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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

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**COMMISSIONERS**

GARY PIERCE, Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS

AZ CORP COMMISSION  
DOCKET CONTROL

DOCKETED BY

IN THE MATTER OF THE APPLICATION OF  
MICHAEL W. SCHULTZ AND PAMELA J.  
SCHULTZ DBA RINCON CREEK WATER  
COMPANY, FOR APPROVAL OF SALE OF  
ASSETS AND TRANSFER CERTIFICATE OF  
CONVENIENCE AND NECESSITY.

DOCKET NO. W-03783A-10-0172

**STAFF'S OPENING BRIEF**

On August 11, 2011, the Utilities Division Staff ("Staff") of the Arizona Corporation Commission ("Commission") was ordered to file a legal brief addressing the following issues:

1. The parties' shall address the question whether Rincon Creek is required to charge customers for water service. The parties should consider any difference between in the law as it was when the Decision was issued and what the law is today, if any. The parties must attach to their brief copies of the legal authority cited in support of their position.
2. Regarding Staff's testimony that Rincon Creek is in violation of Decision No. 31637 for not charging customers for service, the parties should address whether, if it is found that Rincon Creek is in violation of that Decision, any action should be taken against Rincon Creek for this violation.
3. The parties should also address whether it is possible that the matter might be addressed as an adjudication not a public utility pursuant to Commission Decision No. 55568 (May 7, 1987).

Staff hereby responds to the August 11, 2011 order.

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1 I. MICHAEL W. SCHULTZ AND PAMELA J. SCHULTZ D/B/A RINCON CREEK  
2 WATER COMPANY ("RINCON CREEK") ARE REQUIRED TO CHARGE THEIR  
3 CUSTOMERS ACCORDING TO THE COMMISSION APPROVED TARIFF.

4 Only the Commission has the power to determine and prescribe rates to be charged by utilities  
5 within its jurisdiction. A.R.S. § 40-203 (Previous versions: Laws 1912, Ch. 90, § 32; Civ.Code 1913,  
6 § 2308; Rev.Code 1928m § 689; Code 1939, § 69-218); *See In re Cortaro Water Co.*, 3 F.Supp. 257,  
7 260 -262 (Ariz. Dist. Ct. 1933) (holding that Arizona public service corporation water utilities are  
8 required to charge Arizona Corporation Commission approved rates despite any agreements to  
9 provide water at a different rate); *See also Van Dyke v. Geary*, 244 U.S. 39, 47, 37 S.Ct. 483, 486  
10 (U.S. 1917) (holding that owners of public service corporations are also required to charge Arizona  
11 Corporation Commission approved rates).

12 Public service corporations are prohibited from changing any rate without providing the  
13 Commission notice. A.R.S. § 40-367(A) (Previous versions: Laws 1912, Ch. 90, § 15; Civ.Code  
14 1913, § 2291; Rev.Code 1928, § 676; Code 1939, § 69-204). Pursuant to A.A.C. R14-2-409(A)(1)  
15 "[e]ach utility shall bill monthly for service rendered."<sup>1</sup> Furthermore, A.A.C. R14-2-409(D)(1)  
16 requires that "[e]ach customer shall be billed under the applicable tariff indicated in the customer's  
17 application for service."<sup>2</sup>

18 In 1956, the Commission approved rates for Rincon Creek. Commission Decision No. 31637  
19 states,

20 "WHEREFORE, IT IS ORDERED that the rates and charges which are hereby  
21 approved and which shall be in full force and effect are as follows:

22 For the first 7,000 gallons or less of water for each consumer per month  
23 minimum .....\$6.000

24 For each 1,000 gallons in excess of the minimum gallons for each  
25 consumer .....\$0.50.<sup>3</sup>

26 The Commission approved rates for this utility in Decision No. 31637. To Staff's knowledge,  
27 the Commission has not approved new rates since this decision. As a public service corporation  
28 regulated by this Commission, Rincon Creek, and any subsequent owner of the water system, is

<sup>1</sup> A.A.C. R14-2-409 was adopted effective March 2, 1982.  
<sup>2</sup> A.A.C. R14-2-409 was adopted effective March 2, 1982.  
<sup>3</sup> Commission Decision No. 31637.

1 required to charge the Commission approved rates. By charging anything other than the rates  
2 approved in Decision No. 31637 (including charging no rates), the Company is in violation of that  
3 decision. Furthermore, the Company is violation of A.A.C. R14-2-409(A)(1) and R14-2-409(D)(1)  
4 for not billing its customers monthly under the applicable tariff for service rendered. Rincon Creek is  
5 required to bill its customers monthly according to the rates approved in Decision No. 31637 until the  
6 Commission orders otherwise.

7 **II. STAFF DOES NOT BELIEVE THAT ENFORCEMENT ACTION AGAINST**  
8 **RINCON CREEK IS NECESSARY AT THIS TIME.**

9 Although the Company is currently in violation of Commission Decision No. 31637, Staff  
10 does not intend to pursue any action against Rincon Creek at this time as long as Rincon Creek  
11 begins charging its Commission approved tariffed rates.

12 **III. STAFF HAS NOT EVALUATED THE COMPANY'S QUALIFICATION FOR AN**  
13 **ADJUDICATION NOT A PUBLIC SERVICE UTILITY PURSUANT TO**  
14 **COMMISSION DECISION NO. 55568 BECAUSE THE COMPANY HAS NOT**  
15 **SUBMITTED SUCH APPLICATION.**

16 In Decision No. 55568 the Commission issued a policy directive for the evaluation of  
17 applications for adjudication not a public service corporation consisting of seven (7) review criteria:

- 18 i. The application must be submitted by a non-profit homeowners' association;
- 19 ii. The application must be a bona fide request by a majority of the membership of  
20 the association through a petition signed by 51 per cent or more of the then  
21 existing members;
- 22 iii. All associations making an application must have complete ownership of the  
23 system and necessary assets;
- 24 iv. Every customer must be an owner/member with equal voting rights and each  
25 member is or will be a customer;
- 26 v. The service area involved encompasses a fixed territory, which is not within the  
27 service area of a municipal utility or public service corporation, or if it is, the  
28 municipal utility or public service corporation is unable to serve;
- vi. There is a prohibition against further sub-division evidenced by deed restrictions,  
zoning, water restrictions, or other enforceable governmental regulations; and
- vii. The membership is restricted to a fixed number of customers, actual or potential.

Neither the Schultz's, the Shirley's, nor Rincon Creek have submitted an application for  
adjudication not a public service corporation; therefore Staff is unable to evaluate Rincon Creek's  
suitability for adjudication not a public service corporation. However, Staff would note that Rincon

1 Creek does not appear to meet the first criteria set forth in Decision No. 55568 because Rincon Creek  
2 is not, to Staff's knowledge, a homeowners' association. If Rincon Creek chooses to file an  
3 application for adjudication not a public service corporation in the future, Staff would fully evaluate  
4 the application using the above seven factors.

5 RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of October, 2011.

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17  
18 Original and thirteen (13) copies  
19 of the foregoing were filed this  
31<sup>st</sup> day of October, 2011 with:

20 Docket Control  
21 Arizona Corporation Commission  
22 1200 West Washington Street  
23 Phoenix, Arizona 85007

24 Copies of the foregoing were mailed  
25 this 31<sup>st</sup> day of October, 2011 to:

26 Lawrence V. Robertson, Jr.  
27 ATTORNEY AT LAW  
28 P.O. Box 1448  
Tubac, Arizona 85646

