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Arizona Corporation Commission
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Kimberly A. Grouse
kgrouse@swlaw.com

July 10, 2006

Kristin K. Mayes, Commissioner
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Re: Perkins Mountain Water Co. Application for CC&N, Docket No. W-20380A-05-0490;
Perkins Mountain Utility Co. Application for CC&N, Docket No. SW-20379A-05-0489

Dear Commissioner Mayes:

In your letter dated June 19, 2006, you ask whether Rhodes Homes Arizona, LLC ("Rhodes Homes") is circumventing the law, ARS §40-281, by commencing to construct utility infrastructure. Pursuant to statute, a public service corporation must first obtain a Certificate of Convenience and Necessity ("CC&N") from the Arizona Corporation Commission prior to commencing construction of any plant, line or utility system. Rhodes Homes is not circumventing this law because, in fact, it does not apply to Rhodes Homes. Rhodes Homes is not a public service corporation.

Arizona's constitutional definition of a public service corporation is "all corporations, other than municipal engaged in ... furnishing water for irrigation, fire protection, or other public purposes; ... or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit...shall be deemed public service corporations." Ariz. Const. Art. XV, §2 (1980). Rhodes Homes does not furnish water service to the public and has no intention of doing so. It is a developer, not a public service corporation.

You also ask in your letter why Rhodes Homes is not in violation of ARS §40-281, especially if Perkins Mountain Water Company ("Perkins") is in any way affiliated with Rhodes Homes. As Commissioner Mundell noted in his letter dated May 24, 2006, Perkins and Rhodes Homes are separate legal entities. The fact that Rhodes Homes and Perkins may have the same business address, are under common control and are affiliated is not indicia of Rhodes Homes acting as a public service corporation¹. Similar to other corporate entities that have a regulated subsidiary or affiliate, Rhodes

¹ The Arizona Supreme Court found a public service corporation is one which makes its rates, charges and methods of operation a matter of public concern. Such concern must be "clothed with a public interest." *Southwest Gas Corporation v Arizona Corporation Commission*, 169 Ariz. 279, 286, 818 P.2d 714, 721 (Ariz. Ct. App. 1991); *Arizona Corporation Commission v Nicholson*, 108 Ariz. 317, 321, 497 P.2d 815, 819 (Ariz. 1972) (quoting *General Alarm v. Underdown*, 76 Ariz. 235, 262 P.2d 671, 672 (Ariz. 1953)). The Court of Appeals in *Southwest Gas* looked to a set of factors, as many other Arizona courts have, to identify corporations that are clothed with a public interest. The factors stem from *Natural Gas Service Co. v Serv-Yu Cooperative*, 70 Ariz. 235, 237, 219 P.2d 325 (Ariz. 1950). These factors are: 1) What the corporation actually does. 2) A dedication to public use. 3) Articles of incorporation, authorization, and purposes. 4) Dealing with the service a commodity in which the public has been generally held to have an interest. 5) Monopolizing

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Homes is not a public service corporation by virtue of its affiliation. Rhodes Homes provides water solely to its own private property from its own private wells. It has no intention of providing water service to any customers. It is in the business of building master planned communities.

It is common practice in this state for developers of master planned communities to build the utility infrastructure and then transfer the assets to an approved public service corporation at a later date, subject to refunds, or in some cases contributed outright. Upon receipt of the assets, the water or wastewater company accounts for such assets as advances or contributions in aid of construction, as is sanctioned by the Commission's regulations. The Del Webb properties in Anthem are but one example of a master planned community that built the infrastructure and then conveyed the assets to the water company. Another example of a developer building infrastructure is the Arizona Gateway Development in the vicinity of Lake Havasu City in Mohave County. The developer constructed all of the water and sewer facilities and then conveyed the assets to the utility. The utility company recorded this plant as a refundable advance pursuant to a Line Extension Agreement.

At the present time, Perkins has not entered into any agreements with Rhodes Homes or any other entity to build or convey assets. If Perkins receives its CC&N, it too will be able to enter into a Line Extension Agreement with Rhodes Homes, subject to Commission approval.

Because developers have several alternatives to a regulated public service corporation for providing water service to a development, often times the water provider is decided as the community is being developed. Depending on the size of the development, these options include a community facilities district, domestic water improvement district, homeowners association or entering into an agreement with a local municipality. The type of entity a developer chooses is a business decision and a multitude of factors are taken into account in making that decision. It is not uncommon for a developer to begin installation of utility infrastructure concurrent with the construction of the initial phases of the development while still determining what entity will provide utility service.

Master planned communities require significant investment, planning and coordination. In many instances, it may be years before the first house is occupied. During those intervening years, developers are within their rights to continue building infrastructure. This is done to ensure that the necessary infrastructure is in place to provide utility services by the time that the first house is occupied, regardless of the ultimate service provider.

Furthermore, the Arizona Department of Environmental Quality's ("ADEQ") own rules state that an approval to construct becomes void if construction does not begin within one year of issuance

or intending to monopolize the territory with a public service commodity. 6) Acceptance of substantially all requests for service. 7) Service under contracts and reserving the right to discriminate is not always controlling and 8) Actual or potential competition with other corporations whose business is clothed with public interest. In applying these factors, the court upheld the Arizona Corporation Commission's decision not to regulate El Paso as a public service corporation, despite the fact that El Paso dealt in a commodity which the public generally holds an interest. The court found that El Paso was not monopolizing, had no future plans to monopolize, did not accept "substantially all requests for customers" and did not intend to add any new direct sale customers. *Southwest Gas* at 287.

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of an approval to construct. A.A.C. R18-5-505 (E)(1). There is no requirement that the applicant for such approval be a regulated utility.

The utility infrastructure is but one part of the approved plan in Golden Valley. It has been Rhodes Homes intent to build the utility infrastructure since May 2005 when the Rhodes Homes' engineer, Stanley Consultants, prepared infrastructure plans and exhibits as part of its Golden Valley Ranch Engineering Report. Stanley Consultants began the process in July 2005 of developing water and wastewater system construction documents in preparation for applying to the ADEQ for approvals to construct. To keep construction on schedule, Rhodes Homes applied to ADEQ for approvals to construct on February 28, 2006 for a 24-inch pipeline, March 9, 2006 for a storage tank and March 21, 2006 for a new source well. These approvals were granted on March 22, 2006, April 17, 2006 and April 6, 2006, respectively, and construction of the 24-inch pipeline infrastructure began on March 31, 2006.

We trust that this letter addresses your concerns.

Very truly yours,

Snell & Wilmer L.L.P.



Jeffrey W. Crockett
Kimberly A. Grouse

KAG:bjw

cc: Chairman Hatch-Miller
Commissioner Spitzer
Commissioner Mundell
Commissioner Gleason
Brian McNeil
Ernest Johnson
Lyn Farmer
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