

OPEN MEETING ITEM

ORIGINAL

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



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ARIZONA CORPORATION COMMISSION

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

DATE: OCTOBER 22, 2012

DOCKET NO.: W-03783A-12-0023

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Belinda A. Martin. The recommendation has been filed in the form of an Order on:

MICHAEL W. SCHULTZ AND PAMELA J. SCHULTZ
DBA RINCON CREEK WATER COMPANY
(CANCEL CC&N)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

OCTOBER 31, 2012

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

NOVEMBER 7, 2012 AND NOVEMBER 8, 2012

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission

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ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

IN THE MATTER OF THE APPLICATION OF
 MICHAEL W. SCHULTZ AND PAMELA J.
 SCHULTZ DBA RINCON CREEK WATER
 COMPANY FOR CANCELLATION OF
 CERTIFICATE OF CONVENIENCE AND
 NECESSITY.

DOCKET NO. W-03783A-12-0023

DECISION NO. _____

ORDER

Open Meeting
November 7 and 8, 2012
Phoenix, Arizona

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

Procedural History

1. On May 3, 2010, Michael W. Schultz and Pamela J. Schultz d/b/a Rincon Creek Water Company ("Rincon Creek" or "Company"), filed with the Commission an application for approval to sell its water system assets and transfer its certificate of convenience and necessity ("CC&N") to William Shirley and Gretchen Shirley (the "Shirleys," and together with Rincon Creek, the "Applicants") under Docket No. W-03783A-10-0172 ("Transfer Application").

2. On October 5, 2010, the Commission's Utilities Division Staff ("Staff") filed its Staff Report recommending approval of the Transfer Application subject to certain conditions, and on November 26, 2010, the Applicants docketed their comments to the Staff Report.

3. On October 18, 2010, a Procedural Order was docketed setting a hearing on the Transfer Application for December 10, 2010. Rincon Creek provided notice of the hearing and no comments were filed in response.

4. The hearing convened as scheduled and no members of the public were present. The

1 Applicants were represented by Mr. Schultz and the Shirleys, and Staff was represented by counsel.
2 During the hearing, several questions arose about the Company's failure to charge for service and
3 whether Rincon Creek's CC&N was necessary. At the hearing's conclusion, the record was held
4 open pending the issuance of a Procedural Order directing the parties to file legal briefs addressing
5 these issues. The Procedural Order was docketed August 15, 2011.

6 5. On September 9, 2011, Lawrence V. Robertson, Jr., filed a Notice of Retention and
7 Entry of Appearance stating the Applicants had retained him to represent them.

8 6. The parties filed their opening and reply briefs as directed.

9 7. By a Procedural Order filed December 1, 2011, a procedural conference was held on
10 December 15, 2011, to discuss potential solutions to the questions and concerns raised during the
11 hearing in light of subsequent changes in the Company's circumstances. As a result, on January 23,
12 2012, the Applicants filed a Motion to (i) Withdraw Application, (ii) Administratively Close Docket
13 and (iii) Transfer Pleadings and Hearing Record to New Docket ("Motion to Withdraw"). The
14 Applicants stated they had discussed the Motion to Withdraw with Staff and Staff did not object.

15 8. At the same time as the Applicants filed the Motion to Withdraw, Rincon Creek filed
16 an Application for Order Canceling Certificate of Convenience and Necessity, requesting that the
17 Commission issue an order finding that Rincon Creek is no longer a public service corporation and
18 canceling the Company's CC&N ("Cancellation Application"). Rincon Creek provided notice of the
19 Cancellation Application and no comments were filed in response.

20 9. On February 14, 2012, a Procedural Order was filed administratively closing the
21 Transfer Application docket and incorporating its record into Cancellation Application's docket in
22 the interest of administrative efficiency.

23 10. On April 10, 2012, Staff filed a Request for Procedural Conference.

24 11. By a Procedural Order docketed April 16, 2012, a procedural conference was held on
25 May 2, 2012, to discuss procedural requirements and other issues concerning the Cancellation
26 Application.

27 12. A Procedural Order was docketed May 4, 2012, setting filing deadlines for the Staff
28 Report and the Company's response.

1 13. Staff filed its Staff Report June 1, 2012. Rincon Creek filed its Comments on
2 Commission Staff's June 1, 2012, Staff Report on June 11, 2012 ("Response"), and Staff submitted a
3 Notice of Filing Clarifying Comments on June 15, 2012 ("Clarification").

4 **Rincon Creek Background**

5 14. In Decision No. 31532 (April 30, 1959), the Commission granted a CC&N to Gilbert
6 G. Acosta to provide water service in an area covering approximately one and three-quarter square
7 miles east of Tucson at the base of the Rincon Mountains. Rincon Creek's rates and charges were set
8 in Decision No. 31637 (June 22, 1959). Mr. Acosta operated the system as Rincon Creek Water
9 Company. Over the years, the Acostas gave a few parcels of land within the certificated area to
10 others and provided water to them for free.¹

11 15. On July 3, 1991, the Schultzes purchased the Acosta's ranch property ("Ranch
12 Property") from the Estate of Mary G. Acosta ("Estate") located within the certificated area.
13 Incidental to this purchase, the Schultzes also bought Rincon Creek and assumed operations and
14 maintenance of the water system.² Mr. Schultz held the Company as a sole proprietorship, but used
15 the same business name.³

16 16. On August 5, 1993, the Schultzes and the Estate filed a joint application for
17 Commission approval of the sale of the water system assets and transfer of the CC&N. The
18 Commission approved the application in Decision No. 58595 (April 8, 1994). At that time, Rincon
19 Creek had four unmetered connections. The Schultzes planned to develop the Ranch Property, but
20 anticipated adding only one additional customer in the near future. The Decision noted that the rates
21 set in 1959 were still in effect and ordered that "Rincon Creek Water Company shall continue billing
22 its customers those rates and charges currently in effect until further Order of the Commission."⁴

23 17. In January 2010, Mr. Schultz⁵ and the Shirleys signed a purchase agreement for the
24 Ranch Property ("Purchase Agreement"). In an April 20, 2010, addendum to the Purchase
25

26 ¹ Transcript of December 10, 2010, pages 38-39, 50. (Hereinafter, "Tr. at __.")

27 ² Tr. at 9; Decision No. 58595 (April 8, 1994), page 3.

28 ³ Transfer Application, page 1.

⁴ Decision No. 58595, page 6.

⁵ During a procedural conference held December 15, 2011, the Applicants noted that Mr. and Mrs. Schultz divorced some time after the purchase of Rincon Creek. Transcript of December 15, 2011, Procedural Conference, page 15.

1 Agreement, the Shirleys bought Rincon Creek for \$35,000, as well as an Arizona Department of
 2 Water Resources ("ADWR") Groundwater Service Provider Right, an ADWR Irrigation
 3 Grandfathered Water Right Certificate, and ownership of the wells on the Ranch Property
 4 ("Addendum").⁶ After closing on the real estate transaction, the Shirleys assumed operation of the
 5 water system.⁷

6 **Transfer Application**

7 18. On May 3, 2010, Mr. Schultz and the Shirleys filed the Transfer Application with the
 8 Commission. At the time of filing, Rincon Creek provided water to five customers, one of which was
 9 the Shirleys as owners of the Ranch Property. In the Staff Report, Staff noted Rincon Creek's water
 10 system consisted of two wells, two storage tanks, two pressure tanks and the distribution system, but
 11 observed that the customers' lines and the wells were not metered. Staff recommended approval of
 12 the Transfer Application subject to certain conditions, one of which was that Rincon Creek should
 13 install meters on customers' lines and the wells.

14 19. At the hearing on the Transfer Application, Mr. Schultz testified that during his
 15 ownership of Rincon Creek, he never charged for water service and paid for system repairs and
 16 improvements himself. Mr. Schultz stated that he was not aware that Rincon Creek was required to
 17 charge his customers for service.⁸

18 20. As when Mr. Schultz bought the Company, the Shirleys' purchase of Rincon Creek's
 19 assets was incidental to the purchase of the Ranch Property.⁹ Mr. Shirley testified that they purchased
 20 the Ranch Property for the purpose of building a small guest ranch consisting of eight casitas.¹⁰ The
 21 water for the casitas would be provided by the Rincon Creek, but the guest ranch would be on a
 22 master meter and paid for by the Shirleys as its owners.¹¹

23 _____
 24 ⁶ A copy of the Purchase Agreement and Addendum are attached as exhibits to the Transfer Application. According to
 25 Staff, the Acostas (rather than Rincon Creek or Mr. Schultz) are listed as the registered owners of the well supplying
 26 water to customers. There is also a back-up well on the Ranch Property registered to Mr. Schultz. Staff Report to
 27 Transfer Application, Attachment A, page 2.

28 ⁷ Tr. at 29.

⁸ Tr. at 11-12.

⁹ Tr. at 15-16. The Shirleys purchased the Ranch Property for \$1.65 million separate from the \$35,000 they paid for the
 water system. Transfer Application, Purchase Agreement, Addendum and Affidavit of Value exhibits.

¹⁰ Mr. Shirley testified that the guest ranch had been approved by Pima County as a Type 1 Minor Resort. Tr. at 52.

¹¹ Tr. at 23-24.

1 21. Mr. Shirley testified that during his discussions with Rincon Creek's customers
2 regarding his purchase of the water system, the customers were adamant they had agreements with
3 the Acostas that they would receive their water for free and insisted it was their right not to be
4 charged for water.¹² Mr. Shirley stated he understood that Rincon Creek had Commission-approved
5 rates, but he could find nothing specifically requiring the Company to collect revenue from its
6 customers and he did not intend to charge for water service.¹³

7 22. When asked if he would object to a recommendation requiring Rincon Creek to file a
8 rate case, Mr. Shirley stated he was not sure what that meant but if it was required, he would seek
9 legal advice on what it entails as well as advice about whether Rincon Creek is required to charge its
10 customers for water.¹⁴ Mr. Shirley testified that the revenue generated by the sale of water to the
11 customers would only total about \$100 per month, but he has sufficient financial resources to operate
12 and maintain the water system.¹⁵ According to Mr. Shirley, they have no plans to extend the CC&N
13 or add customers, and noted they had consulted with a regulations advisor and an attorney about
14 possibly reducing the size of the certificated area.¹⁶ He stated: "We're not looking to operate a water
15 company for profit. We are looking to get along with our neighbors and operate a guest ranch."¹⁷

16 23. Staff witness Kiana Sears testified to Staff's position that a regulated water company's
17 collection of revenue from its customers is not optional.¹⁸ Ms. Sears stated Staff learned during the
18 review of the Transfer Application that Rincon Creek had never charged its customers for water, and
19 concluded the Company had been out of compliance with Decision No. 31637 for over 50 years.¹⁹
20 Staff recommended that the Commission direct Rincon Creek to file a rate application twelve months
21 after installation of meters on the customers' lines and the wells.²⁰

22 24. At the hearing's conclusion, the record was held open pending the issuance of a
23

24 ¹² Tr. at 20.

25 ¹³ Tr. at 19, 23.

26 ¹⁴ Tr. at 26-27.

27 ¹⁵ Tr. at 92.

28 ¹⁶ Tr. at 30.

¹⁷ Tr. at 94.

¹⁸ Tr. at 84-86.

¹⁹ Tr. at 85-87.

²⁰ Tr. at 82-83.

1 Procedural Order closing the record or directing the parties to file briefs regarding the issues raised at
 2 hearing.²¹ Subsequently, a Procedural Order was docketed ordering the parties to file legal briefs
 3 addressing three questions: 1) whether Rincon Creek was required to charge customers for water
 4 service; 2) if it was found that Rincon Creek's failure to charge customers for service is a violation of
 5 Decision No. 31637, whether any action should be taken against the Company; and 3) whether the
 6 matter might more appropriately be addressed as an adjudication not a public service corporation.

7 25. In their briefs, Staff and the Applicants disagreed about whether Rincon Creek is
 8 legally obligated to collect revenue from its customers for water service, but Staff stated it would not
 9 pursue any action against Rincon Creek as long as the Company started charging its customers for
 10 water using the Commission-approved rates. Staff and the Applicants agreed that the Company's
 11 current situation likely would not satisfy the criteria enumerated in Decision No. 55568 for
 12 adjudication not a public service corporation.

13 26. In the Applicants' briefs they noted that since the hearing, two customers had
 14 disconnected from Rincon Creek and now receive their water from an unrelated private well, leaving
 15 only two others and the Shirleys as customers. Further, the Shirleys had discussed with these
 16 customers the possibility of entering into a well-sharing agreement, which would leave Rincon Creek
 17 with no customers.²² The Applicants asserted that given these changes in circumstance:

18 [T]here is no plausible reason why Rincon Creek Water Company should
 19 continue to be regulated as a public service corporation, nor why the Commission
 20 should have the related ongoing burden of regulatory oversight. Furthermore,
 21 given these specific factual circumstances, it makes no sense to subject Shirley to
 22 the time and expense of doing all that would be necessary to prepare and process
 23 a formal application requesting adjudication of Rincon Creek Water Company not
 24 a public service corporation. That is particularly so, given (i) the specific
 25 circumstances surrounding Rincon Creek Water Company, and (ii) the
 26 Commission's discretion to waive one (1) or more of the criteria set forth in its
 27 Decision No. 55568. However, if for some reason the Commission is unable or
 28 unwilling to waive full compliance with the criteria set forth in Decision No.
 55568, then Shirley requests as an alternative that the Commission issue a
 decision extinguishing Rincon Creek Water Company's CC&N, given the specific
 circumstances of the instant proceeding.²³

²¹ Tr. at 97.

²² Applicants' Opening Brief, page 7. Appendix B of the Applicants' Opening Brief contains copies of letters from the two former customers confirming they no longer received water from Rincon Creek.

²³ Applicants' Reply Brief, pages 3-4.

1 27. During a procedural conference on December 15, 2011, the parties discussed these
2 issues and proposed several alternatives to resolve them. Ultimately, Rincon Creek concluded it
3 would be better to withdraw the Transfer Application and file an application to cancel its CC&N.

4 **Cancellation Application**

5 28. Rincon Creek filed its Cancellation Application explaining that not only were two of
6 its five customers no longer receiving water service from Rincon Creek, but the Shirleys and the
7 remaining customers entered into a well-sharing agreement on January 19, 2012 (“WSA”), leaving
8 Rincon Creek without any customers. The Shirleys noted the WSA does not contemplate adding new
9 users.²⁴ Additionally, the WSA states it becomes null and void if the Commission does not approve
10 the Cancellation Application.²⁵ The Shirleys reiterated that their main interest in acquiring the water
11 system was to provide water to the guest ranch, not necessarily to own and operate a water
12 company.²⁶ The Company asserted that “if the Commission received an application today requesting
13 a CC&N for the purpose of providing water service to five (5) or less customers, in all likelihood it
14 would deny the request.”²⁷

15 29. Rincon Creek concluded that given its present circumstances it is not a public service
16 corporation. In support of its position, the Company applied the factors enumerated in *Natural Gas*
17 *Service Co. et al. v. Serv-Yu Cooperative, Inc.*, 70 Ariz. 235, 219 P.2d 324 (1950) (“*Serv-Yu*”), to its
18 current status as follows:

19 Factor No. 1 (What the Entity Actually Does): Company has no customers and
20 no longer provides water service to the public.

21 Factor No. 2 (Dedication of Property to a Public Use): In light of the response to
22 Factor No. 1, Company’s property is no longer dedicated to a public use.

23 Factor No. 3 (Articles of Incorporation): Company is not a corporation, a limited
24 liability company, a partnership, a joint venture or any other legal or formal
25 entity; and, as a consequence, does not have any articles of incorporation, articles
of organization, partnership agreement or joint venture agreement. Company is
simply a name adopted by Schultz (and Schultz’s predecessor-in-interest) for
business purposes when water service was being provided to members of the

26 ²⁴ Response, Appendix A, WSA Recitals, page 1. Mr. Shirley testified that as a part of his discussions with Pima County
for approval of a Type 1 Minor Resort, he agreed not to build any homes on the Ranch Property. Tr. at 52.

27 ²⁵ WSA, Section 11(d), page 7.

28 ²⁶ Cancellation Application, pages 2-3.

²⁷ Cancellation Application, page 3.

public.

Factor No. 4 (Service of a Commodity in Which Public is Generally Held to Have an Interest): As noted in response to Factor No. 1, Company no longer provides a commodity or service in which the public might have an interest.

Factor No. 5 (Monopolizing or Intending to Monopolize): Company has no intent to monopolize, nor does Schultz (or Shirley). To the contrary, by means of this Application, Schultz seeks to have Company's current exclusive right to provide water service cancelled.

Factor No. 6 (Acceptance of Substantially All Requests for Service): Company has not received any new requests for service in recent years. To the contrary, former customers have either fully disconnected from Company's water system or now receive water under a well-sharing agreement which does not allow for additional connections. Thus, Company is not accepting substantially all (or any) requests for water service.

Factor No. 7 (Service Under Contracts): Company has no contracts for water service.

Factor No. 8 (Competition with Other Public Service Corporations): Company heretofore has not been in competition with other public service corporations; and, if this Application is granted, Company will not be in competition with any public service corporations in the future.

Accordingly, absent possession of the CC&N which this Application seeks to cancel, Company is not and will not be a public service corporation under a Serv-Yu analysis.²⁸

30. In its Staff Report on the Cancellation Application, Staff briefly summarized some of the terms of the WSA, stating that "the agreement gives each party an equal ownership in the well."²⁹ Based on Staff's review of the WSA, the documentation contained in the record, and the information provided by the Company and the Shirleys, Staff recommended approval of the Cancellation Application.³⁰

31. Rincon Creek filed a Response clarifying that the Shirleys are the well's sole owners and, although the parties have an equal right to withdraw, transport and use water from the well, the WSA does not convey any ownership interests in the well to the other two signatories.³¹

32. Staff acknowledged the Shirleys' ownership in its Clarification, but concluded the

²⁸ Cancellation Application, pages 3-4.

²⁹ Staff Report, page 1.

³⁰ The Staff Report also included alternative recommendations if the Commission decided cancellation of Rincon Creek's CC&N is not in the public interest. Since we are approving the Cancellation Application, we are not addressing the alternative recommendations.

³¹ Response, page 2.

1 effect of the WSA is that all the parties benefit equally under its terms. Staff stated this clarification
 2 did not change its recommendation that the Commission should find Rincon Creek is no longer a
 3 public service corporation and approve the Cancellation Application. Staff asserted its conclusions
 4 are supported by *Arizona Water Company v. Arizona Corp. Comm'n*, 161 Ariz. 389, 778 P.2d 1285
 5 (App. 1989). In that case, owners of a shared well extended water service to two individuals who did
 6 not have an ownership interest in the well. Arizona Water Company complained that the well owners
 7 were acting as a public service corporation within Arizona Water Company's certificated area by
 8 providing water service to the two non-owners. The Commission disagreed and concluded that under
 9 the facts of the case, the well's owners were not acting as a public service corporation. On appeal,
 10 the court applied the factors enumerated in *Serv-Yu* to the facts as presented and upheld a superior
 11 court judgment affirming the Commission's decision.

12 Conclusion

13 33. The Commission granted Rincon Creek's CC&N in 1959, but it never had more than
 14 five customers at any point and the Company never metered the lines or charged its customers for
 15 water service,³² and as of January 2012, Rincon Creek no longer has any customers. The Shirleys
 16 stated they have no specific desire to operate a water company as a for-profit venture; they only
 17 purchased the system because it was part of the Ranch Property. Rincon Creek asserts that the
 18 application of the *Serv-Yu* factors to its present situation shows it is not a public service corporation.

19 34. Rincon Creek has not received a request for service for years, but if the need for water
 20 service arises after cancellation of its CC&N, a map of Rincon Creek's certificated area shows there
 21 are three other Commission-regulated water companies either adjacent to or near Rincon Creek that
 22 could potentially extend water service to Rincon Creek's currently certificated area.³³

23 35. Based upon the evidence and testimony presented by Rincon Creek and the Shirleys,
 24 and under applicable Arizona law, we find that Rincon Creek is not a public service corporation.
 25 Cancellation of Rincon Creek's CC&N is in the public interest and Staff's recommendation that the

26 _____
 27 ³² Tr. at 10-12. In the Transfer Application, Rincon Creek noted there are no refunds due on main extension agreements,
 security deposits or meter and service line installations.

28 ³³ The water companies are Rincon Water Company, Saguaro Water Company and Spanish Trail Water Company.
 Memorandum docketed by Staff on February 21, 2012.

1 Commission approve the Cancellation Application is reasonable and should be adopted.

2 36. Further, because 1) Rincon Creek provided notice of the Transfer Application and of
3 the Cancellation Application; 2) a hearing was held on the Transfer Application; 3) the record of the
4 Transfer Application was incorporated into this docket; 4) no customers objected to cancellation of
5 Rincon Creek's CC&N or requested a hearing on the matter; 5) Rincon Creek no longer has any
6 customers; and 6) we have found that cancellation of Rincon Creek's CC&N is in the public interest,
7 we find that a hearing in this matter is not necessary.

8 CONCLUSIONS OF LAW

9 1. Rincon Creek has been a public service corporation within the meaning of Article XV
10 of the Arizona Constitution and A.R.S. §§ 40-281 and 40-285.

11 2. The Commission has jurisdiction over Rincon Creek and the subject matter of the
12 Cancellation Application.

13 3. Notice of the Cancellation Application was provided as required by law.

14 4. Based upon the record in the Transfer Application docket and in this docket, Rincon
15 Creek is no longer a public service corporation within the meaning of Article XV of the Arizona
16 Constitution.

17 5. Cancellation of Rincon Creek's CC&N is in the public interest.

18 6. A hearing in this matter is not necessary.

19 7. Staff's recommendation to approve the Cancellation Application is reasonable and
20 should be adopted.

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ORDER

IT IS THEREFORE ORDERED that Rincon Creek Water Company's Certificate of Convenience and Necessity granted in Decision No. 31532 (April 30, 1959) is canceled.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this _____ day of _____ 2012.

ERNEST G. JOHNSON
EXCUTIVE DIRECTOR

DISSENT _____

DISSENT _____

1 SERVICE LIST FOR:

MICHAEL W. SCHULTZ AND PAMELA J.
SCHULTZ DBA RINCON CREEK WATER
COMPANY

2

3 DOCKET NO.:

W-03783A-12-0023

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