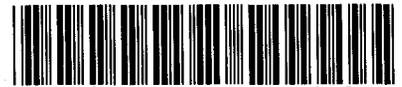


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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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IN THE MATTER OF THE APPLICATION OF
MONTEZUMA RIMROCK WATER
COMPANY, LLC FOR APPROVAL OF A
RATE INCREASE.

DOCKET NO. W-04254A-08-0361

IN THE MATTER OF THE APPLICATION OF
MONTEZUMA RIMROCK WATER
COMPANY, LLC FOR APPROVAL OF A
FINANCING APPLICATION.

DOCKET NO. W-04254A-08-0362

STAFF'S RESPONSE TO INTERVENER
JOHN DOUGHERTY'S MOTION TO
INVESTIGATE EX PARTE
COMMUNICATIONS

On November 2, 2011, Intervener John Dougherty filed a Motion to Investigate Ex Parte Communications ("Motion") in the above captioned docket. The asserted origin for the Motion was that Arizona Corporation Commission ("Commission") Utilities Division Staff ("Staff") had related the understanding of facts that Staff developed through discovery between it and the Montezuma Rimrock Water Company ("MRWC") in its Response to Procedural Order filed on October 31, 2011. Also on November 2, 2011, Mr. Dougherty filed a Supplement to Motion to Investigate Ex Parte Communications ("Supplement"). In the Supplement, Mr. Dougherty related further concerns regarding Staff's understanding of information it obtained and/or inferred from discovery it obtained from MRWC. The Motion is based on a misunderstanding of the law applicable to *ex parte* communications and of litigation Staff's role as a party in matters before the Commission and, therefore, the motion should be denied.

The general rule of *ex parte* is that it prevents communications during litigation between a litigant or group of litigants and the ultimate decision-maker in the matter in the absence of all other parties to the matter. Black's Law Dictionary provides that an *ex parte* communication is "a generally prohibited communication between counsel and the court when opposing counsel is not present."

1 *Black's Law Dictionary* at 597 (7th ed. 1999). The Commission's rule regarding *ex parte*,
2 A.A.C. R14-3-113, incorporates this concept. A.A.C. R14-3-311(C) provides in pertinent part:

- 3 1. No person shall make or cause to be made an oral or written
4 communication, not on the public record, concerning the substantive
5 merits of a contested proceeding or siting hearing to a commissioner or
6 commission employee involved in the decision-making process for that
7 proceeding or siting hearing.
- 8 2. No commissioner or commission employee involved in the decision-
9 making process of a contested proceeding or siting hearing shall request,
10 entertain, or consider an unauthorized communication concerning the
11 merits of the proceeding or siting hearing.

12 The Motion indicates a clear misunderstanding of Staff's role in litigation by reaching the
13 conclusion that *ex parte* prevents communications between Staff and parties. On page 2 of the
14 Motion, Mr. Dougherty asserts:

15 Intervener alleges there is evidence that a 'commission employee *involved in the*
16 *decision-making process* of a contested proceeding' requested, entertained or
17 considered an 'unauthorized communication concerning the merits of the proceeding'
18 in violation of R14-3-113(C)(2).

19 Motion at 2 (emphasis added). The cited provision of the Commission's *ex parte* rule illustrates a
20 fundamental misunderstanding that litigation Staff is involved in the decision-making process.

21 Staff would note that it has been repeatedly explained to Mr. Dougherty here and in other
22 dockets related to this matter that Staff is not the decision-maker in this matter. Staff is a party
23 litigant whose role is to litigate from a non-interested perspective and thereby develop a more
24 complete record for the Commission's determination. Staff was specifically ordered by procedural
25 order dated October 4, 2011 to evaluate MRWC's October 12, 2011 Proposed Plan for Arsenic
26 Abatement. In light of the short timeframe to perform Staff's evaluation, Staff propounded informal
27 discovery upon MRWC including phone calls. The information Staff relied upon was provided
28 through said discovery.

As a party to the matter, Staff is not barred by *ex parte* from communicating with another
party regarding the merits of the application. Staff's communications with other parties is necessary
in order to provide a thorough recommendation for the consideration of the Administrative Law
Judge and, ultimately, the Commissioners. Staff's recommendation was provided through a filing in

1 the docket and simultaneous mailings to all parties to this docket. Clearly, none of the
2 communications involved in Staff's evaluation of this application remotely indicate a violation by
3 Staff of the *ex parte* rule.

4 Because Staff is a party litigant and consequently is not the decision-maker in this matter, *ex*
5 *parte* is not violated nor implicated by Staff's communication with other parties to the docket.
6 Therefore, the Motion should be denied.

7 RESPECTFULLY SUBMITTED this 4th day of November, 2011.

8 

9
10 Charles H. Hains
11 Attorney, Legal Division
12 Arizona Corporation Commission
13 1200 West Washington Street
14 Phoenix, Arizona 85007
15 (602) 542-3402

14 **Original and thirteen (13) copies of**
15 **the foregoing filed this 4th day of**
16 **November, 2011, with:**

16 Docket Control
17 Arizona Corporation Commission
18 1200 West Washington Street
19 Phoenix, Arizona 85007

19 **Copy of the foregoing mailed this**
20 **4th day of November, 2011, to:**

20 Patricia D. Olsen, Manager
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