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AZ CORP COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

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APR 25 2014

COMMISSIONERS

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IN THE MATTER OF THE APPLICATION
OF TRUXTON CANYON WATER
COMPANY, INC. FOR APPROVAL OF A
RATE INCREASE.

DOCKET NO. W-02168A-11-0363

IN THE MATTER OF THE APPLICATION
OF TRUXTON CANYON WATER
COMPANY, INC. FOR APPROVAL OF A
REVISION OF THE COMPANY'S
EXISTING TERMS AND CONDITIONS OF
WATER SERVICE.

DOCKET NO. W-02168A-13-0309

IN THE MATTER OF THE APPLICATION
OF TRUXTON CANYON WATER
COMPANY, INC. FOR AUTHORITY TO
INCUR LONG-TERM DEBT.

DOCKET NO. W-02168A-13-0332

POST HEARING BRIEF

Truxton Canyon Water Company, Inc. ("Company" or "Truxton") hereby files its
post hearing brief.

////

1 **1.0 Preliminary Statement**

2 In practical terms, what Staff and/or Valle Vista Property Owners Association
3 (“VVPOA”) want from the Company and the Trust is simply stated as follows. The
4 Trust should give away control of its assets valued at over \$11 million for free. The Trust
5 should spend at least \$200,000 on a water system plant knowing none of the money will
6 ever be returned. Moreover, two years ago the water rates for the Valle Vista Property
7 Owners Association (“VVPOA”) were reduced outside of a rate case. Now revenues
8 generated by the typical resident’s rates may be reduced by more than 22%, further
9 reducing Company revenues by an additional \$72,750 (13%). While the Trust and the
10 Company are portrayed as raking in millions of dollars without expenses (*see e.g.* Exhibit
11 I-5, Rebuttal Testimony of Wes Stewart at p. 6, lns. 15-16), the reality is that the
12 Company is in financial collapse – with a loss of \$170,000 in 2011 and \$250,000 in 2012
13 - and the Trust has no money to bail out the Company.

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18 Financially destitute, the Company seeks to borrow money to fix problems the
19 Commission wants addressed. It has asked for approval to finance building arsenic
20 treatment, fix a mile of leaking pipeline, and convert the failing diesel Hualapai pumps
21 into more efficient electric motors. But Staff recommends no funds for replacing the
22 leaking pipeline, less than half the funds needed to convert the pumps to electric power,
23 and it cut the arsenic treatment cost estimate by approximately 20%. Overall, the
24 Company asked to borrow \$419,208 for these improvements and Staff is recommending
25 that approval be reduced by 38%, making it so the Company cannot afford to construct
26 the improvements. Meanwhile, the Company’s largest customer VVPOA does not want
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1 any of these costs to be passed along to it.

2 As if this were not bad enough, Staff is recommending a decrease in rates set 13
3 years ago. *See* Decision No. 63713. The idea that a rate decrease is appropriate after all
4 this time is difficult to understand and justify, especially in light of the improvements that
5 are needed and the fact that the Commission already cut the revenue from water sales to
6 VVPOA. As it stands, the Company is financially distressed despite its repeated pleas its
7 revenues not be cut. Reducing its rates any further will simply exasperate the problems
8 and jeopardize public health and safety.

11 **2.0 Revenue Requirement**

12 The Company continues to assert that a revenue requirement of \$855,924 for a
13 system with approximately 924 customers, including a large golf course, park, and
14 amenities is reasonable. *See* Exhibit A-2 at p. 6. Admittedly, on its face, if the Trust
15 Facilities (defined below) are transferred as proposed by the Company, then adjusting the
16 purchased water expense of \$147,409 seems to make sense. On the other hand, if the
17 transfer does not occur because there is no payment for the Trust Facilities, then the
18 Company will need to continue to purchase water. For decades, with Commission
19 knowledge and approval, the Company has purchased water from the Trust. *See, e.g.,*
20 Commission Decision No. 63713, p. 2, lns. 7-8, and p. 3, lns. 24-28. This is a reasonable
21 expense and is needed in order to provide service.

22 Furthermore, excluding \$202,891 in outside service expenses as proposed by Staff
23 denies the Company the ability to continue to operate and maintain the system. If this
24 adjustment is adopted, there will not be enough revenue to pay the expenses to maintain
25

1 reliable water service to its customers. *See* Exhibit A-5, Rebuttal Testimony of Sonn
2 Rowell at p. 2-3. These funds are needed to pay vendors and workers to operate and
3 maintain the system, regardless of whether the Trust or the Company owns the Trust
4 Facilities.
5

6 Finally, it should be noted that the Commission has historically allowed the Trust
7 to manage the Company and receive payment for such service. In Decision No. 63713,
8 the Commission allowed an outside operating expense of \$15.00 per connection per
9 month. *Id.* at p. 4. In fact, Staff investigated industry averages in 2001 and determined
10 that a monthly charge of \$15.00 per connection was reasonable. *Id.* Here, the Company
11 is seeking less - \$13.18 - per month per connection, as established by Trust invoices. *See*
12 Exhibit A-3, Updated Rate Case Supporting Documents.
13
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15 **3.0 Transfer of Trust Facilities.**

16 The Commission wants the Company to own the Trust Facilities, and the
17 Company is willing to own the Trust Facilities. The Trust Facilities include the
18 following, as well as related plant:
19

- 20 • Six wells
- 21 • 500,000 gallon underground storage tank
- 22 • 40,000 gallon storage tank
- 23 • 5,211,760 feet of distribution mains
- 24 • 15 miles of 14-16 inch transmission lines

25 Using replacement value methodology, the market value established for these facilities is
26 \$11,532,385. *See* Exhibit A-7, Schedule 1 of Matt Rowell's Rejoinder Testimony. The
27
28

1 Trust is willing to transfer these facilities to the Company for less than 1/10 of the value -
2 \$1.4 million. See Exhibit A-5 Testimony of Rick Neal at p. 2. Clearly, this is a
3 reasonable position.
4

5 Meanwhile, Staff and VVPOA are demanding that the Trust Facilities transfer for
6 free. Put another way, Staff and VVPOA are essentially arguing that the market value for
7 the Trust Facilities is zero. To support this argument, Staff assumes the Trust Facilities
8 are fully depreciated and then makes the legal argument that NARUC Guidelines state
9 that affiliate transactions should be at depreciated value. This position is unreasonable.
10

11 First, the court cannot base findings of fact on Staff's assumptions. Second, this is
12 not a situation where the Trust wants to transfer its assets to the Company; rather the
13 Commission, an agency of the state government, is demanding it. When the government
14 insists that owner dedicate their property to public use, the property owner is entitled to
15 compensation. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841, 107 S.Ct.
16 3141, 3151 (1987) (unless the California Coastal Commission compensated a property
17 owner, it could not require the owner to give the public an easement across his beachfront
18 property before rebuilding a house on the property.); see also *Lingle v. Chevron U.S.A.*
19 *Inc.*, 544 U.S. 528, 538-39, 125 S.Ct. 2074, 2081-82 (regulatory takings occur when the
20 government impermissibly limits an owner's free use of his property.). Property owners
21 are constitutionally entitled to the fair market value of their property subject to taking.
22 See *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 16, 104 S.Ct. 2187 (1993).
23
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27 With all due respect to NARUC, the Constitution and United States Supreme
28 Court decisions cited above trump its guidelines. Accordingly, if the Trust Facilities are

1 to be taken, the evidence of fair market value exceeds \$11 million. This clearly
2 illustrates that the requested \$1.4 million sought by the Trust is more than reasonable.

3
4 To be clear, if the Commission does not want to have the Company borrow \$1.4
5 million to acquire the Trust Facilities, then the Company has no problem purchasing
6 water from the Trust as it has done for approximately 40 years. Historically, the
7 Commission has known and condoned this arrangement. *See, e.g.*, Decision No. 63713,
8 p. 2, Ins. 7-8, and p. 3, Ins. 24-28 (Staff increased purchased water expense because the
9 rate the Company pays to the Trust was unreasonably low).

10
11 Thus, the court should recommend either (1) approve the financing request for
12 \$1.4 million to purchase the Trust Facilities; or (2) include the purchased water expense
13 of \$147,409 as an expense.

14
15 **4.0 Financing Electric Improvements to Hualapai Well System and Transmission**
16 **Line Replacement.**

17 The Company is seeking to convert its gas powered pumps to electric power,
18 which will cost approximately \$127,000. *See* Exhibit A-6, Rejoinder Testimony of Rick
19 Neal, p. 3, Ins. 15-27. Typically, the Hualapai pumps are only used when VVPOA's golf
20 course demands so much water for irrigation that the wells in Hackberry cannot produce
21 enough water. *Id.* The diesel engines at Hualapai are not remotely reliable and
22 replacement parts are no longer available. *Id.* These engines are very likely to fail this
23 summer and neither the Trust nor the Company has the money to make the necessary
24 repairs. *Id.* Meanwhile, Staff is recommending only \$60,000 for these improvements,
25 which is simply not enough to cover the cost. *Id.* at p. 6, Ins. 1-5.
26
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1 Further, Staff wants the Commission to deny the Company's request for funding
2 to fix the section of transmission pipeline that has the most leaks. At same time,
3 however, Staff still insists that the system should not leak more than 10%. See S-1,
4 Direct Testimony of Dorothy Hains, Executive Summary at ¶ 4. The obvious implication
5 is that the Trust should pay to fix the pipeline. But as previously noted, the Trust does
6 not have \$100,000 at its disposal for such a project, which is why it sought the financing
7 that Staff wants denied. See S-1, Direct Testimony of Dorothy Hains, Engineering
8 Report at p. 9. The Court should approve the Company's application so it can make the
9 improvements to the transmission line and the Hualapai well system.

13 **5.0 Interim Manager.**

14 Apparently, Staff continues to assert that an interim manager should be authorized
15 for appointment to Truxton. However, the Commission does not have the authority to
16 assume managerial control of the Company and remove the owner from managing his
17 own company over the owner's objection. See Ariz. Const. Art. 15, § 3; *Williams v. Pipe*
18 *Trades Industry Program of Ariz.*, 100 Ariz. 14, 409 P.2d 720 (1966). The Commission
19 does not have the power to control the management of the Company without the
20 Company's permission to do so. See *Phelps Dodge Corp. v. Ariz. Electric Power Coop.*,
21 207 Ariz. 95, 101, 83 P.3d 573, 579 (App. 2004).

22 If the Commission does take control of the Company from the owners, such action
23 will constitute a taking. See Ariz. Const. Art. 2, § 17. Under the constitutional provision
24 that "no private property shall be taken or damaged" without just compensation, a state is
25 liable for injuries to personal property as well as real property. *State v. Leeson*, 84 Ariz.

1 44, 323 P.2d 692 (Ariz.1958). If the Commission takes control of the Company, the
2 biggest issue may become how much money the Arizona taxpayers will have to pay the
3 Trust for the Company. While the Company does not want to take such action, it is a
4 plausible outcome. Similarly, the Commission cannot order the Company to give up its
5 constitutional rights to protect its property against an interim manager, who will certainly
6 be held responsible for any and all of his or her actions.
7

8
9 The attorney for VVPOA agrees with this argument. In another matter,¹
10 addressing the interim management issues, VVPOA's attorney represented to this court,
11 "[i]f the Commission ordered such involuntary transfer, it would result in a regulatory
12 taking of [the water company's] property, in turn exposing the Commission ... to
13 payment of just compensation for such taking." *See id.*, Montezuma Rimrock Water
14 Company Closing Brief at p. 62 (Aug. 30, 2013).
15
16

17 **6.0 Trust Is Not a Public Service Corporation.**

18 The Trust is not a public service corporation. Long ago the Arizona Supreme
19 Court recognized "[f]ree enterprise and competition is the general rule. Governmental
20 control and legalized monopolies are the exception... Such invasion of private right
21 cannot be allowed by implication or strained construction." *Ariz. Corp. Com'n v.*
22 *Nicolson*, 108 Ariz. 317, 321 497 P.2d 815, 819 (1972). Under this context, the Arizona
23 Corporation Commission determines if an entity is a public service corporation by
24
25

26
27 ¹ *In the Matter of the Rate Application of Montezuma Rimrock Water Company, LLC*, Docket
28 No. W-04254A-11-0323, et al.

1 applying the following eight factors set forth in *Natural Gas Serv. Co. v. Serv-Yu Coop.*,
2 70 Ariz. 237, 219 P.2d 324 (1950):

- 3 1. What the corporation actually does;
- 4 2. A dedication to public use;
- 5 3. Articles of incorporation, authorization, and purposes;
- 6 4. Dealing with the service of a commodity in which the public has been
7 generally held to have an interest;
- 8 5. Monopolizing or intending to monopolize the territory with a public service
9 commodity;
- 10 6. Acceptance of substantially all requests for service;
- 11 7. Service under contracts and reserving the right to discriminate is not always
12 controlling; and
- 13 8. Actual or potential competition with other corporations whose business is
14 clothed with public interest.

15 *Southwest Gas Corp. v. Ariz. Corp. Comm'n*, 169 Ariz. 279, 286, 818 P.2d 714, 721

16 (Ariz. Ct. App. 1991). As explained below, applying these eight factors demonstrates the
17 Trust is not a public service corporation.

18 **6.1 What the corporation actually does.**

19 The Company understands that the Trust was established to pass Neal family
20 assets from one generation to the next without incurring excessive taxes. The primary
21 assets in the Trust included a cattle operation and real property. Part of the real property
22 assets included the Trust Facilities. The two water companies also owned by the Neal
23 family were added to the Trust assets.

24 Historically, the Trust sold water from its wells to the water companies and the
25 Valle Vista Property Owners Association because it was the lowest cost alternative. Now
26

1 the Trust only sells water to Truxton. Truxton has the ability to own its own wells and
2 supply water to its customers without the use of the Trust's assets.
3

4 **6.2 A dedication to public use.**

5 The Trusts property is not dedicated to a public use. The Trust owns thousands of
6 acres of land, buildings, land improvement equipment, and historically owned cattle and
7 related ranching personal property. This property is not dedicated to public use. While it
8 is true that the Trust did provide water to the water companies, it never dedicated its
9 wells or other infrastructure to public use.
10

11 **6.3 Articles of incorporation, authorization, and purposes.**

12 The Trust was established for tax purposes. The Trust's purpose was to minimize
13 the amount of intergenerational tax liability. It was never intended to be a public service
14 corporation.
15

16 **6.4 Dealing with the service of a commodity in which the public has been 17 generally held to have an interest.**

18 The issue here is whether the water provided by the Trust is sufficiently essential
19 for it to be characterized as a commodity in which the public has an interest. The Trust
20 does not serve any water users. While the public has an interest in water as a commodity,
21 the Trust is not the regulated provider of that commodity. Truxton is that provider. As
22 stated before, the Company is willing to acquire wells and plants to provide the water to
23 its customers.
24

25 **6.5 Monopolizing or intending to monopolize the territory.**

26 The Trust has never sought to monopolize a territory.
27

28 **6.6 Acceptance of substantially all requests for service.**

1 The Trust has never accepted substantially all requests for service.

2 **6.7 Service under contracts and reserving the right to discriminate.**

3
4 Providing service under contract and reserving the right to discriminate is a factor
5 supporting the conclusion that an entity is not a public service corporation. The Trust has
6 provided water under contract to the water companies and VVPOA.

7
8 **6.8 Competition with other corporations whose business is clothed with**
9 **public interest.**

10 The Trust does not compete with any public service corporation. It does not sell
11 water to any entity except the Company. In doing so, it is helping to Company to provide
12 water service.

13 **6.9 Conclusion**

14 As the application of the *Serv-Yu* test illustrates, the Trust clearly is not a public
15 service corporation.

16 RESPECTFULLY SUBMITTED this 25th day of April, 2014.

17
18 **MOYES SELLERS & HENDRICKS LTD.**

19 

20 _____
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23 Company, Inc.

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