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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 COMMISSION ON  
ITS OWN MOTION INVESTIGATING THE  
FAILURE OF TRUXTON CANYON WATER  
COMPANY TO COMPLY WITH  
COMMISSION RULES AND REGULATIONS.

DOCKET NO. W-02168A-10-0247

STAFF'S LEGAL MEMORANDUM IN  
RESPONSE TO PROCEDURAL ORDER

I. INTRODUCTION.

A Procedural Order Scheduling a Hearing on the Rehearing of Decision No. 72386 dated September 26, 2011 ("Procedural Order") recounted issues raised by the Commissioners during the August 16, 2011 Open Meeting. Among those enumerated was the issue of the Claude K. Neal Family Trust ("Trust") allegedly acting as a public service corporation ("PSC"). While Staff had indicated during the procedural conference on September 16, 2011 that it did not anticipate filing additional testimony, the administrative law judge ("ALJ") directed Staff to file additional testimony related to issues raised by the Commissioners. Staff has provided additional testimony through an Update to Previously Filed Testimony docketed December 5, 2011, a Supplement to the Update to Previously Filed Testimony docketed January 6, 2012, and Updated Surrebuttal Testimony docketed February 7, 2012. Staff hereby provides notice of filing this legal memorandum discussing the legal framework to determine when an entity is a PSC.

II. DISCUSSION.

Determining whether an entity is a public service corporation requires a multi-step analysis. First, one must consider whether the entity satisfies the literal and textual definition of a public service corporation under Article 15, Section 2 of the Arizona Constitution. *Southwest Transmission Cooperative v. Ariz. Corp. Comm'n*, 213 Ariz. 427, 430, 142 P.3d 1240, 1243 (App. 2007). Second, if the entity meets the constitutional definition, then the specific facts of the case, such as determining

1 whether an entity's business and activities are such as to makes its rates, charges and method of  
2 operation a matter of public concern, shall be evaluated in light of the eight factors discussed by the  
3 Arizona Supreme Court in *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 219 P.2d 324  
4 (1950). Finally, other important Arizona Cases, such as *Southwest Transmission, Southwest Gas*  
5 *Corp. v. Ariz. Corp. Comm'n*, 169 Ariz. 279, 818 P.2s 714, and *Arizona Corp. Comm'n v. Nicholson*,  
6 108 Ariz. 317, 497 P.2d 815 (1972) provide additional guidance in the analysis.

7           **A. The Definition of a "Public Service Corporation" under the Plain Language of**  
8           **the Article XV, Section 2 of the Arizona Constitution.**

9           It is imperative to start any discussion of whether an entity is a public service corporation by  
10 looking at the words of the Arizona Constitution. A public service corporation is defined as:

11                           [a]ll corporations other than municipal engaged in . . . furnishing water  
12                           for irrigation, fire protection or other public purposes. . . and all  
13                           corporations other than municipal, operating as common carries, shall  
                              be deemed public service corporations.

14 Ariz. Const. art. XV, §2.

15           Therefore, a corporation that furnishes water for irrigation, fire protection or other public  
16 purposes meets the literal definition of a public service corporation. "Furnish" can be defined as "to  
17 provide or supply with what is needed, useful or desirable." *Williams v. Pipe Trade Industry*  
18 *Program of Arizona*, 100 Ariz. 14, 20, 409 P.2d 720, 274 (1966); *Southwest Transmission* 213 Ariz.  
19 at 431, 142 P.3d at 1244. The *Southwest Transmission* court concluded that the word "furnish"  
20 connotes a transfer of possession. 213 Ariz. at 431, 142 P.3d at 1244. Also, "to furnish" only requires  
21 use by the recipient, not just the end use or for retail consumption. *Id.*

22           Under the Arizona Constitution, common carriers are public service corporations. A  
23 "common carrier" is defined as "[a]ll electric, *transmission*, telegraph, telephone or pipeline  
24 corporations, *for the transportation of* electricity, messages, *water*, oil or other property for profit, are  
25 *declared to be common carriers. . .*" Ariz. Const. art. XV, §10 (emphasis added). Thus, an entity that  
26 transports water meets the textural definition of a "common carrier" and thus is a public service  
27 corporation under the Arizona Constitution.

1 By owning and operating wells and transmission mains that have, or currently do, deliver,  
2 furnish, and transport water for irrigation, fire protection or other public purposes to Valle Vista  
3 Property Owners Association (“VVPOA”), Cerbat Water Company (“Cerbat”), and Truxton Canyon  
4 Water Company (“Truxton”), the Trust appears to meet the literal definition of a public service  
5 corporation under the plain language of the Arizona Constitution.

6 **B. Analysis Utilizing Eight Serv-Yu Factors.**

7 Merely meeting the textual definition of Article XV, Sec. 2, is not the end of the analysis.  
8 *Southwest Transmission* at 431, 142 P.3d at 1244 (citing *Southwest Gas*, 169 Ariz. at 286, 818 P.2d at  
9 721). To be a public service corporation, an entity’s business and activities must implicate the public  
10 interest also. *Id.* at 432, 142 P.3d at 1245. In *Serv-Yu*, the Arizona Supreme Court set out eight factors  
11 to consider in determining whether an entity is “clothed in the public interest.” *Natural Gas Service*  
12 *Co. v. Serv-Yu Co-op.*, 70 Ariz. 235, 219 P.2d 324 (1950). The eight factors serve as a guide for  
13 analysis; all factors do not hold the same weight, nor do all need to be found to exist before the entity  
14 is deemed a public service corporation. *Petrolane-Arizona Gas Serv. v. Ariz. Corp. Comm’n*, 119  
15 Ariz. 257, 259, 580 P.2d 718, 720 (1978); *Southwest Transmission* 213 Ariz. at 430.

16 The eight *Serv-Yu* factors are:

- 17 1. What the corporation actually does;
- 18 2. A dedication to public use;
- 19 3. Articles of incorporation, authorization and purposes;
- 20 4. Dealing with the service of a commodity in which the public has been generally held to  
21 have an interest;
- 22 5. Monopolizing or intending to monopolize the territory with a public service commodity;
- 23 6. Acceptance of substantially all requests for service;
- 24 7. Service under contracts and reserving the right to discriminate is not always controlling;
- 25 8. Actual or potential competition with other corporations whose business is clothed with  
26 public interest.
- 27
- 28

1 **1. What the corporation actually does.**

2 When considering what the company actually does, a court also considers whether the  
3 company's actions affect so considerable a fraction of the public that it is public in the same sense  
4 which any other may be called public. *Southwest Transmission* at 432, 142 P.3d at 1245 (citing *Serv-*  
5 *Yu*, 70 Ariz. at 240, 219 P.2d at 327). The Courts have not viewed this factor through a narrow lens;  
6 they look at what the Company's actual role is. *Id.* at 432, 142 P.3d at 1245.

7 The Court in *Southwest Transmission* looked closely at Southwest Transmission's role in  
8 providing electricity to consumers. Through its transmission service, the Company delivered power  
9 to its distributors, and a significant number of retail consumers relied on this transmission service.  
10 The Court found that, even though Southwest Transmission did not supply directly to the end user,  
11 this did not preclude it from consideration. *Id.*

12 The Trust's role here has been to sell water to a private end user, the VVPOA, as well as to  
13 two regulated public water utilities, Truxton Canyon Water Company and Cerbat Water Company.  
14 The Trust's current water sales to Truxton affect the hundreds of customers who rely on that water  
15 source.

16 **2. A dedication to public use.**

17 Whether there is a dedication to public use is governed by the facts and the circumstances of  
18 each case. *Serv-Yu*, at 238, 219 P.2d at 326. Although the intent of the owner may be of relevant  
19 consideration, the outcome under this factor does not solely depend upon the wishes and declaration  
20 of the owner. *Id.* To be a public service corporation, "an owner of such a plant must at least have  
21 undertaken to actually engage in business and supply at least some of his commodity to *some of the*  
22 *public.*" *Id.* (emphasis added). It is not necessary to hold oneself out as providing service to the  
23 entire public to be a public service corporation.

24 The Trust has in the past supplied water to not only two regulated public utilities but also a  
25 large private customer, the VVPOA. The customers of the utilities as well as the VVPOA can be  
26 classified as "some of the public." To the knowledge of Commission Staff, the Trust is currently  
27 supplying water to Truxton.

28 ...

1 **3. Articles of Incorporation, Authorization and Purposes.**

2 The Court in *Serv-Yu* made it clear that “it is what the corporation is doing rather than the  
3 purpose clause that determines whether the business has the element of public utility.” *Serv-Yu* at  
4 341, 219 P.2d at 328. Corporate statements about an entity’s authorizations and functions could be  
5 made with the purpose of avoiding regulation, and should not be used to deflect attention from a  
6 determination of the true character of the business. *Id.* at 242, 219 P.2d at 328-9. Thus, various  
7 strategies, such as changing the purpose clause of a charter, refraining from use of the right of  
8 eminent domain, or avoiding holding oneself out to serve the public generally and selling only to  
9 select consumers through private contracts, may not successfully be adopted to avoid regulation. *Id.*  
10 If a business is affected with a public interest, it is a public service corporation. *Id.*

11 The record in this case does not contain facts that describe the Trust’s purpose clause, or the  
12 intention behind the creation of the Trust.

13 **4. Dealing with the service of a commodity in which the public has been generally held to**  
14 **have an interest.**

15 “In determining the question of whether an entity is a public service corporation, much  
16 enlightenment is gained if we know that the utility is dealing with a service or a commodity in which  
17 the public has generally been held to have an interest.” *Serv-Yu*, at 238-9, 219 P.d2 at 326. Water is  
18 indisputably a commodity in which the public has been generally held to have an interest.

19 **5. Monopolizing or intending to monopolize the territory with a public service commodity.**

20 The Court in *Mountain States Telephone* concluded that the power to regulate public service  
21 corporations is derived from their status as corporations performing a public service, not from  
22 monopoly status. *Mountain States Telephone & Telegraph Co v. Arizona Corp. Comm’n*, 132 Ariz.  
23 109, 1145-15, 644 P.2d 263 at 268-69. The Court noted that this conclusion is consistent with the  
24 many cases that hold that it is the public character of the service rendered by the corporation that  
25 allows the Commission to exercise jurisdiction over it. *Id.* at 115, 644 P.2d at 269. The existence of a  
26 monopoly does not play a part in that determination. *Id.* The record in this case does not contain facts  
27 that describe the Trust’s actions as monopolistic.

28 ...

1 **6. Acceptance of substantially all requests for service.**

2 It has been held that a business may be “so far affected with a public interest that it is subject  
3 to regulation . . . even though the public does not have the right to demand and receive service.”  
4 *Serv-Yu* at 242, 219 P.2d at 328. Therefore, it is not a controlling factor that the corporation  
5 supplying service does not hold itself out to serve the public generally. Regardless of the right of the  
6 public to demand and receive service in a particular instance, the question whether a business  
7 enterprise constitutes a public utility is determined by the nature of its operations. *Id.* Each case  
8 must stand upon the facts peculiar to it.

9 The Trust has not accepted requests for service by new customers since it took on the  
10 VVPOA as a customer. It has had the same three customers for more than two decades. However,  
11 the Trust was the sole provider of water for two regulated water utilities, and is still the sole provider  
12 for Truxton. The utilities have an obligation to serve within their CC&Ns.

13 **7. Service under contracts and reserving the right to discriminate are not always**  
14 **controlling.**

15 Providing service pursuant to contracts does not preclude the conclusion that the entity is a  
16 public service corporation. Entering into private contracts may be a factor, but it is not a controlling  
17 factor. If entering into contracts with customers would control determining whether an entity is a  
18 public service corporation, that would be an all-too-easy way of evading the law. *Serv-Yu* at 240, 219  
19 P.2d at 327.

20 The Trust supplied water to the VVPOA, Truxton Canyon and Cerbat through individually  
21 executed purchase water agreements, in which it charged each entity a different amount for delivered  
22 water. The contract with VVPOA was a flat rate, regardless of how much water the VVPOA used.  
23 By contrast, the contracts with the regulated utilities actually charged the utilities for the water the  
24 utilities actually sold; water was not metered between the Trust’s mains and each utility’s mains.

25 **8. Actual or potential competition with other corporations whose business is clothed in the**  
26 **public interest.**

27 A corporation, calculated to compete with public utilities and take business away from them,  
28 should be under like regulatory restriction if effective government supervision is to be maintained.  
*Serv-Yu* at 240, 219 P.2d at 328. Under the specific facts of this case, by the Trust selling water to

1 the VVPOA, it would appear to be in direct competition with Truxton, a utility with a CC&N for the  
2 area that encompasses the VVPOA. While the Trust may not have been attempting to exert  
3 monopolistic power in the area, it was competing with the regulated utility in the area. The Trust no  
4 longer sells water to the VVPOA.

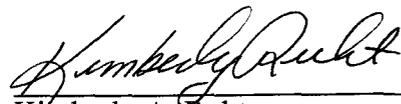
5 **C. Other Cases that Provide Guidance.**

6 The fact that an entity may incidentally be providing a public commodity is not sufficient to  
7 subject it to regulation; it must be in the business of providing a public service. *Southwest*  
8 *Transmission*, 213 Ariz. at 432, 142 P.3d at 1245; *Nicholson* 108 Ariz. at 320, 497 P.2d at 818. To  
9 Staff's knowledge, the Trust owns land in the Kingman area. Because the wells that serve both  
10 Cerbat and Truxton are on Trust-owned land, and are owned by the Trust, the Trust does significant  
11 business providing water. However, there is the possibility that the Trust is involved in other  
12 businesses, to which the provision of water may be incidental. But Staff can unequivocally assert  
13 that the Trust has furnished, or is currently furnishing, water to the VVPOA, Cerbat Water Company  
14 and Truxton Canyon Water Company.

15 **III. CONCLUSION.**

16 Pursuant to the Procedural Order of September 26, 2011, Staff has addressed the legal  
17 framework for determining whether an entity is a public service corporation as it pertains to the Trust.  
18 Staff believes that it is premature to evaluate whether the Trust is or is not PSC given the present  
19 context of this case. The purpose of this docket is to investigate a complaint against Truxton Canyon  
20 Water Company. The Trust has not been specifically named as a party to this docket.

21 RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of February, 2012.

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