its current customers. In any case, the view of staff expressed above is also contingent on continued service to current customers.

I hope that the foregoing has satisfactorily addressed your concerns and thank you again for cooperating with our investigation of this matter.

Very truly yours,



Christopher C. Kempley
Chief Counsel
Legal Division

cc: Alex Mills (President of AMDC)
Ronald M. Lehman, Esq. (Statutory Agent of AMDC)
Tim Sabo (Legal Division)
Reg Lopez (Utilities Division – Tucson)
Janie Woller (Utilities Division)
Steve Olea (Acting Director, Utilities Division)

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER



BRIAN C. McNEIL
EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

August 6, 2001

Richard L. Sallquist
Sallquist & Drummond, P.C.
2525 East Arizona Biltmore Circle
Suite A-117
Phoenix, Arizona 85016

Re: Sedona National Property Owners Association

Dear Mr. Sallquist,

This letter is in response to your July 18, 2001, request that Staff provide an informal opinion as to whether "Sedona National Property Owners Association" ("Sedona National") would be considered a public service corporation subject to the jurisdiction of the Arizona Corporation Commission.

Staff has reviewed the July 17, 2001, draft of the Sedona National's Declaration of Covenants, Conditions and Restrictions, as amended August 2, 2001, and relied on your representations to provide this informal opinion. Sedona National consists primarily of two properties in Yavapai County, Parcel Numbers 408-23-011, 408-23-006A, 408-23-006B, 408-23-004, 408-23-004A and 408-23-005, of Township 17, Range 5 East, as fully described in the legal description. The properties are surrounded by Coconino National Forest lands. Sedona National will not allow any of the lots to be further subdivided.

Sedona National is to construct water facilities to provide water service to the proposed twenty residential lots, the associated golf course and Members' Lodge/Club. Water will not be offered outside of the defined property or to the public. Sedona National management is subject to member authorization, based on one vote per lot, whether it is a developer owned lot or an owner occupied property.

Based on the above, I believe Sedona National would not be a public service corporation subject to the jurisdiction of the Arizona Corporation Commission. However, this letter is merely an informal Staff opinion. Sedona National would need to apply and receive formal adjudication from the Arizona Corporation Commission to obtain an official decision that it is not a public service corporation.

If you have any questions concerning this matter, or need any further clarification, please feel free to contact me at (602) 542-0839.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Fisher", written over a large, stylized flourish.

Jim Fisher
Executive Consultant
Utilities Division

JIM IRVIN
COMMISSIONER-CHAIRMAN
RENZ D. JENNINGS
COMMISSIONER
CARL J. KUNASEK
COMMISSIONER



JACK ROSE
EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

July 13, 1998

Mr. Jim Talbert
913 East Juanita #1
Mesa, Arizona 85204

Dear Mr. Talbert:

This letter is in response to your request that I render an informal opinion as to whether "The Ranches at Maricopa Homeowners' Association, Inc." (Association) is a public service corporation subject to the jurisdiction of the Arizona Corporation Commission (Commission).

This informal opinion is based on the information that you provided me in the Bylaws of the Association and "Declaration of Covenants, Conditions and Easements" for "The Ranches at Maricopa" subdivision. It appears that the subdivision consists of twenty-four (24) lots with an average lot size of two (2) acres. Apparently, these lots may not be subdivided according to the current restrictions. The Association will provide water to the twenty-four lots through a piped water system. The Association is comprised of the owners of the twenty-four lots. Water will not be furnished outside of the subdivision and will not be provided to the general public. Voting in the Association will be one vote per lot, whether or not it is a developer owned lot or a non-developer owned lot.

Based upon the above, I do not believe that the Association will be a public service corporation subject to the jurisdiction of the Commission. However, should the circumstances described above change in the future, a different opinion may be warranted.

If you have any questions concerning this matter, or need any further clarification, I may be contacted at 542-0818.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patrick C. Williams".

Patrick C. Williams
Consumer Services Supervisor
Utilities Division

PCW:ljs