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BEFORE THE ARIZONA CORPORATION C

COMMISSIONERS

Arizona Corporation Commission

DOCKETED

DEC 10 2010

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

DOCKETED BY NR

IN THE MATTER OF THE JOINT APPLICATION OF TIERRA LINDA HOMEOWNERS ASSOCIATION, INC., AND GARY SMYTH FOR AUTHORIZATION TO SELL WATER SYSTEM ASSETS AND TRANSFER CERTIFICATE OF CONVENIENCE AND NECESSITY.

DOCKET NO. W-20689A-09-0327  
DOCKET NO. W-04236A-09-0327

DECISION NO. 72002

OPINION AND ORDER

DATE OF HEARING: September 13, 2010  
PLACE OF HEARING: Tucson, Arizona  
ADMINISTRATIVE LAW JUDGE: Belinda A. Martin  
APPEARANCES: Larry V. Robertson, Jr., Esq., on behalf of Tierra Linda Homeowners Association, Inc., and Gary Smyth, and Ayesha Vohra, Staff Attorney, Legal Division, on behalf of the Utilities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

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

FINDINGS OF FACT

1. Tierra Linda Homeowners Association, Inc. ("Tierra Linda" or "Company"), is an Arizona corporation authorized to provide water service to its customers in Pima County, Arizona, pursuant to Decision No. 67104 (July 9, 2004).

2. On June 26, 2009, Tierra Linda filed a joint application along with Gary Smyth ("Mr. Smyth" and, together with Tierra Linda, the "Applicants") for approval to sell Tierra Linda's water system assets and transfer its Certificate of Convenience and Necessity ("CC&N") to Mr. Smyth ("Application").

3. On July 24, 2009, the Commission's Utilities Division Staff ("Staff") filed an

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1 Insufficiency Letter in this docket, and on October 9, 2009, the Applicants filed their responses to  
2 Staff's Insufficiency Letter.

3 4. On November 6, 2009, Staff filed its second Insufficiency Letter, and the Applicants  
4 filed their responses on November 16, 2009.

5 5. On March 31, 2010, Staff filed its third Insufficiency Letter, and the Applicants filed  
6 their responses on April 14, 2010.

7 6. On May 12, 2010, Staff filed its Sufficiency Letter indicating that the Application was  
8 sufficient under the Arizona Administrative Code ("A.A.C.").

9 7. The Applicants filed correspondence with the Commission on May 21, 2010, waiving  
10 the time clock requirements in this matter due to scheduling conflicts.

11 8. On May 25, 2010, a Procedural Order was issued setting the hearing in this matter for  
12 September 13, 2010, and establishing deadlines.

13 9. On July 1, 2010, the Applicants filed an Affidavit of Publication indicating that notice  
14 of the hearing was published in *The Daily Territorial* on June 15 and June 16, 2010, and that the  
15 notice was mailed to all property owners and customers in Tierra Linda's service area. No customer  
16 comments were received in response to the notice.

17 10. On July 23, 2010, Staff filed its Staff Report in this docket recommending approval of  
18 the Application subject to certain conditions.

19 11. On August 23, 2010, the Applicants filed correspondence regarding its curtailment  
20 tariff and compliance with Arizona Department of Water Resources ("ADWR") requirements.

21 12. On September 13, 2010, a public hearing was held and the parties appeared through  
22 counsel. No members of the public appeared for public comment.

23 13. On September 24, 2010, Staff filed correspondence indicating that a Main Extension  
24 Agreement between Tierra Linda and Tierra Linda Development had been approved by Staff.

25 **The Parties**

26 **TIERRA LINDA**

27 14. Tierra Linda provides water service to approximately 60 customers in the Tierra Linda  
28 Nueva Subdivision northwest of Tucson. Tierra Linda Nueva Subdivision is currently platted for 190

1 residential lots on two hundred acres, which encompasses Tierra Linda's entire certificated area.<sup>1</sup>  
2 The water utility's infrastructure was paid for by Tierra Linda Development and built by one of Mr.  
3 Smyth's entities, as discussed herein.

4 15. Robert Zammit is president and sole director of Tierra Linda. Tierra Linda  
5 Development is a limited liability company, of which Mr. Zammit is the managing member, along  
6 with other investor members.<sup>2</sup>

7 16. As part of the application process, Tierra Linda filed with the Commission a Water  
8 Main Extension Agreement for Developer-Installed On-Site and Off-Site Facilities ("MXA")  
9 between Tierra Linda and Tierra Linda Development dated June 16, 2009. On September 24, 2010,  
10 Staff filed correspondence in this docket stating that Staff had approved the MXA.

11 17. Staff reports that a check of the Utilities Division compliance database indicates that  
12 Tierra Linda has no delinquent compliance items.

13 18. Tierra Linda's current rates and charges were established in Decision No. 67104 (July  
14 9, 2004.)

15 GARY SMYTH

16 19. Mr. Smyth owns and operates Smyth Steel, which constructs and installs water  
17 systems for water utilities in Arizona, including Tierra Linda's water system.

18 20. Mr. Smyth also owns Cayetano Inc. d/b/a Lakewood Water Company ("Lakewood"),  
19 which is regulated by the Commission and serves approximately 300 customers in Pima County.

20 21. In June 2009, Mr. Smyth formed Smyth Utility Management, which provides utility  
21 management services to small and medium sized water and wastewater companies in Southern  
22 Arizona.

23 22. During its review of the Application, Staff discovered that Lakewood was not in  
24 compliance with ADWR requirements governing water providers, having failed to file a report  
25 required by ADWR. Lisa Sullivan, the manager for Lakewood, testified that Lakewood had timely  
26 filed the report, but later learned that ADWR had not received the report. Lakewood refiled the  
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28 <sup>1</sup> Tr. at 14-15.

<sup>2</sup> Tr. at 45.

1 report and subsequently received an ADWR Water Provider Compliance Status Report dated August  
2 3, 2010, indicating that Lakewood is currently compliant with ADWR requirements governing water  
3 providers and/or community water systems.<sup>3</sup> The Applicants filed a copy of the ADWR Water  
4 Provider Compliance Status Report on August 23, 2010.

5 23. At hearing, Mr. Smyth provided a financial statement demonstrating that he has  
6 adequate financial resources to operate, maintain and expand the system.<sup>4</sup> Additionally, Staff  
7 concluded that Mr. Smyth has the knowledge and technical means to operate and expand the Tierra  
8 Linda water system.<sup>5</sup>

### 9 The Water System

10 24. Tierra Linda's water system consists of one well that produces 200 gallons per minute,  
11 one 400,000 gallon storage tank, three booster pumps, one 5,000 gallon pressure tank, and a  
12 distribution system. Staff concluded that the system has adequate well production and storage  
13 capacity to serve existing customers and reasonable growth.

14 25. One issue currently facing Tierra Linda is increasing arsenic levels. Recently, arsenic  
15 tests on the system revealed arsenic levels at 10 parts per million, necessitating the need for an  
16 arsenic treatment system.<sup>6</sup>

17 26. Mr. Smyth testified that he is aware that an arsenic treatment system is immediately  
18 needed and, upon Commission approval of the Application, he will provide the capital for the arsenic  
19 treatment system and its installation.<sup>7</sup>

20 27. According to an Arizona Department of Environmental Quality status report dated  
21 July 9, 2009, Tierra Linda's system has no major deficiencies and is delivering water that meets  
22 water quality standards required by 40 CFR 141 and A.A.C., Title 18, Chapter 4.

23 28. Tierra Linda is located within the Tucson Active Management Area ("AMA").  
24 ADWR has determined that the Company is currently in compliance with departmental requirements  
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26 <sup>3</sup> Tr. at 77-78.

27 <sup>4</sup> See Exhibit A-12.

28 <sup>5</sup> Staff Report, Attachment A, page 4.

<sup>6</sup> Tr. at 44-45

<sup>7</sup> Tr. at 62-63. Smyth entities installed arsenic treatment facilities for Sahuarita Water Company, Community Water Company of Green Valley and Las Quintas Serenas, among others. Tr. at 54.

1 governing water providers and/or community water systems.

2 29. Tierra Linda has an approved Backflow Prevention Tariff.

3 30. According to Staff, Tierra Linda's water loss for 2009 was 10.5 percent, which  
4 exceeds acceptable limits of no more than 10 percent water loss. Mr. Smyth testified that he believes  
5 that one reason for the excessive water loss possibly was theft. Mr. Smyth stated that some months  
6 ago he found a hydrant meter normally used by construction companies for water while constructing  
7 homes attached to a hydrant in the subdivision. Since there was no construction ongoing, Mr. Smyth  
8 removed the hydrant meter. He believes that water may have been taken without authorization while  
9 the meter was in place.<sup>8</sup>

10 **The Transaction**

11 31. On June 16, 2009, Tierra Linda and Smyth entered into an asset purchase agreement  
12 whereby Mr. Smyth will purchase Tierra Linda's water utility assets for \$70,000 cash.

13 32. According to Mr. Zammit, the reason for the sale of the water system assets is that  
14 Tierra Linda "believes that the management of the water company will be better with a private  
15 company than it would be by a committee of homeowners association members,"<sup>9</sup> and that sale to a  
16 qualified private owner, who was regulated by the Commission and who had the requisite financial  
17 resources to continue to operate and upgrade the system would be in the best interest of the  
18 association membership.<sup>10</sup>

19 33. Mr. Smyth testified that the purchase of Tierra Linda is a natural progression for his  
20 business and is within his technical ability.<sup>11</sup>

21 34. The close of escrow is conditioned upon the Commission's approval of the sale of  
22 assets and transfer of CC&N.

23 35. According to the Applicants, customer security deposits, refunds due on meter and  
24 service line installations, and refunds due on main line extension agreements will be assumed by Mr.  
25 Smyth subject to Commission approval of this transaction.

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27 <sup>8</sup> Tr. at 57-58.

<sup>9</sup> Tr. at 34.

28 <sup>10</sup> Tr. at 35.

<sup>11</sup> Tr. at 61-62.

1 36. Tierra Linda's customers in its certificated area will be charged the Company's  
2 existing rates and charges for water service.

3 37. At hearing, Mr. Zammit testified that in order to effectuate Tierra Linda's sale to Mr.  
4 Smyth, it was necessary to amend the conditions covenants and restrictions ("CCRs") governing the  
5 subdivision; however, before it may amend the CCRs, Tierra Linda must obtain approval for the  
6 amendment from the Veterans Administration ("VA").<sup>12</sup> According to counsel for the Applicants,  
7 VA approval of the amended CCRs is required because the VA holds mortgages on some of the  
8 homes in the subdivision.<sup>13</sup>

9 **Staff Recommendations**

10 38. In its Staff Report, Staff made the following recommendations:

- 11 a. Mr. Smyth be required to charge the authorized rates and charges in the transfer area.
- 12 b. Mr. Smyth be required to file with Docket Control, as a compliance item in this docket  
13 no later than December 31, 2010, a copy of the letter or notice issued by ADWR  
14 indicating that Lakewood Water Company is in full compliance with ADWR  
15 regulations.
- 16 c. Tierra Linda be required to file with Docket Control, as a compliance item in this  
17 docket, copies of all documentation transferring ownership of its water system and  
18 assets to Mr. Smyth, within 120 days of the effective date of a decision in this matter.
- 19 d. Tierra Linda be required to file with Docket Control, as a compliance item in this  
20 docket, a copy of the transfer of the Pima County Public Utility License Agreement  
21 for the requested area, within two years of the effective date of a decision in this  
22 matter.
- 23 e. Tierra Linda be required to file a curtailment tariff within 45 days of the effective date  
24 of the Commission's decision in this matter. The tariff shall be docketed as a  
25 compliance item under this docket number for the review and certification of Staff.  
26 The tariff shall generally conform to the sample tariff found on the Commission's  
27 website. The Company may need to make minor modifications to the sample tariff  
28 according to its specific management, operational and design requirements as  
necessary and appropriate.<sup>14</sup>
- f. Tierra Linda be required to coordinate the reading of its well meter and individual  
customer meters on a monthly basis and report this data in its Commission Annual  
Report for year ending 2010. If the reported water loss in the Annual Report is greater  
than 10 percent, the Company shall prepare a report containing a detailed analysis and  
plan to reduce water loss to less than 10 percent. If the Company believes it is not cost

<sup>12</sup> Tr. at 24-25.

<sup>13</sup> Tr. at 26-27.

<sup>14</sup> Staff testified that, although the Applicants had already filed a curtailment tariff for approval, because it was filed as part of the Application, it could not become effective under operation of law. Staff stated that an updated curtailment tariff must be filed as a compliance item, reflecting the Decision number and any other corrections required by Staff.

1 effective to reduce the water loss to less than 10 percent, it should submit a detailed  
2 cost benefit analysis to support its opinion. In no case shall the Company allow water  
3 loss to be greater than 15 percent. The water loss reduction report or the detailed  
4 analysis, whichever is submitted, shall be docketed as a compliance item no later than  
5 June 30, 2011.

6 39. At hearing Staff made changes and additions to its Staff Report.

7 40. Staff recommends that Tierra Linda be required to file, as a compliance item in this  
8 docket, within 180 days of the effective date of this Decision, a copy of the VA's approval of the  
9 amendment to Tierra Linda's CCRs.<sup>15</sup>

10 41. Because the VA must approve the amended CCRs before the transaction can close,  
11 Staff revised its recommendation that Tierra Linda be required to file copies of all documentation  
12 transferring ownership of its water system and assets to Mr. Smyth, from within 120 days of the  
13 effective date of this Decision, to within 180 days of the effective date of this Decision.<sup>16</sup>

14 42. Staff withdrew its recommendation that Mr. Smyth file a copy of the ADWR  
15 compliance report for Lakewood since that report was filed with the Commission prior to hearing.

16 43. Staff also recommended that the sale and transfer of assets to Mr. Smyth be considered  
17 null and void, after due process, should the Applicants fail to comply with the above conditions.

18 44. The Applicants agreed with Staff's recommendations and the modifications.

19 45. Regarding Staff's conditions stated in Findings of Fact No. 38(d)-(f), we believe that  
20 these conditions should be required of either Tierra Linda and/or Mr. Smyth, depending upon  
21 whether the legal transfer of the Company has taken place at the time of the required filing.

22 46. Staff recommendations as modified are reasonable and shall be adopted.

23 **CONCLUSIONS OF LAW**

24 1. Tierra Linda is a public service corporation within the meaning of Article XV of the  
25 Arizona Constitution and A.R.S. §§ 40-281, 40-282 and 40-285.

26 2. The Commission has jurisdiction over Tierra Linda and Mr. Smyth and the subject  
27 matter of the Application.

28 3. Notice of the Application was provided as required by law.

4. There is a continuing need for water utility service in Tierra Linda's certificated area.

<sup>15</sup> Tr. at 105-107.

<sup>16</sup> Tr. at 107-108.



1 prepare a report containing a detailed analysis and plan to reduce water loss to less than 10 percent.  
2 If Tierra Linda Homeowners Association, Inc., and/ or Gary Smyth believe it is not cost effective to  
3 reduce the water loss to less than 10 percent, they should submit a detailed cost benefit analysis to  
4 support this opinion. In no case shall Tierra Linda Homeowners Association, Inc., and/or Gary  
5 Smyth allow water loss to be greater than 15 percent. The water loss reductions report or the detailed  
6 analysis, whichever is submitted, shall be docketed as a compliance item no later than June 30, 2011.

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1 IT IS FURTHER ORDERED that that the sale and transfer of Tierra Linda Homeowners  
2 Association, Inc.'s, systems assets and transfer of its CC&N to Gary Smyth shall be considered null  
3 and void, after due process, should Tierra Linda Homeowners Association, Inc., and Gary Smyth fail  
4 to comply with the above conditions.

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

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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9  CHAIRMAN  COMMISSIONER  
10  COMMISSIONER  COMMISSIONER  COMMISSIONER  
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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 10<sup>th</sup> day of December, 2010.

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19 ERNEST G. JOHNSON  
20 EXECUTIVE DIRECTOR

21 DISSENT \_\_\_\_\_

22 DISSENT \_\_\_\_\_

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1 SERVICE LIST FOR: TIERRA LINDA HOMEOWNERS ASSOCIATION,  
2 INC., AND GARY SMYTH

3 DOCKET NOS.: W-20689A-09-0327 and W-04236A-09-0327

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