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BEFORE THE ARIZONA CORPORATION COMM  
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AZ CORP COMMISSION  
DOCKET CONTROL

IN THE MATTER OF THE FORMAL  
COMPLAINT OF CHARLES J. DAINS AGAINST  
RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

**NOTICE OF FILING  
EXCEPTION OF THE ESTATE OF CHARLES J. DAINS**

The Estate of Charles J. Dains hereby files its Exception in the above-captioned docket.  
RESPECTFULLY SUBMITTED on March 10, 2011.

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Arizona Corporation Commission

**DOCKETED**

MAR 10 2011

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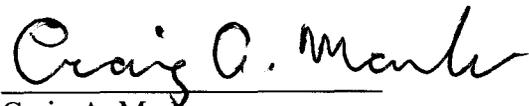
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**BEFORE THE ARIZONA CORPORATION COMMISSION**

**COMMISSIONERS**

GARY PIERCE, Chairman  
PAUL NEWMAN  
SANDRA D. KENNEDY  
BOB STUMP  
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IN THE MATTER OF THE FORMAL  
COMPLAINT OF CHARLES J. DAINS AGAINST  
RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

**EXCEPTION OF THE ESTATE OF CHARLES J. DAINS**

The Estate of Charles J. Dains (“Dains Estate”) hereby takes one Exception to the March 1, 2011, Recommended Opinion and Order (“ROO”) in the above-captioned docket. The Dains Estate first thanks Administrative Law Judge Yvette B. Kinsey for conducting a fair and comprehensive evidentiary hearing. Additional thanks go to Administrative Law Judge Sarah N. Harpring for reviewing and analyzing the record, and then writing such a thorough, well-reasoned ROO. The Dains Estate would only modify the ROO in one way – because of the egregious conduct of Rigby Water Company (“Rigby”), interest should be added to the award.

**I. EXCEPTION – INTEREST SHOULD BE AWARDED BECAUSE OF RIGBY’S  
RULE VIOLATIONS AND EGREGIOUS CONDUCT**

**A. Rigby’s Repeated Environmental Transgressions Damaged the Dains  
Partnership**

In 1985, Charles J. Dains and his partners (the “Dains Partnership”) spent substantial sums of money to obtain a Certificate of Assured Water Supply, for engineering to plat Terra Ranchettes, and everything else necessary submit the subdivision plan to the State Real Estate Department for approval.<sup>1</sup> To obtain water service, Mr. Dains approached Rigby.<sup>2</sup> However, because Rigby was out of compliance with State testing requirements for inorganic chemicals and radio-chemicals, Rigby was not allowed to supply water to the development.<sup>3</sup> Consequently,

<sup>1</sup> Exhibit Dains-1 at 2, CDD-2; Exhibit R-15.

<sup>2</sup> Exhibit Dains-1 at 2.

<sup>3</sup> ROO at 9:13-19

Mr. Dains and his partners could not obtain approval for the new subdivision from the Arizona Real Estate Department.<sup>4</sup>

Rigby eventually was able to resolve its initial non-compliance issues, but the record does not disclose how many years this took.<sup>5</sup> However, Rigby was soon out of compliance again. From at least the early 1990s, Rigby lacked sufficient storage capacity to provide water service to existing customers.<sup>6</sup> This led to a 1994 cease and desist order from Maricopa County.<sup>7</sup> Rigby was ordered to construct 50,000 gallons of new water-storage facilities.<sup>8</sup>

Because they could not develop the parcel until Rigby was able to resolve its compliance issues, the partners could not recover their engineering and other development costs.<sup>9</sup> Further, because the parcel was now assessed as developed land instead of raw land, property taxes increased significantly.<sup>10</sup> Overall, as a result of Rigby's continual non-compliance, the Dains Partnership was unable to recover its investment in Terra Ranchettes.<sup>11</sup>

**B. Rigby Forced the Dains Partnership to Oversize a Storage Tank without Compensation**

Rigby was put in a very difficult place by Maricopa County's order to construct 50,000 gallons of new water-storage facilities. Rigby could not fund this construction.<sup>12</sup>

At buildout, only about 20,000 gallons of new storage would be required for the Terra Ranchettes development.<sup>13</sup> However, Rigby demanded that it would provide water service only if the Dains Partnership constructed an oversized 50,000-gallon storage facility.<sup>14</sup> This would allow Rigby to satisfy the Maricopa County Cease-and-Desist Order and Compliance Agreement.

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<sup>4</sup> *Id.*

<sup>5</sup> Tr. at 176-177.

<sup>6</sup> Tr. at 123:18 – 124:3.

<sup>7</sup> ROO at 10:8-9.

<sup>8</sup> *Id.*, at 10, n. 12; Exhibit Dains-9.

<sup>9</sup> Exhibit Dains-1 at 3:1-7; Tr. at 91:6-24.

<sup>10</sup> Tr. at 71:20-25.

<sup>11</sup> Tr. at 28:18 – 29:2.

<sup>12</sup> Rigby was already collecting a surcharge from its customers to fund construction of 20,000 gallons of new storage facilities. Tr. at 124.

<sup>13</sup> Tr. at 83.

<sup>14</sup> Exhibit Dains-1 at 3:10-13.

### **C. Rigby Agreed to Purchase the Terra Ranchettes Water System for \$236,998.68**

Ultimately, Rigby and the Dains Partnership reached an agreement. If the Dains Partnership constructed the additional storage, Rigby would purchase the entire water infrastructure.<sup>15</sup> The price would be the actual cost of the infrastructure, to be paid annually over 20 years.<sup>16</sup>

The ROO recognized that, because of Rigby's representations, Mr. Dains could reasonably have believed that he was selling the Terra Ranchettes water system—including the oversized water-storage tanks—for its total cost, to be paid over 20 years.

In the MXA, Mr. Dains made what could perhaps be characterized as a disadvantageous deal, likely in reliance on the erroneous usage estimate and the resulting wildly overstated refund estimate provided by Mr. Wilkinson. Mr. Dains may have believed that the transaction was a sale of the water system because the MXA was drafted after the actual construction of the water system, no attorneys appear to have provided advice either to Mr. Dains or to Rigby regarding the MXA, Mr. Dains had no prior experience with private water utilities, Mr. Wilkinson himself even referred to the transaction as a "purchase" of the water system in his letter to Hilton, the refund estimate provided by Mr. Wilkinson and the 20-year refund period included in the MXA would have resulted in reimbursement of all of the TR partnership's construction costs, and the 20-year refund period appears to have been designed to result in full or close to full reimbursement. Mr. Wilkinson himself testified that Mr. Dains may not have understood what the MXA really meant, and Mr. Dains and Mr. Wilkinson clearly were mismatched in knowledge of the operations of private water utilities, in the purpose for and terms of an MXA, and in what a reasonable water usage estimate would be.<sup>17</sup>

The parties ultimately memorialized the purchase agreement in an MXA, which was executed almost two years after construction was completed.<sup>18</sup> The MXA stipulates that the exact cost of the advanced facilities to be refunded was \$236,998.68.<sup>19</sup>

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<sup>15</sup> Exhibit Dains-1 at 3:8 – 4:8; Tr. at 151:1 – 153:15; Exhibit Dains 11

<sup>16</sup> Exhibit Dains-1 at 3:18 – 4:8.

<sup>17</sup> ROO at 24:13 – 25:1.

<sup>18</sup> Construction was completed in July 1997. ROO at 13:16-17. The MXA was not executed until May 1999. ROO at 16:8-10.

<sup>19</sup> ROO at 17:12-17.

**D. Rigby Has Refunded Only a Tiny Portion of the Purchase Price**

The Dains Partnership executed the MXA in reliance on Rigby's estimate that they would receive refunds over 20 years of the total cost of the advanced infrastructure. This was consistent with their earlier discussions with Rigby concerning the purchase price for the water system. However, after 11 years, Rigby has actually refunded only \$27,261 of the \$237,000 advanced.

<b>Year</b>	<b>Actual Refund</b>
2000	\$ 2,894.16
2001	\$ 1,924.00
2002	\$ 2,169.80
2003	\$ 2,292.54
2004	\$ 2,175.05
2005	\$ 2,388.01
2006	\$ 2,617.05
2007	\$ 2,770.45
2008	\$ 2,892.73
2009	\$ 2,716.59
2010	\$ 2,421.05
<b>Totals</b>	<b>\$ 27,261.43</b>

Source: R-1 at RWC-9, 10

**E. Rigby Will Receive a \$2,560,000 Windfall From the City of Avondale**

Rigby has now agreed to be condemned and purchased by the City of Avondale at a price of \$2,560,000.<sup>20</sup> Rigby's total remaining plant in service is just \$114,295.84.<sup>21</sup> Current liabilities are just \$253,073.<sup>22</sup> Therefore, Rigby will receive an enormous windfall of almost \$2.2 million.<sup>23</sup>

**F. To Avoid Unjust Enrichment, Rigby Should Pay Interest on the Award**

In the ROO, Judge Harping thoroughly analyzes the evidence and concludes that Rigby unjustly violated Arizona Administrative Code ("AAC") R-14-2-406 (M), which requires water

<sup>20</sup> Tr. at 164.

<sup>21</sup> Rigby 2009 Annual Report to the Commission at 3.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> \$2,560,000 - (\$114,295.84 + \$253,073) = \$2,192,631.16

utilities to submit MXAs for Staff review and approval.<sup>24</sup> Based on this violation, the ROO concludes that Rigby should refund \$209,727.25 to the Dains Estate.<sup>25</sup> However, the ROO would not award interest.<sup>26</sup>

If Rigby does not pay interest on the award, it would be unjustly enriched. Rigby will receive a huge windfall from Avondale. The Dains Partnership provided Rigby a significant part of the customer base and infrastructure that made Rigby's enormous windfall possible. Rigby's has approximately 320 customers.<sup>27</sup> Of those 320 customers, 83 are in Terra Ranchettes, so just over one quarter of Rigby's customer base was provided by the Dains Partnership. Further, the \$237,000 of plant advanced by the Dains Partnership is twice Rigby's remaining plant in service of \$114,000.

**G. Interest Is Also Necessary to Fully Compensate the Dains Estates for Rigby's Failure to File the MXA**

The ROO is quite clear; Rule 406 required Rigby to execute and file the MXA before the Dains Partnership constructed the Terra Ranchettes infrastructure:

Rigby was aware of the requirements of Rule 406, including the requirements of Rule 106(M), before the water system for Terra Ranchettes was constructed.

...

However, Rigby instead chose to have the water system built by the TR partnership, subject to refund, and failed to ensure that the MXA was executed before construction was commenced, before it was completed, or even before Rigby began providing water service to customers on the Terra Ranchettes system. Rule 406 clearly contemplates that an MXA will be completed prior to construction of a water system. (*See* Rule 406(C)(1)(h).)<sup>28</sup>

The Dains Partnership completed construction of the Terra Ranchettes infrastructure in July 1997.<sup>29</sup> Therefore, by July 1997, Rigby had already violated Rule 406 by not executing and filing an MXA.

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<sup>24</sup> ROO at 26:6-10.

<sup>25</sup> *Id.* at 26:10-11.

<sup>26</sup> *Id.* at 26:11-12.

<sup>27</sup> Tr. at 130.

<sup>28</sup> ROO at 25:3-12.

<sup>29</sup> *Id.* at 13:16-17

As early as July 1997, Rule 406 (M) required Rigby to refund to the Dains Partnership the entire amount of the advanced funds. Certainly, Rule 406(M)'s refund obligation began no later than 1999, after Rigby failed to file the belated, post-construction MXA.

Rule 406(M)'s refund obligation is not contingent on the Dains Estate discovering the violation and filing a complaint. Rigby's refund obligation was immediate and self-actuating:

Where agreements for main extensions are not filed and approved by the Utilities Division, the refundable advance shall be immediately due and payable to the person making the advance. (Emphasis added.)

If Rigby had complied with Rule 406(M), it would have provided the required refund to the Dains Partnership no later than 1999. It is now 2011. The Commission can only provide complete justice to the Dains Estate by requiring that Rigby pay interest on the refund.

**H. Interest Is Also Necessary to Compensate the Dains Estate for the Delay Costs Caused by Rigby**

As discussed above, Rigby's disgraceful compliance history caused the Dains Partnership to incur significant delay costs. These delay costs began to accrue in 1985, 26 years ago. As a result, the Dains Partnership was unable to recover its investment in the Terra Ranchettes development. Requiring Rigby to pay interest on the award will help compensate the Dains Estate for the consequences of Rigby's disgraceful compliance history.

**I. Interest Is Also Necessary to Compensate the Dains Estate for Construction of the Oversized Storage Facilities**

As discussed above, Rigby unjustly forced the Dains Partnership to construct oversized storage facilities. These facilities were needed to resolve Rigby's compliance issues with Maricopa County, which related to existing customers, not the future Terra Ranchettes customers. The Commission's policy is that growth should pay for growth, not that developers should pay to resolve pre-existing compliance issues.

Once the oversized storage tanks were constructed, Rigby should have immediately refunded the excess construction costs – in 1997. It is now 2011, and Rigby has provided no

refund. Requiring Rigby to pay interest on the award will help compensate the Dains Estate for Rigby's failure to refund the excess construction costs in 1997.

**J. The Appropriate Interest Rate Is the Rate Rigby Charges Customers for Past-Due Balances**

An appropriate interest rate would be the late-charge rate that Rigby charges its customers for past-due balances, which the Dains Estate believes is 1.5% per month.<sup>30</sup> This is an 18% interest rate, compounded monthly. The Commission can also take administrative notice that an 18% interest rate, compounded monthly, is consistent with rates currently charged on unpaid credit-card balances.

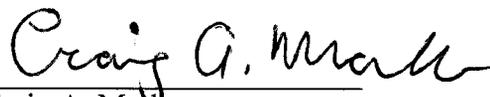
**II. A PROPOSED AMENDMENT TO PROVIDE INTEREST IS ATTACHED**

Attachment A is a copy of a proposed amendment to the ROO that would order Rigby to pay interest on the recommended \$209,727.25 refund at the rate of 1.5% per month.

**III. REQUESTED RELIEF**

The Dains Estate asks the Commission to amend the ROO to order Rigby to pay interest on the recommended \$209,727.25 refund at the rate of 1.5% per month.

RESPECTFULLY SUBMITTED on March 10, 2011.



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<sup>30</sup> This is the typical rate Arizona utilities charge for past-due balances. See, e.g., tariffs on file for Arizona-American Water Company, Arizona Water Company, Chaparral City Water Company, and Johnson Utilities Company.

**Suggested Amendment to Recommended Opinion and Order**

Page 26, lines 11-12,

DELETE: “, without interest,<sup>34</sup>”

Page 26, line 13,

ADD NEW PARAGRAPHS:

105. Rule 406(M) required Rigby to file the MXA no later than 1999. Rigby’s violation of this requirement triggered the Rule’s penalty: “the refundable advance shall be immediately due and payable to the person making the advance.” (Emphasis added.) Dains should have received the refund in 1999. It is now 2011. To provide complete relief to Dains, Rigby must also pay interest on the refund.

106. There are other reasons that interest is appropriate. As discussed, Rigby’s continual compliance problems caused Dains significant delay damages beginning in 1985. Rigby also required Dains to fund and construct oversized water-storage facilities, which were needed to resolve Rigby’s 1996 consent order with Maricopa County. Rigby should have refunded the excess cost of these facilities to Dains in 1997. Further, Rigby should soon receive a \$2,560,000 purchase payment from the City of Avondale, which far exceeds Rigby’s net-plant balance.

107. Given these equities, it is appropriate that Rigby pay interest on the \$209,727.25 refund at the rate of 1.5% per month, compounded monthly.<sup>34</sup> However, the Commission should not provide Dains more relief than it would have received if Rigby had paid Dains its expected refunds of the advanced funds, which would have been \$236,998.68 over 20 years, or \$11,849.43 per year. Therefore, we will only require that Rigby pay interest on the difference between the expected annual refunds of \$11, 849.43 and the actual refunds paid by Rigby. As calculated on Exhibit A, the total interest Rigby is required to pay is \$154,855.84. Rigby’s total refund obligation is therefore \$364,583.09.

34. The Commission notes that Arizona water utilities typically charge their customers 1.5% per month on past-due balances. The Commission also takes notice that 1.5% per month is consistent with the rates consumers currently pay credit-card companies on unpaid balances.

Page 27, line 15,

ADD NEW PARAGRAPH

12. Because Rigby’s violation of A.A.C. R14-2-406(M) occurred no later than 1999, and because of the other factors discussed in this Order, Rigby must also pay interest of \$154,855.84 on the \$236,998.68 refund to provide complete relief to Dains, for a total payment of \$364,583.09.”

Page 27, line 16,

DELETE "\$209,727.25" and REPLACE with "\$364,583.09."

Refund Calculation Worksheet

Exhibit A

	A	B	C	D	E	F	G	H
1								References
2						\$ 236,988.68		
3						\$ 11,849.43		[F2/20]
4								
5	Year	Refund Due	Actual Refund	Yearly Refund Deficiency	Cumulative Refund Deficiency (with interest)	Annual Interest at 1.5% per month (Assessed on prior year's balance)		
6	2000	\$ 11,849.43	\$ 2,894.16	\$ 8,955.27	\$ 8,955.27	\$ -		
7	2001	\$ 11,849.43	\$ 1,924.00	\$ 9,925.43	\$ 18,880.71	\$ 1,751.81		
8	2002	\$ 11,849.43	\$ 2,169.80	\$ 9,679.63	\$ 30,312.16	\$ 3,693.41		
9	2003	\$ 11,849.43	\$ 2,292.54	\$ 9,556.89	\$ 43,562.46	\$ 5,929.61		
10	2004	\$ 11,849.43	\$ 2,175.05	\$ 9,674.38	\$ 59,166.45	\$ 8,521.61		
11	2005	\$ 11,849.43	\$ 2,388.01	\$ 9,461.42	\$ 77,149.49	\$ 11,574.03		
12	2006	\$ 11,849.43	\$ 2,617.05	\$ 9,232.38	\$ 97,955.90	\$ 15,091.84		
13	2007	\$ 11,849.43	\$ 2,770.45	\$ 9,078.98	\$ 122,126.73	\$ 19,161.95		
14	2008	\$ 11,849.43	\$ 2,892.73	\$ 8,956.70	\$ 150,245.39	\$ 23,890.21		
15	2009	\$ 11,849.43	\$ 2,716.59	\$ 9,132.84	\$ 183,268.44	\$ 29,390.73		
16	2010	\$ 11,849.43	\$ 2,421.05	\$ 9,428.38	\$ 222,087.55	\$ 35,850.64		
17								
18	Totals		\$ 27,261.43			\$ 154,855.84		
19								
20		Cumulative Interest Owed				\$ 154,855.84		[Cell F17]
21		Remaining Refund Owed				\$ 209,727.25		[F2-C18]
22		Total Owed to Dains Estate				\$ 364,583.09		[G19+G20]
23								