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OPEN MEETING ITEM



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PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP



ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
DOCKET CONTROL

DATE: SEPTEMBER 27, 2010

DOCKET NO.: W-20704A-09-0467

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Belinda A. Martin. The recommendation has been filed in the form of an Opinion and Order on:

KAYENTA ESTATES HOMEOWNERS ASSOCIATION, INC.
(ADJUDICATION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

OCTOBER 6, 2010

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

OCTOBER 19, 2010 and OCTOBER 20, 2010

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission

DOCKETED

SEP 27 2010

DOCKETED BY	
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ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

1200 WEST WASHINGTON STREET, PHOENIX, ARIZONA 85007-2927 / 400 WEST CONGRESS STREET, TUCSON, ARIZONA 85701-1347

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This document is available in alternative formats by contacting Shaylin Bernal, ADA Coordinator, voice phone number 602-542-3931, E-mail SABernal@azcc.gov

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

IN THE MATTER OF THE APPLICATION OF
KAYENTA ESTATES HOMEOWNERS
ASSOCIATION, INC. FOR AN ADJUDICATION
NOT A PUBLIC SERVICE CORPORATION.

DOCKET NO. W-20704A-09-0467

DECISION NO. _____

OPINION AND ORDER

DATE OF HEARING: August 4, 2010
PLACE OF HEARING: Tucson, Arizona
ADMINISTRATIVE LAW JUDGE: Belinda A. Martin
APPEARANCES: Ms. Ann P. Roberts, BATTAGLIA & ROBERTS, P.C.,
on behalf of Kayenta Estates Homeowners Association;
Ms. Robin R. Mitchell, Staff Attorney, Legal Division,
on behalf of the Utilities Division of the Arizona
Corporation Commission.

BY THE COMMISSION:

On September 29, 2009, Kayenta Estates Homeowners Association, Inc. ("Kayenta" or "Association"), filed with the Arizona Corporation Commission ("Commission") an application for adjudication that it is not a public service corporation under Arizona law. The Association plans to provide water service to an area known as Kayenta Estates Subdivision ("Subdivision") in Cochise County.

On October 30, 2009, the Commission's Utilities Division Staff ("Staff") filed an Insufficiency Letter in this docket stating that the Application had not met the sufficiency requirements as outlined in the Arizona Administrative Code ("A.A.C.").

On December 16, 2009, Kayenta filed an Amended Application ("Amended Application" and together with the original Application, the "Application"). The Amended Application also included a copy of the Bylaws of Kayenta Estates Homeowner's Association, Inc. ("Bylaws").

1 On February 9, 2010, the Association filed an Amendment to the Declaration of
2 Establishment of Covenants, Conditions and Restrictions (the original Declaration of Establishment
3 of Covenants, Conditions and Restrictions, which was filed with the Application, together with the
4 Amendment to the Declaration of Establishment of Covenants, Conditions and Restrictions, shall be
5 collectively referred to as the "CC&Rs").¹

6 On April 5, 2010, Staff filed a Sufficiency Letter indicating the Association's Application had
7 met the sufficiency requirements pursuant to the A.A.C.

8 On May 3, 2010, a Procedural Order was issued setting the matter for hearing and setting
9 associated procedural deadlines.

10 On June 17, 2010, Kayenta filed its Certificate of Mailing and Publication.

11 On July 1, 2010, Staff filed its Staff Report recommending approval of Application.

12 On August 4, 2010, a full public hearing was held before a duly authorized Administrative
13 Law Judge of the Commission at its offices in Tucson, Arizona. The Association and Staff appeared
14 through counsel at the hearing and presented evidence and testimony. No members of the public
15 appeared to give public comment. At the conclusion of the hearing, the matter was taken under
16 advisement pending submission of a Recommended Opinion and Order to the Commission.

17 * * * * *

18 Having considered the entire record herein and being fully advised in the premises, the
19 Commission finds, concludes, and orders that:

20 **FINDINGS OF FACT**

21 1. The Association is an Arizona non-profit corporation incorporated on April 9, 2009.
22 The Association was formed for the purpose of providing potable water, and operating and
23 maintaining a water supply and distribution system for the future homeowners in the Kayenta Estates
24 Subdivision ("Subdivision"), located in Cochise County.
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27 ¹ The Association's CC&Rs contain the Association's directives regarding maintenance of its status as an adjudicated
28 non-public service corporation. The Bylaws state generally the duties of the Association. According to Article XII,
Section 2 of the Bylaws, in the case of any conflict between the CC&Rs and the Bylaws, the CC&Rs control.

1 2. The Subdivision is located between Benson and St. David, Arizona, and covers an
2 approximately 80-acre tract of land. The Subdivision will consist of 27 three-acre parcels. The
3 requested service area is approximately one-eighth of one square mile in size and is more fully
4 described in Exhibit A, attached hereto and incorporated herein by reference.

5 3. In Commission Decision No. 55568 (May 7, 1987), the Commission issued a policy
6 directive regarding applications for adjudication not a public service corporation, and provided the
7 following seven criteria for evaluation of such applications:

- 8 (i). The application must be submitted by a non-profit homeowners association;
9 (ii). The application must be a bona fide request by a majority of the membership
10 of the association through a petition signed by 51 percent or more of the then
11 existing members;
12 (iii). All associations making an application must have complete ownership of the
13 system and necessary assets;
14 (iv). Every customer must be an owner/member with equal voting rights and each
15 member is or will be a customer;
16 (v). 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 it is,
18 the municipal utility or public service corporation is unable to serve;
19 (vi). There is a prohibition against further sub-division evidenced by deed
20 restrictions, zoning, water restrictions, or other enforceable governmental
21 regulations; and
22 (vii). The membership is restricted to a fixed number of customers, actual or
23 potential.

24 4. Applicant is a non-profit homeowner's association.

25 5. The Declarant for the Association's CC&Rs, Mr. John Scully, is the current owner and
26 developer of the property to be served.

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2 6. No lots have been sold in the Subdivision and, as a result, the current membership of
3 the Association is represented by its Board of Directors. On December 14, 2009, the Board of
4 Directors adopted a resolution that approved and supported the Association's Application for
5 adjudication not a public service corporation.

6 7. On September 23, 2009, Mr. Scully filed a Request to Change Well Information with
7 the Arizona Department of Water Resources ("ADWR"), noting a change of ownership of the well
8 currently existing on the affected area from Mr. Scully to the Association. Staff confirmed that
9 ownership of the well had been transferred.² Additionally, the CC&Rs state that all water system
10 assets shall be operated, maintained and controlled by the Association.

11 8. The Association's CC&Rs provide that every customer is a member/owner with equal
12 voting rights with respect to water system matters, regardless of the number of lots owned and that
13 each member/owner is or will be a customer of the water system and is entitled to vote.

14 9. The Association's CC&Rs provide that the Association's service area is limited or
15 fixed to the "membership property" as described in the legal description for the service area. Further,
16 the Association's CC&Rs provide that the service area is not within a municipal utility or public
17 service corporation, which Staff confirmed.³

18 10. The Association's CC&Rs provide that none of the 27 lots shall be subdivided,
19 resubdivided, altered or changed.

20 11. The Association's CC&Rs restrict membership to a fixed number of actual or potential
21 customers and therefore membership is limited to 27 members.

22 12. The Associations CC&Rs state that the CC&Rs may be amended during the first 20
23 years from the date of the CC&Rs' recordation by an instrument signed by not less than 75 percent of
24 the membership, and by 67 percent of the membership after 20 years. The Bylaws may be amended
25 by a vote of the majority of the votes entitled to be cast at a meeting of a quorum of members present
26 in person or by proxy.

27 _____
28 ² Exhibit S-2.

³ Tr. at 25-26.

1 13. Mr. Scully testified he understands that if at any time a vote of the membership ever
2 permits the further subdivision of the subdivision, permits an increase in the number of memberships,
3 allows an expansion of the property to be served by the Association, or changes the equal voting
4 rights requirements, these actions require the Association to apply to the Commission for a Certificate
5 of Convenience and Necessity.⁴

6 14. During hearing Mr. Scully testified that the CC&Rs had not yet been filed with the
7 Cochise County Recorder's Office.⁵ It appears from the Association's Application that the Bylaws
8 have not yet been filed with the Cochise County Recorder's Office.

9 15. Staff's witness, Kiana Sears, testified Staff recommends that Kayenta file with Docket
10 Control, as a compliance item in this docket, within 60 days of the effective date of the Decision in
11 this matter, a copy of the Association's CC&Rs indicating that the CC&Rs have been filed with the
12 Cochise County Recorder.⁶

13 **Proposed Water System**

14 16. The proposed Association water system will consist of two wells (one existing well
15 and one new well), each producing 23 gallons per minute ("GPM"), two 20,000 gallon storage tanks,
16 two pressure pumps and two 3,000 gallon pressure tanks and a distribution system. According to the
17 Association, each individual lot would have its own septic system. Kayenta expects to begin service
18 at the earliest in 12 to 18 months.⁷

19 17. Engineering Staff determined that the proposed Association water system would have
20 adequate capacity to meet peak water use demand and sufficient fire flow of 500 GPM for one hour.

21 18. Staff contacted the Arizona Department of Environmental Quality ("ADEQ") to verify
22 that, because Kayenta is not currently providing water to the subdivision, there is no ADEQ
23 compliance status report.

24 19. The Association is not within the ADWR's Active Management Area or regulated as a
25 community water system by ADWR.

26 _____
27 ⁴ Tr. at 19-20.

⁵ Tr. at 17.

⁶ Tr. at 38.

⁷ Tr. at 13.

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20. Staff notes that Kayenta has not been regulated by the Commission and, as such, there are no compliance concerns to report.

21. The Association is in good standing with the Commission's Corporations Division.

22. The Association meets the criteria set forth in Commission Decision No. 55568 (May 7, 1987).

23. Given the foregoing, Staff recommends that Kayenta's Application be approved.

24. Although the Association's CC&Rs restrict the Association's membership to a fixed number, prohibit further subdivision or expansion, and require equal voting rights for all members, the CC&Rs and Bylaws may be amended by the Association's members. Therefore, if the Association's CC&Rs or Bylaws are ever changed to allow further subdivision of the current 27 lots, to allow an increased number of memberships, to allow expansion of the property to be served by the Association, or to change the equal voting rights requirements, the adjudication granted by this Order should become null and void, after due process. If the Association makes any of the above changes, the Association will be required to file an application for a Certificate of Convenience and Necessity within 30 days of any of the above mentioned events.

25. The recommendations stated herein are reasonable and shall be adopted.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this Application.

2. Notice of the Application was provided in accordance with the law.

3. The Association currently satisfies the criteria for adjudication not a public service corporation and is therefore not a public service corporation within the meaning of Article XV of the Arizona Constitution.

4. The Association remains subject to the applicable laws, regulations, and order of other regulatory agencies, including, but not limited to ADEQ, ADWR and Cochise County.

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ORDER

IT IS THEREFORE ORDERED that the application of Kayenta Estates Homeowners Association, Inc., for adjudication not a public service corporation is hereby granted conditioned upon its compliance with the conditions set forth below.

IT IS FURTHER ORDERED that although Kayenta Estates Homeowners Association, Inc., currently satisfies the requirements set forth in Commission Decision No. 55568 (May 7, 1987) for adjudication not a public service corporation, if at any time in the future the Bylaws and/or Recorded Covenants, Conditions and Restrictions for Kayenta Estates Homeowners Association, Inc., are changed to allow further subdivision of the current 27 parcels in the adjudication area, to allow an increased number of memberships, to allow expansion of the property to be served, or to change the equal voting requirements, then the adjudication granted herein shall become null and void after due process, and Kayenta Estates Homeowners Association, Inc., shall file an application for a Certificate of Convenience and Necessity within 30 days of any of the above mentioned events.

IT IS FURTHER ORDERED that Kayenta Estates Homeowners Association, Inc., shall file with Docket Control, as a compliance item in this docket, within 60 days of the effective date of this Decision, a copy of its Declaration of Establishment of Covenants, Conditions and Restrictions and its Amendment to the Declaration of Establishment of Covenants, Conditions and Restrictions, as recorded with the Cochise County Recorder.

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1 IT IS FURTHER ORDERED that Kayenta Estates Homeowners Association, Inc., is hereby
2 advised of its continuing obligations under the applicable laws, regulations and orders of other
3 regulatory agencies, including but not limited to the Arizona Department of Environmental Quality,
4 the Arizona Department of Water Resources and Cochise County.

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

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
7

8
9 CHAIRMAN _____ COMMISSIONER

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11 COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER

12
13 IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,
14 Executive Director of the Arizona Corporation Commission,
15 have hereunto set my hand and caused the official seal of the
16 Commission to be affixed at the Capitol, in the City of Phoenix,
17 this ____ day of _____, 2010.

18 _____
19 ERNEST G. JOHNSON
20 EXECUTIVE DIRECTOR

21 DISSENT _____

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23 DISSENT _____

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1 SERVICE LIST FOR: KAYENTA ESTATES HOMEOWNERS ASSOCIATION

2 DOCKET NO. W-20704A-09-0467

3 Ann P. Roberts
4 BATTAGLIA & ROBERTS, P.C.
5 167 East Fifth Street
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7 Janice Alward, Chief Counsel
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10 1200 West Washington Street
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12 Steven M. Olea, Director
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15 1200 West Washington Street
16 Phoenix, Arizona 85007

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EXHIBIT A

The North half of the Northeast Quarter of Section 30, Township 17 South, Range 21 East of the Gila and Salt River Base and Meridian, Cochise County, State of Arizona, more particularly described as follows:

Beginning at the Northeast quarter of said Section 30, monumented by a 3" open pipe tagged LS5980;

Thence along the East line of said Northeast quarter of Section 30, South $00^{\circ}43'44''$ East a distance of 1332.84 feet to the Southeast corner of said North half of the Northeast quarter;

Thence along the South line of said North half North $89^{\circ}58'42''$ West a distance of 2643.91 feet to the Southwest corner of said North half;

Thence along the West line of said North half North $00^{\circ}49'01''$ West a distance of 1330.39 feet to the Northwest corner of said Northeast quarter, being monumented by a 3" open pipe;

Thence along the North line of said Section 30, North $89^{\circ}58'05''$ East a distance of 2645.92 feet to the Northeast corner of said Section 30 and the Point of Beginning.

Said parcel contains 80.85 acres more or less.