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AZ CORP COMMISSION
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1 FENNEMORE CRAIG
2 Jay L. Shapiro (No. 014650)
3 Patrick Black (No. 017141)
4 3003 N. Central Ave.
5 Suite 2600
6 Phoenix, Arizona 85012
7 Attorneys for Pine Water Company, Inc.

Arizona Corporation Commission

DOCKETED

DEC 19 2003

DOCKETED BY *CB*

BEFORE THE ARIZONA CORPORATION COMMISSION

8 IN THE MATTER OF THE
9 APPLICATION OF PINE WATER
10 COMPANY FOR A
11 DETERMINATION OF THE
12 CURRENT FAIR VALUE OF ITS
13 UTILITY PLANT AND PROPERTY
AND FOR INCREASES IN ITS
RATES AND CHARGES BASED
THEREON FOR UTILITY SERVICE
AND FOR APPROVAL TO INCUR
LONG-TERM DEBT

DOCKET NO: W-03512A-03-0279

MOTION FOR PROTECTIVE ORDER

14 Applicant Pine Water Company ("Pine Water" or "Company"), hereby requests
15 that the Arizona Corporation Commission ("Commission") issue a Protective Order in the
16 above-captioned proceeding quashing the notices of deposition (collectively referred to
17 herein as "Notices") served on the Company by intervener Pine Strawberry Water
18 Improvement District ("District") on or about December 8, 2003.¹ The depositions sought
19 by the District are unnecessarily cumulative and duplicative as well as unduly burdensome
20 on the Company, as well as ratepayers who will be forced to incur substantial additional
21 rate case expense. Accordingly, for the reasons discussed herein below, Pine Water urges
22 the Commission to issue a protective order pursuant to Rule 26(c) of the Arizona Rules of
23 Civil Procedure, A.A.C. R 14-3-101(a) and R 14-3-109(o) quashing the Notices.

24
25 ¹ Copies of the Notices are included herewith as Attachment 1. Notably, although the Notices and
26 accompanying cover letter are dated December 8, they were not received by counsel for Pine Water until
Saturday, December 13, 2003.

1 **I. Depositions are Unnecessary in Commission Rate Case Proceedings.**

2 Depositions upon oral examination are very rare in matters before the Commission,
3 particularly rate cases. In this case, Pine Water has already pre-filed written direct and
4 rebuttal testimony and, on January 5, 2004, will file its rejoinder testimony. Therefore, in
5 contrast to court proceedings where, absent a deposition, an opposing party cannot know
6 the substance of an opposing witness' testimony before trial, the District will know
7 exactly what the Company's two witnesses, Mr. Robert T. Hardcastle and Mr. Thomas J.
8 Bourassa, will say when they take the stand during the hearings in this matter.²

9 Moreover, written discovery practice before the Commission is very liberal and
10 parties may use written interrogatories and requests for production of documents,
11 generally known as "data requests." Response times for such data requests are
12 significantly shorter, ten calendar days in this docket, than the response times allowed
13 under the Rules of Civil Procedure and the Commission does not generally impose limits
14 on the number of such requests. In fact, to date, the District has already propounded 61
15 interrogatories and 17 requests for production on Pine Water and the Company has
16 responded by providing information relevant or reasonably calculated to lead to the
17 discovery of admissible evidence in this ratemaking proceeding.³ For these reasons, the
18 depositions sought by the District are unnecessarily cumulative or duplicative.

19
20
21 ² As reflected in the attached Notices, the District also seeks to take the deposition of Mistie Jared. Ms.
22 Jared is not a witness for the Company in this proceeding and, in fact, is not even an employee of Pine
Water. As discussed further below, there is simply no basis for the District to take the deposition of a non-
witness.

23 ³ The Company has objected to many of the District's written discovery requests, as reflected in the
24 District's recent Motion to Compel Discovery. However, as explained in Pine Water's opposition to that
25 motion, filed concurrently herewith, many of the District's written discovery requests seek information
26 well beyond the scope of this proceeding. Nevertheless, Pine Water has responded by providing
information regarding its plant and operating expenses, in addition to the extensive information provided
with its application, and, more recently, has voluntarily provided the District with copies of the
Company's responses to data requests promulgated by Staff.

1 **II. The District is Engaged in a Fishing Expedition Seeking Information**
2 **Unrelated to the Determination of Just and Reasonable Rates for Pine Water.**

3 As stated, the District has also filed a Motion to Compel Discovery and,
4 concurrently herewith, Pine Water has responded to such Motion as required by the
5 December 16, 2003 Procedural Order in this docket. In its response, the Company asserts,
6 among other things, that the District's discovery conduct portrays an inappropriate use of
7 this proceeding to further its desire to condemn or otherwise acquire the assets of Pine
8 Water. See Opposition to Motion to Compel ("Opposition") at 3; see also Rebuttal
9 Testimony of Robert T. Hardcastle ("Hardcastle Rb.") at Hardcastle Rebuttal Exhibit 2
10 (reflecting District's efforts already underway). In short, the District cannot be said to
11 represent the interests of Pine Water's customers; there is absolutely no evidence in the
12 record demonstrating that ratepayers have sought or otherwise authorized the District to
13 intervene in this proceeding. Rather, the District is little more than a county-managed,
14 competitive water service provider with the power of eminent domain seeking a free shot
15 at information it can later use to drive Pine Water out of business. Hardcastle Rb. at 33-
16 36; Opposition at 3.

17 For example, much of the written discovery propounded by the District seeks
18 information related to a determination of the fair market value of property owned by Pine
19 Water, its affiliate Strawberry Water Company, and its shareholder, Brooke Utilities. See,
20 e.g., Opposition at 11-12. Of course, Strawberry Water and Brooke Utilities are not
21 parties to this proceeding and discovery regarding the value of these entities' assets is
22 outside the scope of this proceeding.⁴ Moreover, the fair market value of Pine Water's
23 property, i.e., what a willing buyer would pay a willing seller, is not relevant in this
24

25 ⁴ As further explained in Pine Water's opposition to the motion to compel, the Company has provided
26 information regarding transactions between Pine Water and Strawberry Water and/or Brooke Utilities as
such information is clearly relevant to certain test year expenses and other issues in this proceeding.
Opposition at 9-11.

1 proceeding, where the Commission is required to determine the Company's fair value rate
2 base based on original cost less depreciation. *Id.* at 11-12.

3 Similarly, the District has sought information regarding the value Brooke Utilities
4 places on Pine Water's CC&N as well as Brooke Utilities' business and decision-making.
5 The District has also sought substantial information regarding Pine Water's operations,
6 not only for the test year, but for as many as five and seven years prior to the test year. *Id.*
7 at 6-9. Yet, the District complained when Pine Water objected on the basis that the
8 Commission sets rates based on a historical test year, justifying production of information
9 concerning expenses limited to the test year and one prior year in most instances. *See*
10 District Motion to Compel at 3-5. In light of this incredibly broad discovery, Pine Water
11 simply cannot escape the conclusion that the requested depositions are merely an
12 additional attempt by the District to utilize this proceeding to find out everything it can
13 about an entity, or entities, it seeks to condemn. Obviously, this is improper.

14 **III. The Commission has the Authority to Limit Discovery Under the Applicable**
15 **Rules Of Civil Procedure And The Commissions Rules Of Practice.**

16 Pine Water does not dispute that depositions are authorized under the Arizona
17 Rules of Civil Procedure, and that those rules generally apply to this proceeding.
18 However, Rule 26(b), Arizona Rules of Civil Procedure, allows the Commission to limit
19 the means of discovery for any of three enumerated reasons:

- 20 1. The discovery sought is unreasonably cumulative or
21 duplicative, or obtainable from some other source that is
22 either more convenient, less burdensome or less
expensive;
- 23 2. The party seeking discovery has had ample opportunity
24 by other means to obtain the information sought; or
- 25 3. The discovery is unduly burdensome or expensive.

25 Presently, it is unclear exactly why the District feels three depositions are necessary in this
26 case, or what discoverable information is being sought that is not otherwise obtainable

1 through written discovery. Nevertheless, all three factors appear to be present in this case,
2 compelling an order of the Commission quashing the Notices.

3 To begin with, as explained above, the Commission's discovery process applicable
4 to this rate case affords all parties ample opportunity to submit written discovery to obtain
5 information regarding the determination of the fair value of Pine Water's property devoted
6 to public service, a reasonable return thereon and recovery of reasonable and prudent
7 operating expenses. As indicated, the Company has responded to data requests by Staff
8 and the District, providing information regarding its test year operating expenses, its plant,
9 and the manner in which it determined the requested increase in its revenue requirement.
10 In addition, Pine Water has responded to requests regarding operational issues, including
11 information regarding the chronic water supply shortages that plague Pine Water and its
12 customers. Moreover, nothing prohibits the District from propounding additional
13 discovery requests.

14 Written discovery is far more convenient and less burdensome on the Company,
15 given that the Company would have to prepare its witnesses (and in this case, a non-
16 witness) for depositions, and then produce each for several hours at a time and place of the
17 District's choosing. This is particularly true given the timing of the District's Notices.
18 The District sought to intervene in this case on or about October 15, 2003, the last day it
19 could do so under the applicable Procedural Order. Now, having waited nearly two
20 months, the District seeks to take depositions on dates unilaterally selected to immediately
21 follow the 2003-2004 holiday season, coincident with the Company's rejoinder filing and
22 just over one week before the commencement of the hearings in this docket. This would
23 create a substantial hardship on Pine Water.⁵

24 _____
25 ⁵ Counsel for the District first raised the notion of depositions with counsel for Pine Water on November 6,
26 2003. That same day, the District was informed that Pine Water would not agree to produce its witnesses
for deposition, generally voicing the same reasons asserted herein. See Attachment 2.

1 Written discovery is also far less expensive. The requested depositions will require
2 the Company to incur substantial attorney time to prepare the deponents for deposition,
3 and to attend and defend said depositions, as well as the cost of transcripts from such
4 depositions.⁶ If Pine Water is required to incur legal, expert witness and other related
5 costs associated with the District's desire to take depositions in this rate proceeding, such
6 amounts are appropriately recovered by Pine Water as necessary rate case expense. As a
7 consequence, the depositions sought by the District would cause an unnecessary financial
8 burden on ratepayers.

9 The Company's opposition to depositions in proceedings before public utility
10 commissions is not unique. For example, in *Re The Application of Western Wireless*
11 *Holding Co. for Designation as an Eligible Telecommunications Carrier, 1999 Wyo.*
12 *PUC Lexus, 530*, the Applicant refused to make its witnesses available for deposition by
13 independent local exchange carriers who were opposing the wireless company's
14 application. Upon filing of a motion for a protective order, the Wyoming Public Service
15 Commission concluded the depositions would not be allowed because the wireless
16 company had pre-filed testimony and written discovery was readily available:

17 Western Wireless has shown good cause to support its motion
18 for a protective order. Western Wireless has demonstrated,
19 consistent with Rule 26(b)(1)(B) [WRCP], that the discovery
20 sought could have been obtained through sources that were
21 more convenient, less burdensome or less expensive, and that
22 the Independent Companies had ample opportunity to conduct
discovery in a timely manner. Independent Companies chose
not to utilize these other sources in a timely manner, but
rather chose not to utilize these other sources in a timely
manner, but rather chose to depose witnesses at the eleventh
hour. (See 1999 Wyo. PUC LEXIS 530[*8])⁷

23 Similarly, in *Re US West Communications, Inc. and its Ability to Serve South*

24 ⁶ There is also a question regarding the costs of preparing and producing Pine Water's accounting witness
25 for deposition, although Pine Water is of the belief that the District must pay the costs of Pine Water's
expert witness in the event the depositions are allowed.

26 ⁷ For convenience copies of the two decisions cited herein are included as Attachment 3.

1 *Dakota Customers*, 1998 S.D. PUC Westlaw 417390, the South Dakota Public Service
2 Corporation denied a request to depose witnesses who had previously filed testimony:

3 On the issue of depositions, the Commission ruled that it will
4 not allow depositions since the Commission is requiring
5 prefiled testimony. The Commission noted that the use of
6 prefiled testimony, and the limitation of direct testimony at a
7 hearing to what is contained in the written testimony has
8 traditionally been used the by the Commission in place of
9 depositions and is designed to limit burdensome discovery in
10 administrative appeals. (*See* 1998 S.D. PUC Lexis [p.2])

11 Finally, if the Commission were to conclude that depositions are warranted in this
12 proceeding, which it should not do for the reasons discussed herein above, the District
13 must not be allowed to depose Ms. Jared, who is not a witness in this case. The purpose
14 of discovery is to allow a party to prepare for trial where it will have to cross-examine
15 adversarial witnesses. Ms. Jared is not a witness. Nevertheless, the District will likely
16 assert that Ms. Jared's deposition is appropriate because she has provided certain of the
17 Company's data request responses in this docket. Having persons employed by the utility
18 that are not witnesses respond to data requests is certainly not uncommon and should not
19 provide a basis for the excessive discovery sought herein by the District. This is
20 particularly true given the fact that Ms. Jared possesses information that is otherwise
21 available through the Company's witnesses, to the extent such information is relevant to
22 this proceeding in the first place.

23 **IV. Conclusion.**

24 Before this matter proceeds to hearings, the District will know exactly what Pine
25 Water's witnesses will testify to and generally know what exhibits will support such
26 testimony. At best, the District is seeking to practice its cross-examination of these
27 witnesses through the requested depositions. At worst, the District is using this
28 proceeding to conduct a fishing expedition to obtain information relevant, not to a
29 determination of just and reasonable rates, but to the District's desire to acquire or

1 otherwise condemn the assets of Pine Water. Given the substantial inconvenience that
2 would be caused to Pine Water if such depositions take place – an inconvenience
3 exacerbated by the District’s delay in seeking this unusual discovery – coupled with the
4 detrimental impact on the Company’s ratepayers, who will ultimately be saddled with
5 paying for this unnecessary and costly discovery, there is ample reason to disallow the
6 depositions sought by the District. Accordingly, Pine Water urges the Commission to
7 issue a Protective Order quashing the Notices.

8 RESPECTFULLY SUBMITTED this 19th day of December, 2003.

9 FENNEMORE CRAIG

10
11 By _____

Jay L. Shapiro
Patrick J. Black
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012
Attorneys for Pine Water Company

12
13
14
15
16
17 Original and 13 copies were filed
this 19th day of December, 2003, to:

18 Docket Control
19 Arizona Corporation Commission
1200 West Washington
20 Phoenix, Arizona 85007

21 A copy of the foregoing
22 was hand-delivered this
19th day of December, 2003, to:

23 Dwight D. Nodes, Assistant Chief ALJ
24 Hearing Division
Arizona Corporation Commission
25 1200 W. Washington St.
Phoenix, AZ 85007

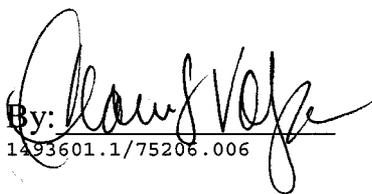
1 Gary H. Horton
2 Legal Division
3 Arizona Corporation Commission
4 1200 W. Washington St.
5 Phoenix, AZ 85007

6 A copy of the foregoing was sent by
7 electronic and regular mail this
8 19th day of December, 2003, to:

9 John O. Breninger
10 P.O. Box 2096
11 3475 Whispering Pines Road
12 Pine, AZ 85544-2096

13 John G. Gliege, Esq.
14 Law Office of John G. Gliege
15 P.O. Box 1388
16 Flagstaff, Arizona 86002-1388
17 Attorney for Pine-Strawberry
18 Water Improvement District

19 Robert M. Cassaro
20 P.O. Box 1522
21 Pine, Arizona 85544

22
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24
25
26
By: 
1493601.1/75206.006

ATTACHMENT

#1

JAY SHAPIRO

DEC 13 2003

ACTION _____

1 LAW OFFICE OF JOHN G. GLIEGE
2 P.O. Box 1388
3 Flagstaff, AZ 86002-1388
4 (928 380 0159)

5 John G. Gliege (#003644)
6 Attorney for Pine Strawberry Water Improvement District

7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

8 **IN THE MATTER OF THE APPLICATION**
9 **OF PINE WATER COMPANY FOR A**
10 **DETERMINATION OF THE CURRENT**
11 **FAIR VALUE OF ITS UTILITY PLANT AND**
12 **PROPERTY, A RATE INCREASE AND FOR**
13 **APPROVAL TO INCUR LONG-TERM DEBT.**

DOCKET NO. W-03512A-03-0279
NOTICE OF DEPOSITION

14 **TO: PINE WATER COMPANY AND ITS ATTORNEY OF RECORD:**

15 **PLEASE TAKE NOTICE** that the testimony of ROBERT HARDCASTLE, President of Pine
16 Water Company, Inc, will be taken on oral examination before a Notary Public, or some other official
17 authorized by law to administer oaths, at:

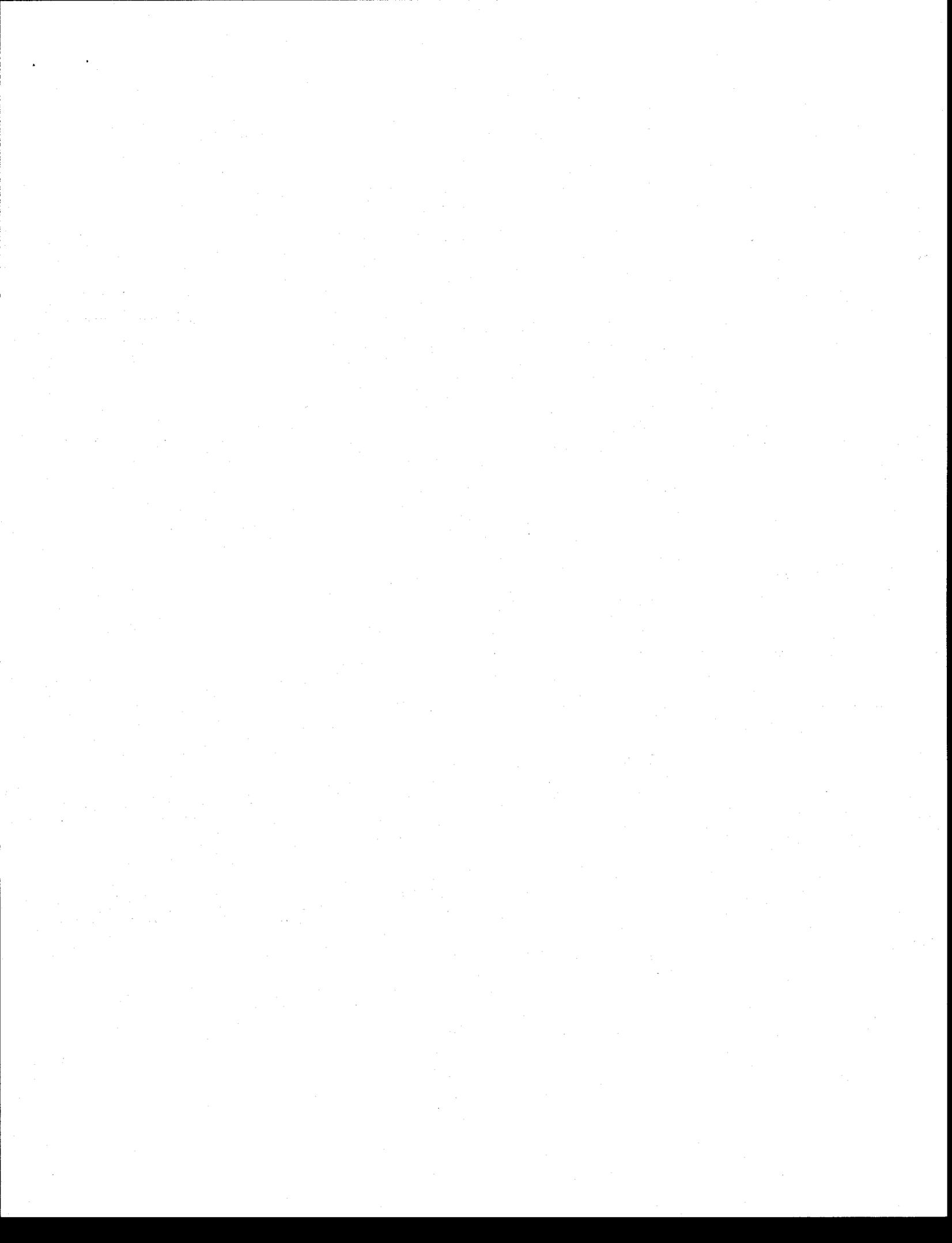
18 **DATE AND TIME OF APPEARANCE:**

JANUARY 6, 2004 AT 9:00 AM

19 **PLACE OF APPEARANCE:**

Brown & Toleu
4500 s. Lakeshore Dr. Ste 280
TEMPE AZ 85282

20
21
22 The oral examination will continue thereafter until completed. You are invited to attend and cross
23 examine.
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25
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28
29



JAY SHAPIRO

DEC 13 2003

ACTION _____

1 LAW OFFICE OF JOHN G. GLIEGE
2 P.O. Box 1388
3 Flagstaff, AZ 86002-1388
4 (928 380 0159)

5 John G. Gliege (#003644)
6 Attorney for Pine Strawberry Water Improvement District

7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

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10 **DETERMINATION OF THE CURRENT**
11 **FAIR VALUE OF ITS UTILITY PLANT AND**
12 **PROPERTY, A RATE INCREASE AND FOR**
13 **APPROVAL TO INCUR LONG-TERM DEBT.**

DOCKET NO. W-03512A-03-0279
NOTICE OF DEPOSITION

14 **TO: PINE WATER COMPANY AND ITS ATTORNEY OF RECORD:**

15 **PLEASE TAKE NOTICE** that the testimony of THOMAS J. BOURASSA, accountant for
16 Pine Water Company, Inc, will be taken on oral examination before a Notary Public, or some other
17 official authorized by law to administer oaths, at:

18 **DATE AND TIME OF APPEARANCE:**

JANUARY 5, 2004 AT 9:00 AM

19 **PLACE OF APPEARANCE:**

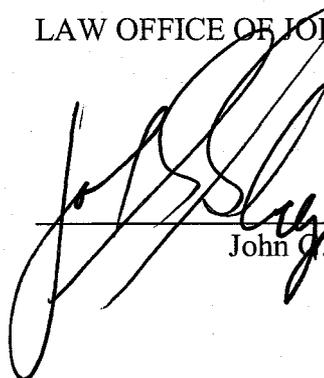
Brown & Toleu
4500 s. Lakeshore Dr. Ste 280
TEMPE AZ 85282

20
21
22 The oral examination will continue thereafter until completed. You are invited to attend and cross
23 examine.
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1 Respectfully submitted this 8th day of December, 2003.

2 LAW OFFICE OF JOHN G. GLIEGE

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John G. Gliege

Original and thirteen copies of the foregoing
sent this 8th day of December, 2003 to:

Docket Control Center
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

Copies of the foregoing
Mailed this 8th day of
December, 2003 to :

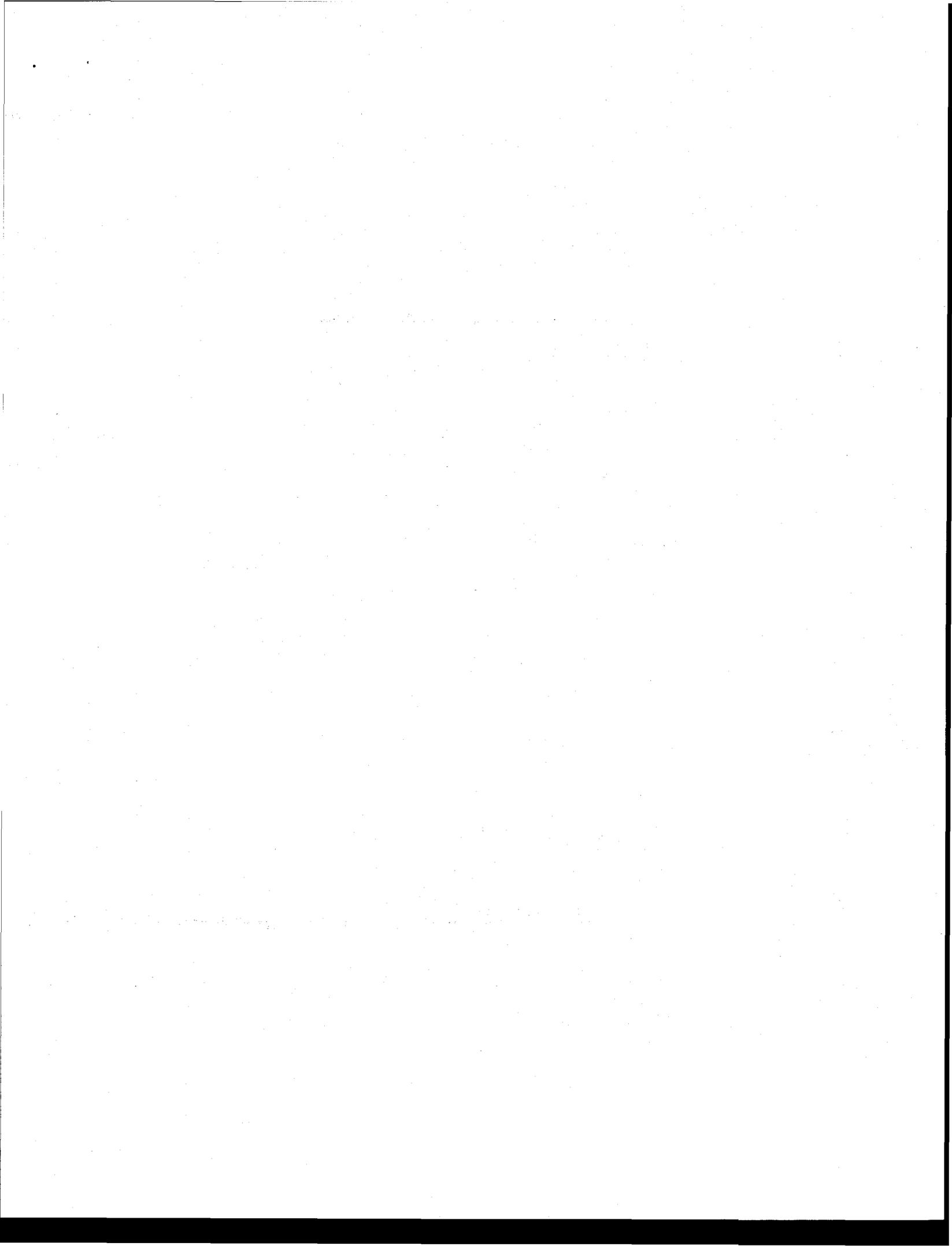
Jay L. Shapiro
Patrick Black
Fennemore Craig
3003 North Central Ave. Ste 2600
Phoenix, AZ 85012-2913

Christopher Kempsey, Chief Counsel
LEGAL DIVISION
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

Ernest G. Johnson
Director of Utilities
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

Robert M. Cassaro
P.O. Box 1522
Pine, AZ 85544

John O. Breninger
P.O. Box 2096
Pine, AZ 85544



JAY SHAPIRO

DEC 13 2003

ACTION _____

1 LAW OFFICE OF JOHN G. GLIEGE
2 P.O. Box 1388
3 Flagstaff, AZ 86002-1388
4 (928 380 0159)

5 John G. Gliege (#003644)
6 Attorney for Pine Strawberry Water Improvement District

7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

8 **IN THE MATTER OF THE APPLICATION**
9 **OF PINE WATER COMPANY FOR A**
10 **DETERMINATION OF THE CURRENT**
11 **FAIR VALUE OF ITS UTILITY PLANT AND**
12 **PROPERTY, A RATE INCREASE AND FOR**
13 **APPROVAL TO INCUR LONG-TERM DEBT.**

DOCKET NO. W-03512A-03-0279
NOTICE OF DEPOSITION

14 **TO: PINE WATER COMPANY AND ITS ATTORNEY OF RECORD:**

15 **PLEASE TAKE NOTICE** that the testimony of MISTIE JARED, an agent or employee of
16 Pine Water Company, Inc, will be taken on oral examination before a Notary Public, or some other
17 official authorized by law to administer oaths, at:

18 **DATE AND TIME OF APPEARANCE:**

JANUARY 5, 2004 AT 1:00 PM

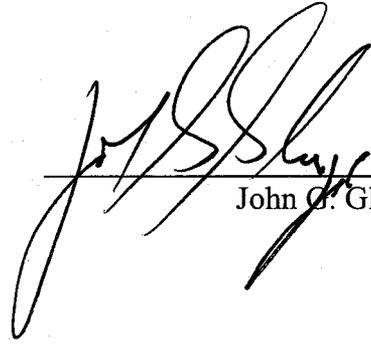
19 **PLACE OF APPEARANCE:**

Brown & Toleu
4500 s. Lakeshore Dr. Ste 280
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22 The oral examination will continue thereafter until completed. You are invited to attend and cross
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29

1 Respectfully submitted this 8th day of December, 2003.

2 LAW OFFICE OF JOHN G. GLIEGE

3
4
5 

John G. Gliege

6 Original and thirteen copies of the foregoing
7 sent this 8th day of December, 2003 to:

8 Docket Control Center
9 Arizona Corporation Commission
10 1200 W. Washington Street
11 Phoenix, AZ 85007

11 Copies of the foregoing
12 Mailed this 8th day of
13 December, 2003 to :

14 Jay L. Shapiro
15 Patrick Black
16 Fennemore Craig
17 3003 North Central Ave. Ste 2600
18 Phoenix, AZ 85012-2913

18 Christopher Kempsey, Chief Counsel
19 LEGAL DIVISION
20 Arizona Corporation Commission
21 1200 W. Washington Street
22 Phoenix, AZ 85007

21 Ernest G. Johnson
22 Director of Utilities
23 Arizona Corporation Commission
24 1200 W. Washington Street
25 Phoenix, AZ 85007

25 Robert M. Cassaro
26 P.O. Box 1522
27 Pine, AZ 85544

28 John O. Breninger
29 P.O. Box 2096
Pine, AZ 85544

ATTACHMENT

#2

SHAPIRO, JAY

From: SHAPIRO, JAY
Sent: Thursday, November 06, 2003 11:04 PM
To: 'John G. Gliege'
Subject: RE: Depositions of Mr. Hardcastle and Mr. Bourassa

John-- I did not include Pine Water's response to this request in my earlier e-mail regarding the parties' written discovery because I believe your request herein raises several other, unrelated issues, that are best addressed separately.

That said, Pine Water responds to the District's requests concerning depositions and subpoenas as follows:

1. Pine Water will not agree to the depositions of its witnesses in the pending rate case, Tom Bourassa and/or Robert Hardcastle. Put bluntly, I have represented numerous public service corporations in numerous rate cases before the Commission and have never seen a single deposition. I believe the reasons are obvious. For one thing, rate cases such as this one involve prefiled testimony of witnesses (three rounds from the applicant) which obviates much of the purpose of depositions. Moreover, Commission ratemaking proceedings allow for more liberal discovery than traditional civil litigation to the extent that there are no preset limits on the numbers of discovery requests that can be promulgated. Finally, depositions would have a disproportionate impact on the Pine Water's rate case expense, which will be, up to an amount determined to be reasonable by the Commission, recovered from ratepayers.
2. I will not seek authority to accept a subpoena ducus tecum on behalf of Brooke Utilities or Crystal Investments, LLC and any effort to subpoena financial or other documentation directly from these entities in Pine Water's pending rate case will be opposed. Neither Brooke Utilities nor Crystal Investments are public service corporations regulated by the Commission, nor are these entities subject to A.A.C. R14-2-801 *et seq.*, the Commission's rules governing holding companies and affiliated interests as Pine Water is not a Class A utility. Accordingly, their financial and/or other information is not discoverable in this proceeding.
3. Notwithstanding Pine Water's position, as set forth in Point No. 2 above, to the extent Pine Water seeks to include capital investment in rate base and/or to recover operating expenses that reflect some transactional nexus with a holding company, such as Brooke Utilities, Pine Water recognizes that it bears the burden of demonstrating the prudence of such investment and/or expenses. Accordingly, to the extent Pine Water has placed such investment and/or expenses at issue in this case, Pine Water is required to submit evidence to support the prudence of such investment and/or expenses and, likewise, to respond to data requests seeking to determine the basis for and substantiation of such investment and/or expenses. In fact, some of this information has already been sought by the District in its first set of interrogatories and first set of requests for production of documents in Pine Water's pending rate case. Notably, however, the propriety of such discovery must be considered on a case-by-case basis, as we will due with respect to the District's first set of interrogatories and first set of requests for production of documents in accordance with the Procedural Order governing Pine Water's pending rate case.

Please let me know if you have questions or wish to discuss this matter further.

Jay

-----Original Message-----

From: John G. Gliege [mailto:jgliege@earthlink.net]
Sent: Thursday, November 06, 2003 1:43 PM
To: SHAPIRO, JAY
Subject: Depositions of Mr. Hardcastle and Mr. Bourassa

Jay, In light of your rather busy schedule I would like to schedule depositions for Mr. Hardcastle and Mr. Bourassa between December 1, when we receive the rebuttal testimony and your discovery responses and December 22 when we have to make a filing with the Commission. Please advise as to your available

12/19/2003

dates.

Also, since Mr. Hardcastle is listed as Statutory Agent for Brooke Utilities, Inc., can you obtain authorization to accept a subpoena duces tecum for Brooke Utilities for certain financial documentation from them. Also, can you obtain the same authority to accept a subpoena on behalf of Crystal Investments L.L.C.? Please advise. John G. Gliege

12/19/2003

ATTACHMENT

#3

LEXSEE 1999 WYO PUC LEXIS 530

IN THE MATTER OF THE APPLICATION OF WWC HOLDING CO., INC.
(WESTERN WIRELESS) FOR AUTHORITY TO BE DESIGNATED AS AN
ELIGIBLE TELECOMMUNICATIONS CARRIER

DOCKET NO. 70042-TA-98-1; (RECORD NO. 4432)

Wyoming Public Service Commission

1999 Wyo. PUC LEXIS 530

June 25, 1999, Issued

PANEL: [*1] STEVE ELLENBECKER, Chairman; STEVE FURTNEY, Deputy Chairman; KRISTIN H. LEE, Commissioner

OPINION: ORDER DENYING MOTION TO COMPEL AND GRANTING MOTION FOR PROTECTIVE ORDER

This matter is before the Commission upon the Motion to Compel filed by Intervenors, Range Telephone Cooperative, Inc., RT Communications, Inc., Dubois Telephone Exchange, Inc., and Union Telephone Company (Independent Companies), and Western Wireless' Motion for a Protective Order regarding the Proposed Deposition of Western Wireless' Witness, filed in the above captioned matter. The Commission noticed these Motion filings for legal argument, which was held at the Commission's regular open meeting of June 10, 1999. Counsel for Independent Companies, Western Wireless and U S WEST presented argument on the Motions at the June 10, 1999, open meeting.

The Commission, having reviewed the respective motions, and having considered the argument of the respective legal counsel, FINDS and CONCLUDES:

1. Independent Companies in their Motion to Compel, and through argument of counsel, requested that the Commission compel the deposition of Western Wireless' witness Gene DeJordy. In support of its motion, Independent Companies [*2] state that Western Wireless was advised pursuant to a faxed message on or around June 1, 1999, of its desire to depose Western Wireless' witness Gene DeJordy. Independent Companies were advised on June 8, 1999, in a response from Western Wireless that Mr. DeJordy would not be made available for a deposition.

2. Independent Companies support their motion to compel the deposition *duces tecum* of Mr. DeJordy by citing the Commission's Rules 108 and 109 which provide that depositions and discovery will generally be governed in accordance with the provisions contained in the Wyoming Administrative Procedure Act which also references the provisions contained in the Wyoming Rules of Civil Procedure. Bruce Asay, counsel for the Independent Companies, further argued that as a party the Independent Companies had a right to engage in discovery and the right to depose under the Wyoming Rules of Civil Procedure. Mr. Asay stated that although responses to Independent Company interrogatories were received, they were not responsive and were "worthless".

Mr. Asay argued at the motion hearing that Mr. DeJordy be compelled to appear in Cheyenne for the deposition on June 16, 1999, that there be [*3] no limits on the scope or duration of the deposition, and that the Independent Companies not be required to pay any costs associated with the deposition.

3. Roger Franzen, counsel for U S WEST, argued that the Independent Companies should be allowed to depose Mr. DeJordy and indicated the desire of U S WEST to attend and participate in the deposition.

4. Western Wireless, in its Motion for Protective Order opposes the taking of Mr. DeJordy's deposition, citing as grounds for its opposition the following:

a. that upon contacting Mr. Asay regarding his June 1, 1999 fax stating his desire to conduct a deposition *duces tecum*, Mr. Asay was unable to state what documents he wished to be produced at the deposition, why he had not requested the deposition sooner as the case has been pending for nearly nine months, and he was unable to state what he expected to discover through deposition that he would not have been able to discover through interrogatories;

b. that this subject proceeding has been on file for nearly nine months and scheduled hearings have been delayed several times at the request of the Independent Companies;

c. that the Independent Companies have had ample time and [*4] opportunity to discover Western Wireless' position, its testimony, and documents that Western Wireless will rely on, as well as other issues;

d. that no limitations on the number of interrogatories or discovery cut-off dates were imposed by the Commission during the pendency of this proceeding;

e. that counsel for Western Wireless wrote a letter to Mr. Asay on February 3, 1999, requesting that if there was any dissatisfaction on the part of Independent Companies regarding prior interrogatory responses, that she be advised prior to February 10, 1999, or the assumption would be that there were no discovery-related disputes outstanding, and that Mr. Asay did not respond by the February 10, 1999 date, nor did he file additional interrogatories or a prior Motion to Compel;

f. that intervenors to this proceeding have had access to the prefiled testimony and exhibits of Western Wireless' witnesses which provide advance notice to the Independent Companies and other parties as to the position of Western Wireless, and parties will have an opportunity for cross-examination of Western Wireless witnesses at the public hearing which is scheduled for July 1, 1999;

g. that the issues in this [*5] proceeding are limited in scope and straightforward in nature, thus negating the need for depositions in addition to interrogatories and advanced prefiled testimony;

h. that this late request for deposition is unduly burdensome, cumulative, unnecessary and an attempt to add additional expense and unnecessary barriers to the resolution of this filing; and,

i. that Independent Companies' request for production of documents is untimely and in violation of W.R.C.P. 34 which requires submission of a written request for production of documents thirty days in advance.

5. Counsel for Western Wireless further argues that based upon the above-cited grounds, Western Wireless has met any and all grounds set forth in W.R.C.P. Rule 26(b)(1)(B) which would permit the Commission to find that the deposition is unnecessary.

6. W.R.C.P. Rule 26(b)(1)(B) states:

Limitations. - The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive: (ii) the party seeking [*6] discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

7. The Commission finds that Intervenor Independent Companies have had adequate and ample opportunity to conduct discovery in this matter during the approximate nine-month time period that this proceeding has been on file with this Commission. During this nine-month time period all parties have been afforded an opportunity to conduct discovery,

which has been exercised by U S WEST and Independent Companies through the written interrogatory process. This Commission has conducted discovery hearings during the course of this proceeding for the purpose of ruling on discovery disputes. As recently as May 25, 1999, the Commission held a procedural hearing for the purpose of taking argument on U S WEST's second Motion to Compel Discovery against Western Wireless. [*7] As represented by counsel for Western Wireless, counsel for the Independent Companies has remained silent in failing to voice any objections to the written responses of Western Wireless to outstanding discovery requests. Independent Companies have chosen not to avail themselves, in a timely manner, of the processes available to them to compel discovery, given their prior determination that Western Wireless' responses to its interrogatories were not responsive and were "worthless". The Commission during the course of this proceeding has directed and encouraged the parties to attempt to resolve any and all discovery disputes, consistent with the provisions of Rule 26 (f) regarding discovery conferences. Although Western Wireless and U S WEST were able to resolve their disputes regarding outstanding interrogatory issues through attempts for reasonable resolution, and finally hearing before the Commission, the Independent Companies chose not to use this process.

8. The Commission finds and concludes based upon the representations of parties in their respective motions, and supporting oral arguments at the public hearing held in these discovery matters, that Western Wireless has shown [*8] good cause to support its motion for a protective order. Western Wireless has demonstrated, consistent with Rule 26(b)(1)(B), that the discovery sought could have been obtained through sources that were more convenient, less burdensome or less expensive, and that the Independent Companies had ample opportunity to conduct discovery in a timely manner. Independent Companies chose not to utilize these other sources in a timely manner, but rather chose to depose witnesses at the eleventh hour. The Commission is very cognizant of the need to afford parties an opportunity to prepare and present their positions in contested cases before the Commission. Although the Commission has made its determination not to allow the deposition of Mr. DeJordy, the Commission also believes that the Independent Companies will not be unduly prejudiced by this decision, as the Independent Companies have had access to the prefiled testimony and exhibits of Mr. DeJordy which were filed with the Commission and other parties on May 13, 1999, and Independent Companies will be allowed ample opportunity to cross-examine Mr. DeJordy at the public hearing scheduled to commence on July 1, 1999.

NOW, THEREFORE, IT IS [*9] HEREBY ORDERED THAT:

1. For the reasons stated above, the Motion to Compel filed by the Intervenors, Range Telephone Cooperative, Inc., RT Communications, Inc., Dubois Telephone Exchange, Inc., and Union Telephone Company (Independent Companies) be, and the same is hereby, denied, and Western Wireless' Motion for a Protective Order regarding the Proposed Deposition of Western Wireless Witness, be, and the same is hereby, granted.

2. This Order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming this 25th day of June, 1999.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

STEVE FURTNEY, Deputy Chairman

KRISTIN H. LEE, Commissioner

ATTEST:

DAVID J. LUCERO, Assistant Secretary

104S9J

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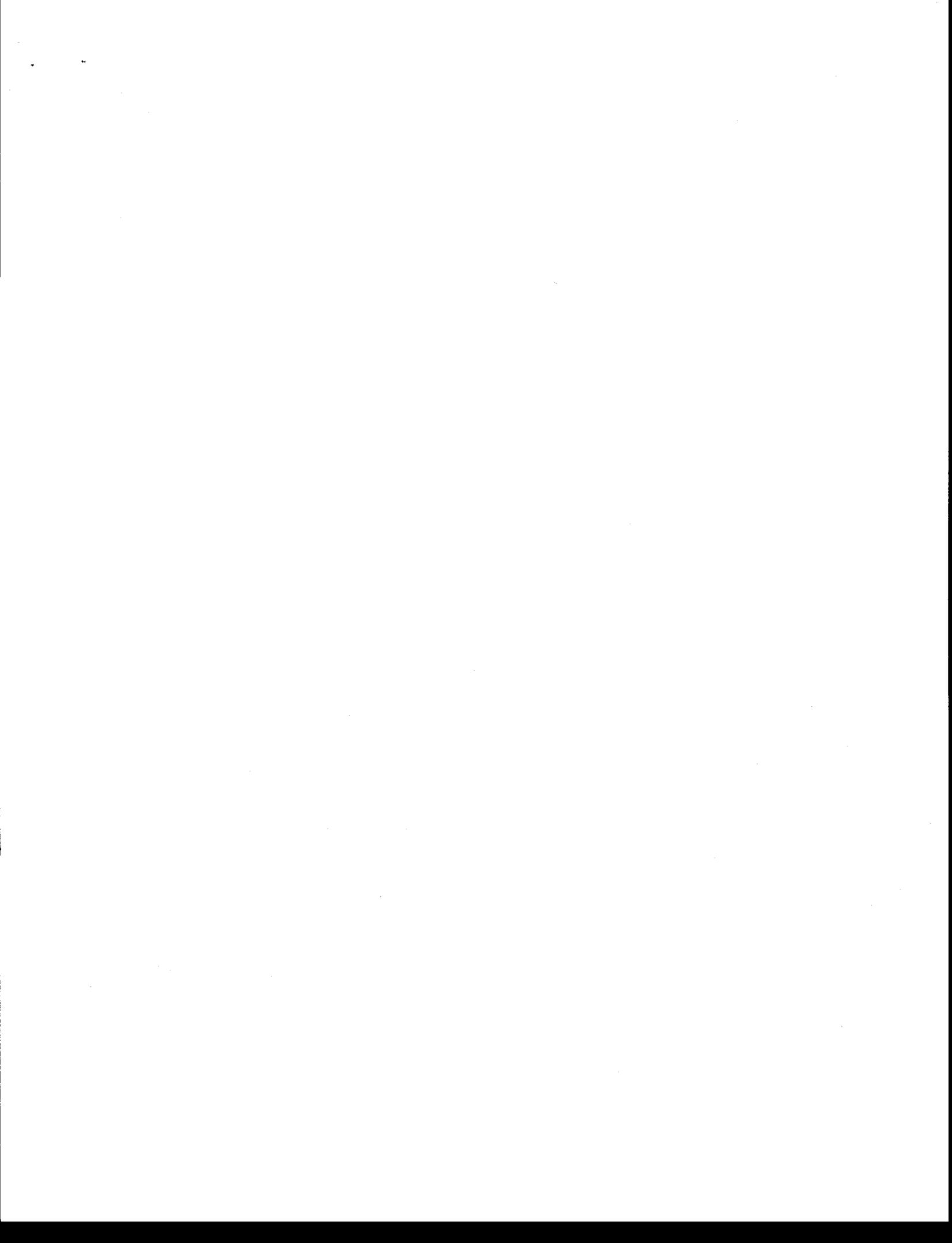
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LEXSEE 1998 SD PUC LEXIS 27

IN THE MATTER OF U S WEST COMMUNICATIONS, INC. AND ITS ABILITY TO
SERVE SOUTH DAKOTA CUSTOMERS

TC97-192

South Dakota Public Service Commission

1998 S.D. PUC LEXIS 27

February 20, 1998, Dated

PANEL: JAMES A. BURG, Chairman; PAM NELSON, Commissioner; LASKA SCHOENFELDER, Commissioner

OPINION: ORDER CONCERNING MOTION TO AMEND AND MOTION FOR DISCOVERY

On December 12, 1997, the Public Utilities Commission (Commission) received a Petition for Order to Show Cause (Petition) from Commission Staff. The Petition requested that the Commission issue an Order to Show Cause ordering U S WEST Communications, Inc. (U S WEST) to appear before the Commission and demonstrate its financial, managerial and technical ability, produce corporate and personal records, and show cause why one or more remedies, as listed in the Petition, should not be imposed on U S WEST.

On January 8, 1998, the Commission received a response from U S WEST to the Petition. At its January 8, 1998, meeting, the Commission listened to arguments concerning the Petition from Staff Attorney, Camron Hoseck, and U S WEST Attorney, William Heaston. The Commission deferred action at that meeting.

At its January 20, 1998, meeting, the Commission again considered the Petition. The Commission has jurisdiction over this matter pursuant to SDCL 49-2-1, 49-2-2, 49-2-4, 49-13-4, 49-13-5, 49-13-13, 49-13-17, 49-31-3, 49-31-7, 49-31-7.1, 49-31-10, 49-31-11, 49-31-38, 49-31-38.1, and 49-31-38.2 and ARSD 20:10:01:45. The Commission voted unanimously to accept Staff's Petition and issue an Order to Show Cause with the following possible additional remedies: that U S WEST be ordered to improve its planning and provisioning in growth areas; that U S WEST be ordered to provision, in a timely manner, adequate and reliable service; and that U S WEST be ordered to upgrade obsolete and non-functioning infrastructure.

On January 29, 1998, the Commission received a Motion and Notice of Motion to Amend Order to Show Cause (Motion to Amend) from Commission Staff. The Motion to Amend requested that a typographical error be corrected in the paragraph numbered 4 on page 7 by replacing the words "paragraph 2, above" with "paragraph 3, above." The Motion to Amend further requested that the order be amended to say that Commission Staff "may" file prefiled testimony as opposed to "shall" file prefiled testimony in order to allow Staff to call witnesses from the public.

On January 29, 1998, the Commission also received a Motion for Discovery and Request for Expedited Ruling (Motion for Discovery) from U S WEST. In its Motion for Discovery, U S WEST requested that the Commission issue Subpoenas Duces Tecum for the following people: Harlan Best; Gregory Rislov; Steven Wegman; Leni Healy; Tammi Stangohr; Bob Knadle; and William Bullard. The subpoenas requested certain documents and the taking of depositions of the above listed people. Commission Staff filed a resistance to the motion on February 2, 1998.

On February 3, 1998, at a duly noticed meeting, the Commission listened to arguments on the motions. On February 10, 1998, at a duly noticed meeting, the Commission ruled on the motions. The Commission granted Staff's motion to amend paragraph 4 on page 7 because it was a typographical error. The Commission further decided to amend its order with respect to prefiled testimony to allow members of the public to testify without filing prefiled testimony. However, the Commission ordered the Commission Staff to give U S WEST a list of those members of the public who will testify along with a short description of the subject matter of their testimony to U S WEST ten days prior to the hearing.

With respect to the Motion for Discovery, the Commission found that it would allow U S WEST to request from Commission Staff all documents and workpapers that were specifically relied upon by Staff to develop or support

Staff's activity in this docket. The Commission also found that, based on Staff's Petition or Staff's prefiled testimony, U S WEST can also request any workpapers used by Staff to develop any numbers or other assertions by Staff made in its Petition or prefiled testimony. The Commission noted that the requesting of information of Staff by parties through data requests is consistent with past Commission practice. In addition, the Commission ruled that the Staff members who shall respond to these requests are the Staff members who worked as Commission Staff in this docket. As named by Staff Attorney Karen Cremer at the meeting, these Staff people are Harlan Best, Leni Healy, Charlie Bolle, and Tammi Stangohr.

On the issue of depositions, the Commission ruled that it will not allow depositions since the Commission is requiring prefiled testimony. The Commission noted that the use of prefiled testimony, and the limitation of direct testimony at a hearing to what is contained in that written testimony, has traditionally been used by this Commission in place of depositions and is designed to limit burdensome discovery in administrative appeals.

It is therefore

ORDERED, that Staff's motion to correct a typographical error is granted; and it is

FURTHER ORDERED, that the Commission's order will be amended to allow members of the public to testify without filing prefiled testimony but Commission Staff must give U S WEST a list of those members of the public who will testify along with a short description of the subject matter of their testimony to U S WEST ten days prior to the hearing; and it is

FURTHER ORDERED, that Staff shall give to U S WEST those documents as specified in the Motion for Discovery to the extent those documents were specifically relied upon by Staff in developing its case and U S WEST may request any workpapers used by Staff to develop any numbers or other assertions by Staff made in its Petition or in any prefiled testimony; and it is

FURTHER ORDERED, that U S WEST's request for depositions is denied.

Dated at Pierre, South Dakota, this 20th day of February, 1998.

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner