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ARIZONA CORPORATION COMMISSION
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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

NOTICE OF FILING
RESPONSE TO RIGBY WATER COMPANY'S EXCEPTIONS

The Estate of Charles J. Dains hereby responds to the Exceptions filed by Rigby Water
Company in the above-captioned docket.

RESPECTFULLY SUBMITTED on March 24, 2011.

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Arizona Corporation Commission
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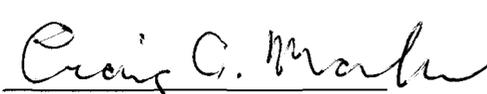
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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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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

RESPONSE TO RIGBY WATER COMPANY'S EXCEPTIONS

The Estate of Charles J. Dains ("Dains Estate") hereby responds to the Exceptions filed by Rigby Water Company ("Rigby") in the above-captioned docket. Rigby's Exceptions are meritless and should be rejected.

I. Response to Rigby's First Exception – Actual Construction Costs Were Clearly Established

Rigby continues to misstate the evidence in this case. The record is clear that total construction costs were \$236,988.68.

First, Rigby ignores the written acknowledgement by its own witness that construction costs were \$236,988.68. Rigby verified the actual construction costs on February 19, 1999, when Mr. Wilkinson mailed Mr. Rigby an execution copy of the MXA. In the cover letter, Mr. Wilkinson stated: "We have attached as Exhibit B, a summary of the actual costs."¹ The actual total costs shown on Exhibit B were \$236,988.68.²

Second, Mr. Dains' May 31, 1998, preliminary cost summary agreed to the penny with Mr. Wilkinson's 1999 final summary of actual costs. Rigby does not dispute that Mr. Dains' estimate of \$207,388.68 did not include the cost of the 50,000 gallon storage tank.³ According to Exhibit B of the MXA, the storage tank cost \$29,600. If we add the \$29,600 cost of the storage

¹ Exhibit R-1 at RWC-4. Emphasis added.

² Exhibit R-1 at RWC-5, Exhibit B.

³ Tr. at 86:4-9.

tank to Mr. Dains preliminary summary of \$207,388.68, the total is \$236,988.68. This is identical to the \$236,988.68 summary of actual total costs provided by Mr. Wilkinson. There is no conflict at all between Mr. Dains' preliminary summary and Mr. Wilkinson's final, stipulated summary of actual costs.

It strains credulity for Rigby to claim that the \$236,988.68 total "is unfounded and not supported by the record." The ROO is clear. Judge Harpring specifically relied on Exhibit B of the MXA — prepared by Rigby — to determine that total construction costs were exactly \$236,988.68.⁴

II. Response to Rigby's Second Exception – The ROO Did Not Shift the Burden of Obtaining Construction Approvals from Developer to Utility

Rigby incredibly claims that the ROO "inappropriately shifts the burden of obtaining the [Approval to Construct] to Rigby Water Company."

First, the record is clear that Rigby was not burdened with obtaining the Approval to Construct ("ATC"). Mr. Dains applied for and obtained the ATC. The ATC was originally issued on August 28, 1985, and was reinstated by Maricopa County on May 2, 1996.⁵

Second, the only reasonable inference from the record evidence is that Mr. Dains provided a copy of the ATC to Rigby before construction began. Exhibits Dains-4 through Dains-7 are a series of detailed letters from Rigby's Mr. Wilkinson where he identifies the remaining construction that Mr. Dains must complete or documents that he must provide. Mr. Wilkinson never asked for a copy of the ATC. The ATC is a very important document. If Mr. Dains had not already provided a copy of the ATC to Rigby, it would have been negligence for Mr. Wilkinson not to ask for one.

Third, as just discussed, Maricopa County reinstated the ATC on May 2, 1996.⁶ If Mr. Wilkinson somehow could not get a copy of the ATC from Mr. Dains, he could easily have gone

⁴ ROO at 17:12-17.

⁵ Exhibits Dains-12 and Dains 13.

⁶ Rigby argues that the reinstatement memo may not have met the Commission's filing requirements. This argument only deserves a footnote. Dains-12 is a copy of the original ATC, issued by the County in 1985. Dains-13 is a copy of the County's May 2, 1996, memo to the Arizona Real Estate Department. It could not be more unequivocal. "Please be advised that this office has reinstated its Certificate of Approval to Construct (Water

to the County to get a copy. Yet, Mr. Wilkinson never did this.⁷ The logical inference is that he already had a copy.

Fourth, the Commission's rules require the utility, not the developer, to file the MXA along with a copy of the ATC. A.A.C. R14-2-406(M) states (in part):

All agreements under this rule shall be filed with and approved by the Utilities Division of the Commission. No agreement shall be approved unless accompanied by a Certificate of Approval to Construct as issued by the Arizona Department of Health Services. (Emphasis added.)

Even if we accept the doubtful proposition that Mr. Dains did not provide Rigby a copy of the ATC, Rigby's negligence did not relieve its requirement to file the ATC. If Mr. Dains somehow did not voluntarily provide a copy of the ATC, Rigby was obligated to at least ask for a copy or to go to the County offices to get a copy.

Judge Harpring evaluated all this evidence and reasonably concluded that Rigby was responsible for obtaining a copy of the ATC and filing the MXA:

As for not having a copy of the ATC, the ATC is a public document that Rigby could have obtained from Maricopa County had it attempted to do so, which it admittedly did not. ... [I]t is Rigby, as the public service corporation obligated under Rule 406(M), who must be held responsible for its failure to file the MXA with Staff for approval and to obtain approval of the MXA.⁸

Judge Harpring was also troubled by Rigby's apparent belief that it could accept a water system without being provided an ATC.

We note with some concern that Mr. Wilkinson appears to have believed that there was no ATC, as this calls into question why Rigby would have accepted the Terra Ranchettes water system into its existing system. Current ADEQ rules prohibit a person from extending an existing public water system before receiving an ATC from ADEQ. (A.A.C. R18-5-505(B).)⁹

Rigby bore two legal burdens. It was required to obtain a copy of the ATC before accepting the water system. It was then required to file a copy of the MXA and ATC with the

System Improvements) for the captioned subdivision. Our Certificate of Approval of Sanitary Facilities for Subdivisions issued August 23, 1985 is still valid"

⁷ Tr. at 115:10-18.

⁸ ROO at 26:3-8.

⁹ Id. at 26, n. 33.

Commission for approval. The ROO did not inappropriately shift these preexisting burdens to Rigby.

III. Response to Rigby’s Third Exception – Mr. Dains Did Not Prevent Rigby from Filing the MXA

Rigby claims that Mr. Dains prevented it from filing the MXA and should not benefit from these alleged misdeeds. This is nonsense.

Rigby had all the information it needed to file the MXA. Mr. Morton testified concerning the information that Staff requires to process an MXA. He provided (Exhibit S-2) a copy of Staff’s current checklist to determine whether a filed MXA satisfies the requirements of R14-2-406.¹⁰

The following table lists each requirement on Staff’s checklist and then shows that Rigby could easily have satisfied each applicable requirement.

Table 1 – MXA Filing Requirements

	Requirement	Available to Rigby?	Reference
1	Name and Address of Applicant	Yes.	Rigby presumably knew its own address. The address was also on file with the Commission.
2	Proposed Service Address	Yes.	MXA Exhibit A shows that the development was located at the intersection of 107 th Avenue and Roeser Road.
3	Description of Requested Service	Yes.	Domestic Water Service to Tierra Mobile Ranchettes Estates. (MXA, p.1 and ¶ 15.).
4	Description and Map of Line Extension	Yes.	MXA Exhibit A.
5	Itemized Cost Estimate to Include materials, Labor and Other Costs as Needed	Yes.	MXA Exhibit B.
6	Payment terms	Yes.	The MXA provides that the developer will fund all construction.
7	A Clear, Concise Statement of Refunding Provisions, If Applicable	Yes.	MXA ¶ 16.

¹⁰ See Exhibit S-2.

	Requirement	Available to Rigby?	Reference
8	Utilities' Estimated Start and Completion Dates	Yes.	The construction was complete and Rigby was providing water service at the time the MXA was executed. Rigby knew when it started and when it was complete.
9	Signature from Both Parties	Yes.	MXA, signature pages.
10	Water Use Data Sheet	Yes.	This was Rigby's requirement to prepare and file. Rigby had all the information it required concerning the development's expected water usage. See Exhibit RWC-8 to R-1.
11	DEQ Plan or Approval to Construct or Compliance Report	Yes.	See Exhibits Dains-12 and Dains 13. The Approval to Construct was originally issued on August 28, 1985, and was reinstated on May 2, 1996. Because Rigby never asked for a copy, the reasonable conclusion is that Rigby already had a copy of this document. Further, a copy of the ATC was readily available from Maricopa County.
12	Confirm within CC&N	Yes.	MXA, page 1, recital 3.
13	Hook Up Fee	Not Applicable.	

Mr. Charles D. Dains, Mr. Dains' son, accurately characterized Rigby's misguided litigation strategy as "Blame the dead guy."¹¹ Despite Rigby's attempt to again blame the dead guy, there is no doubt that Rigby had everything it needed to file the MXA with Commission Staff.

IV. Response to Rigby's Fourth Exception – Mr. Dains Was Not Culpable in Any Misdeeds

Rigby is again trying to blame the dead guy for Rigby's own misdeeds. Mr. Dains did nothing to justify not providing the recommended relief.

Rigby somehow believes that it should not be required to comply with the Commission's rules because Mr. Dains waited several years to file its complaint. Mr. Dains delay was understandable and was in no way blameworthy.

¹¹ Tr. at 24:25 – 25:2.

First, Mr. Dains was 78 years old when he signed the MXA.¹² Judge Harpring reviewed the record and concluded that Mr. Dains did not fully understand the MXA and was at a significant negotiating disadvantage:

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.¹³

Given these facts, it is not surprising that Mr. Dains did not realize for several years that he was not receiving the benefit of the bargain he thought he negotiated.

In 2006, when Mr. Dains finally realized that he was not going to receive the refunds he expected, he filed an informal complaint with the Commission.¹⁴ He was now 86 years old.¹⁵ The formal complaint followed on March 19, 2009.¹⁶ Eight months later, Mr. Dains passed away at the age of 89.¹⁷

Besides trying to blame its own misdeeds on a very old, now deceased man, Rigby argues that Mr. Dains benefitted from selling lots in Terra Ranchettes estate. This is more nonsense. Mr. Dains was a businessman, who hoped to make a profit by developing and selling lots. There is clearly no blame in this.

In fact, Rigby made it impossible for the Dains partnership to realize a profit. Rigby's continual non-compliance prevented development, which had terrible consequences for the Dains family:

My father and I were not big developers, but we did think that we had a chance to help provide for his retirement and our family. The first consequence of Rigby Water's noncompliance was that our partners backed out. They took 50 acres for later development and we retained 30 acres. We were ready to immediately begin developing our 30-acre parcel in 1993, but our plans were thwarted by Rigby Water's inability to provide water service. We were forced to carry a high-interest note and pay real estate

¹² Tr. at 21:11-14.

¹³ ROO at 24:23 – 25:1.

¹⁴ Tr. at 23:15-18.

¹⁵ *Id.*

¹⁶ ROO at 3:15-17.

¹⁷ Tr. at 23:19-22.

taxes for more than ten years before we could move forward. This was a huge financial set-back for us.¹⁸

Further, the Dains Partnership was forced to construct, without compensation, an oversized storage tank.¹⁹

Because of Rigby's continual non-compliance and forced oversizing, the Dains Partnership never realized any profits.²⁰ By contrast, Rigby will receive a huge windfall.

Rigby has now agreed to be condemned and purchased by the City of Avondale at a price of \$2,560,000.²¹ Rigby's total remaining plant in service is just \$114,295.84.²² Current liabilities are just \$253,073.²³ Therefore, Rigby will receive an enormous windfall of almost \$2.2 million.²⁴

To summarize: Rigby broke the law, Mr. Dains did nothing wrong, and Rigby will still have \$2 million in the bank after paying its refund.²⁵

V. **Response to Rigby's Fifth Exception – The Compliance Deadline Should Not Be Extended**

Rigby has not provided any meaningful reasons why the Commission should extend the compliance deadline.

The state of the economy is irrelevant. It affects the Dains family as much if not more than Rigby.

It is irrelevant that Mr. Dains did not make a cash advance to Rigby. Mr. Dains borrowed \$236,988.68 to build the infrastructure and advanced it to Rigby.²⁶ Whether he advanced cash or infrastructure, Mr. Dains had to pay out \$236,988.68.

Rigby's financial status is also irrelevant. Rule 406(M) does not provide for delays based on the rule-breaker's financial status. "Where agreements for main extensions are not filed and

¹⁸ Dains-1 at 3:1-7.

¹⁹ Tr. at 83.

²⁰ Tr. at 28:8 – 29:2.

²¹ Tr. at 164.

²² Rigby 2009 Annual Report to the Commission at 3.

²³ *Id.* at 7.

²⁴ $\$2,560,000 - (\$114,295.84 + \$253,073) = \$2,192,631.16$

²⁵ Rigby has asked for additional interest in its sole exception.

²⁶ Tr. at 150 1-8.

approved by the Utilities Division, the refundable advance shall be immediately due and payable to the person making the advance.” Further, Rigby will very soon be receiving over \$2.5 million from the City of Avondale. If it does not have the funds to pay the refund, Rigby should be able to borrow the necessary funds.

Extension of the compliance deadline could make it very difficult for the Dains Estate to enforce the Commission’s Order. Once Rigby’s assets have been transferred to the City of Avondale, Rigby could well argue that the Commission lacks jurisdiction to enforce its Order. Clearly, the Commission’s means to enforce its Order would be limited. The Dains Estate should not be required to resort to Superior Court to enforce the Order.

If the Commission determines that the compliance deadline should be delayed, then Rigby should be required to secure the refund payment through the use of an escrow account, bond, or letter of credit. The sole condition of payment to the Dains Estate should be entry of the final judgment in Superior Court. The payment should also include reasonable interest from the date of the Order to the date the refund is paid.

RESPECTFULLY SUBMITTED on March 24, 2011.



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