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BEFORE THE ARIZONA CORPORATION

COMMISSIONERS

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ARIZONA CORP COMMISSION
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IN THE MATTER OF:

CHARLES J. DAINS,

COMPLAINANT,

v.

RIGBY WATER COMPANY,

RESPONDENT.

DOCKET NO. W-01808A-09-0137

**STAFF'S POST-HEARING
BRIEF**

Pursuant to the procedural order dated November 16, 2010, the Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission"), files its post hearing brief, on the limited issue regarding the Commission's jurisdiction over outstanding main extension agreements of a public service corporation involved in a condemnation proceeding as well as a discussion of Arizona Administrative Code (A.A.C.) R14-2-406 (F) and (M), as it relates to the issues raised in the Formal Complaint ("Complaint") of Charles J. Dains ("Complainant" or "Dains") against Rigby Water Company ("Rigby" or "Company").

I. BACKGROUND.

On March 19, 2009, Dains filed with the Commission ("Commission") a Complaint against Rigby Water Company ("Rigby" or "Company"). The Complaint alleged that Rigby is in violation of A.A.C. R14-2-406 (regarding main extension agreements) and requests that the Commission grant Complainant relief in the amount of \$237,000, less any previously refunded amounts.

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1 **II. ADVANCES MADE UNDER MAIN EXTENSION AGREEMENTS THAT ARE NOT**
2 **FILED WITH AND APPROVED BY STAFF SHOULD BE REFUNDED LESS**
3 **REFUNDS ALREADY MADE.**

4 Dains and Rigby are parties to a 1999 Main Extension Agreement (“MXA”) concerning a
5 planned development known as Terra Mobile Ranchettes Estates in Avondale, Arizona.¹ According
6 to Company witness Fred Wilkinson, the Company attempted to finalize the MXA prior to
7 construction of infrastructure in the development but was unsuccessful.² Mr. Wilkinson testified that
8 an MXA was eventually signed but the Company could not submit the MXA for approval because
9 Dains could not obtain an Approval to Construction (“ATC”) from the Arizona Department of
10 Environmental Quality (“ADEQ”). According to Mr. Wilkinson, Dains failed to obtain the ATC.
11 Mr. Wilkinson further testified that he was unable to obtain actual cost information as well.³ While
12 the MXA was never approved by Staff,⁴ the Company nevertheless made refund payments to Dains.⁵

13 A.A.C. R14-2-406 (“Rule”) contemplates approval of MXA’s by Staff.⁶ Staff witness Bradley
14 Morton testified that there are a number of items and documents that must be provided prior to
15 approval of an MXA.⁷ Unfortunately, according to the evidence presented in this matter, certain items
16 on the checklist could not be presented to Staff. The Rule also states that without an ATC, no
17 agreement shall be approved.

18 While it appears that the Company was between a rock and a hard place; it had a signed MXA
19 but could not get Staff approval because of missing information. However, there were other actions
20 the Company should have taken. The Company could have approached Staff for assistance in
21 resolving the issue. The difficulties the Company encountered in getting the proper documentation to
22 submit to Staff should not relieve it of the obligation under the Rule to submit the agreement for
23 approval.

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25 _____
26 ¹ Complaint at 1.

27 ² Ex. R-1 at 6.

28 ³ Tr. at 16:1-2.

⁴ See Tr. at 165-166.

⁵ *Id.*

⁶ See A.A.C. R14-2-406 (M).

⁷ Tr. at 187; Ex. S-2.

1 The Rule provides that in the event agreements are not filed and approved by Staff, the
2 advance shall be immediately refunded. Decision No. 66593 is directly on point.⁸ The Complainant,
3 Fred Shook entered into an MXA with Park Valley Water Company. Mr. Shook alleged that the
4 MXA had not been filed with or approved by Commission Staff in accordance with A.A.C. R14-2-
5 406 and sought a refund pursuant to A.A.C. R14-2-406(M). The Commission found that the MXA
6 had not been filed with or approved by Staff and ordered the repayment of the advance, less any
7 refunds already paid. In accordance with that Decision, it would appear that Rigby should refund the
8 advance less any refunds already made.

9 **III. COMMISSION JURISDICTION OVER OUTSTANDING MAIN EXTENSION**
10 **AGREEMENTS.**

11 Rigby has filed an application for approval of transfer of assets to the City of Avondale and
12 the cancellation of its certificate of convenience.⁹ The application indicates that the transfer is the
13 culmination of a settlement of a condemnation lawsuit.

14 The Attorney General addressed the Commission's jurisdiction over transfers of assets of a
15 public utility to a municipality in Opinion Number 62-7. The Commission had requested an opinion
16 from the Attorney General on whether the Commission had jurisdiction to hold hearings regulating
17 the transfer of assets from a privately owned water utility to a municipality and to enter an order
18 approving or disproving the transfer. Further, the Commission wanted to know that in the event it
19 was determined that there was jurisdiction, if the Commission, during the course of a hearing, could
20 inquire into the terms and conditions of the sale, the reasonableness of the terms and conditions of
21 the payments and the reasonableness of the amount of the sale. Finally, the Commission inquired as
22 to the effect of A.R.S. § 9-516(C) upon the Commission's jurisdiction.

23 The Commission had recently held hearings concerning the transfer of the assets of the
24 Government Heights Water Company to the City of Tucson. The foregoing questions were raised at
25 the hearing, which prompted the Commission to request an opinion from the Attorney General.
26
27

28 ⁸ Docket No. W-01653A-03-0243.

⁹ Docket No. W-01808A-10-0390.

1 The Attorney General concluded that A.R.S. § 40-285 requires a privately owned public
2 utility to obtain the approval of the Commission prior to disposing of its assets regardless of whether
3 the proposed purchaser is a private company or a municipality. A.R.S. § 40-285(A), "Disposition of
4 plant by public service corporations; acquisition of capital stock of public service corporation by
5 other public service corporation," states in part:

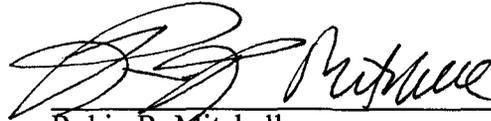
6 A...water corporation shall not sell, lease, assign, mortgage or otherwise
7 dispose of or encumber the whole or any part of its...system, necessary
8 or useful in the performance of its duties to the public, or any franchise
9 or permit or any right thereunder, ... *without first having secured from
the commission an order authorizing it so to do . (emphasis added)*

10 The opinion further stated that the voluntary agreement by a municipality to purchase a
11 privately owned public utility does not subject that municipality to the jurisdiction of the
12 Commission. The seller-utility must obtain Commission approval to make the transfer, the purpose
13 being to permit the Commission to make sure that the rights of the customers of the utility will be
14 adequately protected. The duties and powers of the Commission are limited to the necessary
15 hearings and orders to make sure that sale by the utility will not leave persons without service by the
16 utility or the municipality. The opinion concluded that by virtue of A.R.S. § 9-516, the Commission
17 still retains jurisdiction over the utility and the utility still has an interest as holder of a certificate of
18 convenience and necessity, until the sale has been approved and the municipality is servicing the
19 entire area and there is no area requiring certification or service by any private utility. The Attorney
20 General concluded that a municipality is bound to honor the order of the Commission with respect to
21 the sale and that the Commission may not enter an order denying the public utility the right to dispose
22 of its assets except upon the grounds that the utility is not in fact terminating its function in the
23 service of its customers, the effect of A.R.S. § 40-285(C). If the municipality refuses to serve
24 customers in the area taken over, the Commission retains the power to investigate such refusals and
25 issue a new certificate if necessary to provide service.

26 Further, A.A.C. R14-2-406(F) states that the Commission will not approve the transfer of a
27 CC&N unless either the transferor agrees to satisfy the refund obligation under the MXA or the
28 transferee agrees to assume the transferor's obligation under the MXA. The Commission could

1 require Rigby to retain the MXA obligation in the cancellation docket to ensure that the refund
2 obligation is fulfilled.

3 RESPECTFULLY SUBMITTED this 15th day of December, 2010.

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5 

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12 Original and thirteen (13) copies
13 of the foregoing were filed this
14 15th day of December, 2010 with:

15 Docket Control
16 Arizona Corporation Commission
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19 Copies of the foregoing were mailed
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