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Gilkey, Rist Initial Closing Brief: WS-03478A-12-0307

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SECURP COMMISSION DOCKET CONTROL **Before the Arizona Corporation Commission**

In the matter of the application of
Far West Water & Sewer Company
For approval Sewer Rate increase
Docket # WS-03478A-12-0307

Arizona Corporation Commission
DOCKETED
JUN 10 2013

DOCKETED BY *JM*

Joint filing of Intervenor

Robert Rist

Robert Gilkey

Barbara Gilkey

Initial Closing Brief

Far West Water & Sewer, has asked for an increase in their sewer rates of 188%, taking the monthly rate for a residential customer to \$62.65. While we agree that a rate increase may be appropriate, we strongly disagree with the amount being requested. The company maintains they are insolvent, and no one will invest or loan money to a company that is insolvent. We strongly maintain that the reason for the financial problems and insolvency have been completely as a result of their mismanagement of the finances, operations of the plants, and safety practices.

1. Mismanagement by shareholders and manager

(a) Far West has a long history of poor management. Far West only came into existence because of the need to serve the developments of H&S Developers; in fact originally the water and wastewater facilities were under H&S control. H&S has a very close relationship with Jacobson Construction, who designed the failed Palm Shadows treatment plant. That plant was built to serve the Vista Del Sol sub-division, but the collection system was soon expanded

1 to serve other Jacobson projects such Villa Chaparral.¹ Management continued to expand the
2 collection system east as far as the Sierra Ridge sub-division. This resulted in the Palm
3 Shadows plant failing because it depended on percolation of the effluent into the ground.
4 Management knew there was a problem with percolating because they attempted to solve the
5 problem by adding four more ponds. Finally management did exploratory drilling and
6 confirmed that the plant was built on clay that would not percolate.² This engineering should
7 have been done before the plant was built.

8 (b) Previous management did not provide any safety training or provide proper safety equipment
9 for working in dangerous confined spaces. This resulted in the death of two people and the
10 responsibility falls directly on the two shareholders, the owners of H&S and Far West.
11 Massive legal costs and fines resulted and was the beginning of the current financial problems.

12 (c) The shareholders and management of Far West do not have qualifications to run this company.
13 This is blatantly evident in the fact that they chose to not take part in the hearings of this rate
14 case. Far West chose to leave everything to their lawyer and a hired expert witness, Mr. Ray
15 Jones. In fact, management went out of their way to avoid attending the hearings, and not
16 testifying, by avoiding being served with a subpoena.³ Even the process server we hired to
17 serve the subpoena commented that Andrew Capestro has been elusive and difficult to serve in
18 the past. When Mr. Marks was asked to accept service for Mr. Capestro, he refused. Mr.
19 Capestro is the only person who can answer many questions and that was evident in the
20 hearings when Ray Jones had to answer, "I don't know" to many questions asked of him.⁴ The
21 rate payer deserves more from the management of a utility when they have no choice as to
22 who provides the service.

23 (d) Quality of service has been poor and for the most part non-existent. For years residents have
24 complained about terrible odors and sewage spills. The docket in this case and previous cases
25 has hundreds of letters in opposition to a rate increase; many citing spills, odors, and issues
26 with personnel not taking problems seriously. Several historical sources of odors have been
27 resolved with the new Section 14 plant and the conversion of Palm Shadows to a lift station,
28 however problems still persist. The Public Comment Meeting held in Yuma February 20,
29 2013, by ACC Commissioners brought forth dozens of people complaining about odors. Many

1 Transcript pg. 1026 Lines 5 thru 19

2 Transcript pg. 936, Lines 7 thru 19 and pg. 937 Lines 1 thru 8

3 Transcript pg. 429, Lines 5 thru 20

4 Transcript pp 1000 thru 1004

1 of these complaints seemed to be coming from one area, which is the vicinity of the Marwood
2 Plant. Mr. Rigsby of RUCO testified that he toured the Marwood area on February 21, the day
3 after the Public Comment Meeting, and experienced odors as far away as a mile from the
4 facility.⁵ On a tour of the Marwood facility attended by Robert Gilkey and Robert Rist in
5 March, Mr. Capestro told us that this plant has stunk for 20 years. We are at a loss as to why
6 Management has not corrected this. Management should first be looking at operational
7 changes that might reduce or alleviate these odors. Second, if operational changes cannot be
8 made then design changes need to be considered and put in place. Management should not
9 have to be forced to make corrections by ADEQ orders; management should be doing this on
10 its own. Good management should be proactive in resolving plant problems. Mr. Marks
11 testified in his opening statement that Mr. Jones' association for the last two years with Far
12 West was that of an "Interim Operating Manager" and is "intimately familiar with both Far
13 West's books and records, its utility plant, and its day to day operations;,"⁶ however Mr. Jones
14 testified that he never investigated the operation of the Marwood plant.⁷ Testimony was given
15 that a lift station was to be built at Paula Street, and \$607,381 was spent but the lift station was
16 not built. This was to reduce flow to Marwood, and clear up capacity for El Rancho
17 Encantado.⁸ The lift station has not been built, the money was spent, and construction has
18 continued at El Rancho Encantado. Mr. Jones has testified on one hand that the lift station is
19 needed to clear up capacity at Marwood⁹, but on the other hand Marwood is currently within
20 its permitted limits so its all right to build at El Rancho Encantado.¹⁰ This is a complete
21 contradiction.¹¹

22 (e) Sewage Spills. Sewage spills are still occurring at an unacceptable rate. Mr. Capestro has
23 opined in the past that spills are to be expected in any sewerage system. We believe this is a
24 total cop-out and should not be tolerated in any system. Mr. Jones has testified that the number
25 of spills is higher than should be expected.¹² The spills reports indicate that several are a direct
26 result of electrical problems. One of the spill reports states that the high water alarm, that
27 automatically calls an on duty operator, failed to call. Far West operators were not notified
28 until two residents spotted the overflow and called the emergency number. We maintain that

5 Transcript pg 559 Lines 1 thru pg 561 Line 19

6 Transcript pg 18, Lines. 20 thru 24 and pg. 19, Lines 1 thru 2

7 Transcript pg 1015, Lines 23 thru 25 and pg 1016, Lines 1 thru 9

8 Docket # WS-03478A-08-0608, Decision #71447, pg. 20 Lines 6 thru 10

9 Transcript pg 1004, Lines 16 thru 25 and pg. 1005, Lines 1 thru 9

10 Transcript pg 1005, Lines 18 thru 25

11 Transcript pg. 1006 Lines 1 thru 14

12 Transcript pg 1018 Line 18 thru pg. 1023 Line 25

1 this is an indication of inadequate preventive maintenance. The spill reports also indicate that
2 Far West is depending on outside companies to respond and ascertain what is the cause of the
3 problem. This indicates a need for more qualified personnel on staff. Far West has spent in
4 excess of \$200,000 for preventive maintenance software, but it is of little value if fully
5 qualified maintenance people are not finding these problems before they result in spills.¹³ Mr.
6 Jones has testified that Isaac has the highest certification in wastewater treatment & collection
7 systems, however that puts little emphasis on maintenance qualifications and mostly on
8 operations. No plant can operate properly without the highest quality maintenance.

9 (f) Who should bear the burden of a failed plant? Mr. Jones testified that it depends on how long
10 the plant has been in service.¹⁴ He seems to be suggesting that Palm Shadows was built in
11 1999, and was taken off line in 2011, so it had a useful life.¹⁵ The plant first had problems in
12 2004, and only made it that long because of very few connections in the early years. The rate
13 payers paid for that plant, and it was contributed to Far West by Jacobson Construction. Now
14 we are being asked to pay for a new force main to move sewage from a failed Palm shadows
15 plant to Section 14. This is 2.1 million dollars the rate payer should not ever owe.

16 (g) There is no transparency in the operations of this company. Although it is a closely held
17 privately owned public utility, it should have a responsibility to its rate payers to be open and
18 transparent. Only when a rate increase is sought do the records get examined, and even then
19 they are not examined thoroughly enough. Even ADEQ only gets a report on a quarterly
20 schedule, and when they make inspections, Far West is notified well in advance. The rate
21 payer is not allowed into the plant except during the discovery phase of a rate making
22 procedure.

23 (h) Far West consistently disregards orders and regulations of the ACC and ADEQ. This was
24 evidenced at Palm Shadows when it began to fail and would not percolate the effluent into the
25 ground. Far West constructed four more percolation ponds, over the same non percolating
26 soil, without having permits from ACC.¹⁶ Money from the Yuma County IDA bond loan was
27 used for projects which were not approved; it was specifically designated for use in
28 construction of the wastewater projects.¹⁷ In the last 12 months they have ignored an ACC

13 WS-03478A-08-0608 Decision 71447 Pg. 19 L.4-12

14 Transcript pages 344-345

15 Transcript pg 345 Lines 3-17

16 WS-03478A-08-0608 RUCO Initial Closing Brief pg 7 Lines 15-23

17 WS-03478A-08-0608 Decision 71447 pg 25 Lines 14-18

1 order to repay Mr. Householder money owed in aid of construction¹⁸.

2 (i) The ADEQ consent order required that Far West take the Del Rey and Villa Royale wastewater
3 plants out of commission and pump the sewage to the Del Oro plant.¹⁹ Far West says that can't
4 be completed until issues with easements for placing force main are completed.²⁰ Far West has
5 known about this issue since 2003²¹, and should have started acquiring easements much earlier
6 than they did.

7 (j) Dealing with affiliate companies, specifically H&S Developers, is not at arms length. How
8 can negotiating with yourself be at Arms Length? The installation of the Palm Shadows force
9 main was awarded to H&S Developers on a time and materials basis.²² This was a 1.3 million
10 dollar project, and should have gone to competitive bid to assure the rate payers were getting a
11 fair price. This project was negotiated between Far West and H&S, who have the same
12 owners. Testimony from Mr. Jones attempted to justify a time and materials, no bid contract,
13 by saying it was a high risk construction job with unknown structures in the ground.²³ H&S
14 Developers certainly is not the only contractor having the ability to lay pipe in the ground. All
15 contractors are required to be bonded and they are also required to call a locating service to
16 mark the location of underground utilities prior to starting construction. In Arizona that
17 service is known as "Arizona Blue Stake". The Commission needs to mandate that Far West
18 adopt a formal BID PROCESS. At the very least a bid process needs to include the following
19 requirements: 1) advertising of the bid requirements placed in the local newspapers and any
20 trade papers in the area; 2) bids are to be sealed and notification of the date and place where
21 bids will be opened, included in the advertisement; 3) statement that the bids will be opened
22 and read at a time and place open to the public; 4) guaranteeing that the contract will be
23 awarded to the lowest qualified bidder; and 5) all bids will be available to be viewed by
24 bidders, at the Far West Office for a period of at least one month after bid opening. Further,
25 when doing transactions with other affiliates, Far West has admitted in data requests that when
26 FW does work for H&S it is charged at cost to H&S, however when H&S or other affiliates do
27 work or sells product to FW it is at retail. In answer to Staff Data Request GB 2-1 Sheryl
28 Ferro, Far West Accounting Analyst wrote:

18 WS-03478A-08-0256 Decision 72594 pp 78-79

19 Transcript pg 1039 Lines 22 thru 25

20 Transcript pg 1040 Lines 1 thru 20

21 Exhibits 2.PDF, page 50, paragraphs 2, 3, 4, 5, 6 (Gilkey 18)

22 Transcript pg 384, Lines 7 thru 10

23 Transcript pg 398 Line 4 thru pg 401 Line 23 and Transcript pp 1029 thru 1031 thru Line 5

1 *H&S Developers, Inc. is owned by Paula Capestro and Sandra Braden. H&S was the*
2 *original developer of the Foothills area. H&S has main extension agreements with Far*
3 *West. H&S originally held the certificates of convenience now held by Far West. The*
4 *water and sewer certificates of convenience and necessity were transferred to Far West*
5 *pursuant to Decision No. 60799 on April 8, 1998. Prior to Far West directly assuming all*
6 *construction obligations during 2010, H&S provided construction services to Far West.*
7 *H&S provides short term cash advances to Far West to meet short term operating cash*
8 *needs. Far West employees occasionally provide services to H&S. When provided,*
9 *those services are billed at cost to H&S. H&S owns and operates Hank's Market &*
10 *Butcher Shop, Foothills Mini Mart, and Foothills Sand & Gravel. Far West purchases*
11 *certain materials and supplies from those entities at retail prices. H&S receives and pays*
12 *water and sewer bills for its properties receiving water or sewer service from Far West.*

13 (k) The Commission has told Far West that they need to infuse new equity into the company. Far
14 West has not done that; their "infusion" was debt and by their own admission no outside
15 lender will loan them money. Their solution was to borrow from the Schechert Trust, an
16 affiliate, at a rate of 10% interest. Now they are looking for a 10% rate of return for the
17 company in addition to paying themselves 10% interest. The shareholders could have infused
18 that money into the company as equity instead of making it a loan. The rate payer will now be
19 asked to cover the costs of these high interest rates and reward the shareholders with a high
20 rate of return because the company is at high risk.

21

22

1 **2. What we ask of the Commission.**

- 2 (a) Require Company to file with ACC for approval of a hook-up fee tariff, prior to
3 implementation of any decision in this case.
- 4 (b) Prohibit Company from issuing any capacity assurances until hook-up fee tariff is
5 implemented.
- 6 (c) Testimony was given by Ray Jones, that hook-up fees are used, but are negotiated at the time
7 of application.²⁴ These fees must be a set tariff. We believe hook-up or capacity fees should
8 pay for new capacity needed by new customers. Monthly rates should pay for operation and
9 maintenance of existing plant and upgrades needed to meet environmental standards set by
10 ADEQ. Hook-up fees need to be kept in an escrow account used only for new construction of
11 plants needed for added growth.
- 12 (d) Install an Interim Manager. There has been much talk about this in the hearings, and we see it
13 as one of the only solutions in restoring a degree of confidence in this utility. This manager
14 must have complete control of Far West Water & Sewer Company. If he/she is not allowed to
15 have control of transactions with affiliates, then there must be no transactions with affiliates.
16 An interim manager should have at least a year to make recommendations to ACC. If it turns
17 out Far West is insolvent and it is due to mismanagement, the Company must be allowed to go
18 into bankruptcy.
- 19 (e) Order that a forensic audit be done. This would be in addition to and in support of item (d)
20 above. The findings done by Staff and RUCO took the word of the Company and an audit to
21 confirm accuracy and appropriateness of the information was not done.²⁵ Justification for a
22 forensic audit would include, but not be limited to:
- 23 1) Notes were not examined:
- 24 (a) Schechert Family Trust demand note²⁶
- 25 (b) The \$200,000 note due Scott Spencer for the benefit of Far West to cover
26 suspended civil penalties for 20 compliance requirements. Mr. Becker was unable
27 to answer the question as to whether this note had been examined.²⁷
- 28

24 Transcript pg. 89 Lines 2 thru 21

25 Transcript pg 816 Lines 6 thru 20

26 Transcript pg 808 Line 7 thru pg 812 Line 18

27 Transcript pg 812 Line 21 thru pg 815 Line 3

1 2) Intervenors discovered a 48 space RV park owned by an affiliate which was not listed
 2 as an RV Park²⁸ and was not being charged a per space fee for sewer service since it had
 3 hooked into the system since 1999. This RV park is located in back of a commercial
 4 aquatics and fitness center, also owned by an affiliate, who was paying one commercial
 5 sewer fee.²⁹

6
 7 In a spot check of some of the journal entries, Intervenors found discrepancies and
 8 inaccuracies such as:

9 1. A \$25,000 disbursement described as "Employee Expense" which turned out to be
 10 something entirely different than the journal entry showed or the first explanation.³⁰

11 2. A \$12,500 discrepancy between the cash disbursement entries and the 1099 issued to
 12 Andrew Capestro.³¹

13
 14 (f) Require the company to appoint an independent board of directors.

15 (g) Ray Jones testified that the Capestro's would like nothing more than to sell the company and
 16 retire.

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18 1 Let me ask you. Given that the, as you have
 19 2 described it, the owners, shareholders have invested so
 20 3 much in this company, personal assets and so forth, have
 21 4 they considered getting out of the utility business,
 22 5 selling to perhaps a better capitalized entity that might
 23 6 not be struggling so much financially?

24 7 A. Absolutely, Your Honor. You know, it is a funny
 25 8 thing. You know, I don't -- I still can't get my head
 26 9 around it, but the people out in Yuma like to call Paula
 27 10 Capestro and Sandy Braden the girls. I am not sure if
 28 11 they mean that in a derogatory sense or if it is just
 29 12 more of a testament to, I guess, the legacy that their
 30 13 father had with the community. But, and I will probably
 31 14 be shot for telling the court this publicly, Sandy

28 Exhibits Gilkey-5 and Gilkey-6
 29 Transcript pg 70 Line 24 thru pg 72 Line 5
 30 Exhibit Gilkey-16
 31 Exhibit Gilkey-14

1 15 Braden is 71 years old. Paula Capestro 61 years old.
2 16 Andy Capestro is 71 years old. These people would love
3 17 nothing more than to put this behind them, sell this
4 18 company to a well-capitalized firm and retire. I can
5 19 assure you of that.

6 We see this as the best overall solution to the problems we see as being systemic in this company. We
7 believe the people of the Foothills area are in favor of a move like this, but it will take much more
8 information before the people can make informed decisions. Judge Nodes mentioned that we could
9 do this through "condemnation". We don't see condemnation as the best option, as it does not always
10 result in an outcome that is best for the residents. If the shareholders really desire this, then we would
11 like to work with them. We will need time, as most winter residents don't return until November.
12 Forming a special District under Title 48, has many advantages for the residents and is encouraged by
13 most State and County governments. We would like the Commission to encourage a move in this
14 direction, in any way it can.

15 (h) Include Robert Gilkey, Barbara Gilkey and Robert Rist as Intervenors in the above
16 requested hook-up fee tariff case.

17 (i) Bring the record from this case is forward to any future Far West rate case.

18 (j) Reference Judge Nodes discussion with Robert Gilkey, regarding the renewal of a previous
19 motion.³²

20 Intervenors Robert Rist, Robert Gilkey and Barbara Gilkey, hereby renew our motion that the Arizona
21 Corporation Commission appoint an Interim Manager and/or order a forensic audit to be done of Far
22 West's operation:

23 "We believe that Decision No. 71447 shows the need for an Interim Manager. In that decision, page
24 34, lines 2-4 it was ordered that Staff shall investigate and formulate a recommendation to the
25 Commission in the permanent rate case or sooner, about whether it is in the public interest to appoint
26 an Interim Manager for this company, and any other appropriate recommendations. That decision
27 clearly concluded that the company had not acted in a competent and prudent manner and in the best
28 interest of the rate payer.

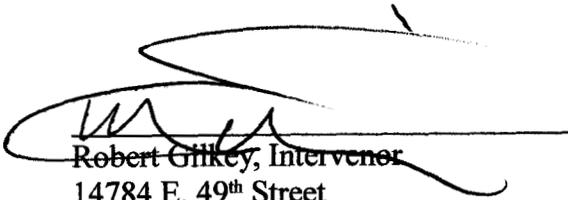
29 "In Staff's Direct Testimony of this Rate case on page 28, line 16, Staff says they did investigate
30 installing an Interim Manager, and at this time they don't recommend it, however, Staff requests that

³² Transcript pg 1059, Lines 18 thru 25

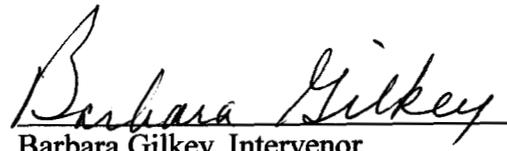
1 this opportunity be reserved.

2 In the last rate case, Staff believed Far West had displayed poor management, costing the Company
3 much more to come into compliance that it should have, and if allowed, to pass these costs on to the
4 rate payer would be unfair. We believe in this rate case, there is no evidence that anything has
5 changed in management. They always make sure that the affiliates get paid first and don't bother
6 having affiliates pay the Company what it is owed. It is time now that a manager and auditor be put
7 in place who the rate payer can trust. We have no confidence in the management of this Company.
8 Comments posted on this docket indicate many rate payers want this action, and we believe it is in the
9 best interest of the rate payers. Restoring confidence in this utility is absolutely essential.”

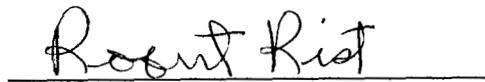
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9 **Copies of the foregoing mailed**
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