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Arizona Corporation Commission
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ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE FILING BY
ARIZONA WATER COMPANY OF
PROPOSED TARIFF NO. TE-264, TREATED
EFFLUENT SERVICE.

W-01445A-00-0319

**ARIZONA WATER COMPANY'S
RESPONSE TO THE CITY OF
CASA GRANDE'S OBJECTIONS
TO PROPOSED TARIFF TE-264**

On May 19, 2000, Arizona Water Company filed a Certificate of Filing of Proposed Tariff No. TE-264, Treated Effluent Service, (the "Proposed Tariff") with this Commission. The City of Casa Grande ("the City") subsequently moved to intervene in and objected to the Proposed Tariff proceeding. Arizona Water Company did not oppose the City's intervention, and the Commission has recently allowed the City to intervene. Arizona Water Company now responds in opposition to the City's objections to Proposed Tariff No. TE-264.

I. Introduction and Background.

Arizona Water Company holds Certificates of Convenience of Necessity (collectively, "CCN") granted by this Commission for the provision of water service in the City of Casa Grande and surrounding areas. The CCN vests Arizona Water Company with the exclusive right to provide water service within the geographical areas described in the CCN. The CCN includes the right to provide all water service, including treated effluent. No Arizona court has ruled to the contrary, including the Arizona Court of Appeals in the Arizona Water Company v. City of Bisbee case. 172 Ariz. 176, 836 P.2d. 389 (App. 1991). The City is simply using the

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1 Bisbee case as a red herring to distract the Commission from consideration of the merits of
2 Arizona Water Company's Proposed Tariff.

3 The City's mission to replace Arizona Water Company as the City's water provider
4 dates back to 1990, when the City held a public vote in which the voters soundly rejected the
5 City's plan to condemn Arizona Water Company's public utility property, plant and CCN. In
6 May 1999, undaunted by its voters' rejection of the condemnation effort, the City Council voted
7 to begin condemnation proceedings against Arizona Water Company without the public vote
8 mandated by A.R.S. § 9-514. The City's case was dismissed in state superior court for failure
9 to obtain the public majority vote. Subsequently, the City has threatened Arizona Water
10 Company and its customer, Reliant Energy, with attempts to interfere with negotiations between
11 the companies for the provision of further water service to Reliant Energy, which was already a
12 customer of Arizona Water Company. See copy of letter dated December 14, 1999 from Kay
13 Bigelow, Esq. of the City to Robert W. Geake of Arizona Water Company, attached as Exhibit
14 A. The City's objections to Arizona Water Company's Proposed Tariff are another effort by
15 the City to usurp Arizona Water Company's lawful role as the exclusive provider of water
16 service to customers in the Company's CCN area.

17 **II. The City has blatantly misstated the holding of the Bisbee case.**

18 The Bisbee Court did not rule that Arizona Water Company, or any public service
19 corporation, cannot serve treated effluent to customers within their CCN. The Bisbee Court
20 was not asked to decide, and did not even consider, that question. Framing the issue before it in
21 the first sentence of the opinion, the court stated that "[t]his case involves the right of [the] City
22 of Bisbee to deliver sewage effluent from its sewage treatment plant to the Phelps Dodge
23 Corporation for use in Phelps Dodge's copper leaching operation." 172 Ariz. at 176, 836 P.2d
24 389 (emphasis added). Under the very specific facts present in the Bisbee case, the Court held
25 that the City of Bisbee could deliver sewage effluent which was not treated to a level for any
26 beneficial use other than to water down copper mine tailings. While Arizona Water Company
27
28

1 contends that the Bisbee opinion is no longer good law,¹ the opinion does not prohibit Arizona
2 Water Company from serving treated effluent to its customers, nor does it even address the
3 proposition for which it is cited by the City. Stated differently, the City has the law backwards:
4 just because the City of Bisbee was allowed to give away barely-treated effluent to Phelps
5 Dodge under a now-superseded statutory scheme in the late 1980's does not mean and has
6 never meant that a public service corporation holding a CCN for that area cannot provide
7 effluent to its customers. This is the principal fatal flaw in the City's objections.

8 **III. Arizona Water Company, as well as other public service corporations,
9 already serve treated effluent.**

10 The City's argument that Arizona Water Company cannot serve treated effluent is also
11 illogical because Arizona Water Company, as well as other public service corporations in
12 Arizona, already serve treated effluent. First, Arizona Water Company instituted reclaimed
13 water service on January 1, 1990 in its Apache Junction system, and serves treated effluent in its
14 Apache Junction CCN area under its Tariff No. RW-256. Thus, the Company's present
15 Proposed Tariff would simply expand the availability of treated effluent service to all of its
16 service areas. Moreover, the Commission has also allowed other public service corporations to
17 serve reclaimed wastewater. See Re Sunrise Vistas Utilities Company, Decision No. 60390,
18 August 29, 1997 and Re Citizens Utilities Company, Decision No.60975, June 19, 1998.

19 **IV. Arizona Water Company's service of treated effluent is consistent with
20 Arizona water conservation policy.**

21 The City itself has stated on numerous past occasions that it is good water conservation
22 policy to use treated effluent, where possible, in place of ground and surface water. In spite of
23 these frequent pronouncements, the City spitefully seeks to prevent Arizona Water Company
24 from serving treated effluent after the City lost its condemnation case. The City seems to be
25

26 ¹ See Plaintiff Arizona Water Company's Memorandum in Support of Injunctive Relief filed
27 in United States District Court for the District of Arizona on March 24, 2000, attached as
28 Exhibit B, and its Reply Memorandum dated April 14, 2000, attached as Exhibit C.

1 saying, “if we can’t serve effluent, then it should go to waste and nobody should serve it.” The
2 City objects to the Proposed Tariff on the ground that “[s]ince AWC will apparently seek
3 effluent from others (it has no sewer business), there must not be ANY chance that a shortage in
4 effluent supply will result in groundwater or CAP water being substituted for effluent.”
5 Objections, ¶ 4 (emphasis added). The City’s argument is groundless because a shortage in
6 effluent would have the same effect on the customer regardless of the entity supplying the
7 effluent. The customer would need to seek an alternative water supply from an authorized
8 provider, in this case, solely Arizona Water Company. Besides raising a purely hypothetical
9 and inappropriate situation for consideration by the Commission, the City’s argument is mooted
10 by existing state water policy which expressly compels water utilities like Arizona Water
11 Company to maximize the use of non-groundwater sources such as treated effluent.

12 **V. Arizona Water Company’s Proposed Tariff is reasonable.**

13 The City asserts that “[t]he proposed tariff does not contain guarantees that AWC’s
14 potable water customers will never be charged for any expense related to the service of effluent.
15 The Arizona Department of Environmental Quality (“ADEQ”) regulates effluent which requires
16 a completely separate delivery system, inspections, licenses, etc. All such expenses, and the
17 administrative burden, must not impact the users of potable water.” Objections, ¶ 6.

18 Those allegations reflect a misunderstanding of Arizona Water Company’s Proposed
19 Tariff. None of the concerns are well-founded because Arizona Water Company will not be
20 treating or delivering the effluent; rather, the Company will meter and deliver the treated
21 effluent from the producer of the effluent. All of the expenses listed by the City will be borne
22 by the supplier and the user, as they would be regardless of Arizona Water Company’s role in
23 metering the treated effluent service. The supplier and user must independently comply with
24 ADEQ regulations, and the cost of compliance will be unchanged by Arizona Water
25 Company’s participation in the process. As set forth in its Proposed Tariff, Arizona Water
26 Company will charge only for services that would exist regardless of the entity providing the
27 service, such as metering and transporting the water from the supplier to the user. Moreover, in
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1 light of this fact, the rate hearing called for by the City is unnecessary and a waste of the
2 Commission's resources.

3 **VI. Conclusion.**

4 For the reasons set forth above, Arizona Water Company disputes the City's groundless
5 objections. As such, a rate hearing is neither appropriate nor necessary in order to properly
6 consider the Proposed Tariff. Arizona Water Company therefore respectfully requests the
7 Commission to proceed with its consideration of its Proposed Tariff TE-264 and to reject the
8 City's baseless objections.

9 RESPECTFULLY SUBMITTED this 14th day of July, 2000.

10 BRYAN CAVE LLP

11
12
13 By: 

14 Steven A. Hirsch, #006360
15 Jill Harrison, #018388
16 Two N. Central Avenue, Suite 2200
17 Phoenix, AZ 85004-4406
18 Attorneys for Arizona Water Company

17 **ORIGINAL** and 10 copies filed this
18 14th day of July, 2000, with:

19 Arizona Corporation Commission
20 Utilities Division
21 Docket Control Center
22 1200 W. Washington Street
23 Phoenix, AZ 85007-2996

23 **COPIES** of the foregoing faxed and
24 mailed this 14th day of July, 2000, to:

25 Kay Bigelow, Esq.
26 Casa Grande City Attorney
27 510 E. Florence Blvd.
28 Casa Grande, AZ 85222-4100
Attorneys for City of Casa Grande

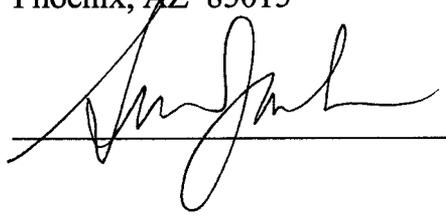
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and

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Attorneys for City of Casa Grande

Mr. Robert W. Geake
Vice President and General Counsel
Arizona Water Company
3805 N. Black Canyon Hwy.
Phoenix, AZ 85015



A handwritten signature in black ink, appearing to read 'R. Geake', is written over a solid horizontal line. The signature is cursive and extends slightly above and below the line.

A



City of Casa Grande

RECEIVED DEC 17 1999

December 14, 1999

Robert W. Geake, Vice-President and General Counsel
Arizona Water Company
3805 North Black Canyon Highway
Phoenix, AZ 85015

RE: Service of Water to Reliant Energy Desert Basin L.L.C.

Dear Steve:

The City would like to explore ways that it and Arizona Water Company could mutually serve Reliant Energy's electrical generation plant to our mutual benefit.

As I am sure you have told your client, the City and Arizona Water Company (AWC) either could wait for the outcome of the City's appeal of Judge Campbell's ruling or we could work on a solution for the City's concerns for the City and AWC's joint customers. As your client will discover as it talks to Reliant Energy about water service, Reliant's financiers require very serious representations and warranties about a water provider's ability to serve water without interruption or uncertainty. The City's list of concerns set forth below are not going to make AWC an attractive water provider because of the potential uncertainty these concerns raise for a large-scale customer such as Reliant.

1. The City definitely will appeal Judge Campbell's ruling given the strength of the relevant legal authority and an earlier superior court ruling in the City's favor.
2. Arizona Water will be exceeding its gallons per capita per day (GPCD) limitations by serving over 4000 acre feet annually of groundwater or CAP water to Reliant. Without a resolution of the litigation and the City's concerns that AWC is not working toward long-term water resource solutions, the City is not willing to serve effluent to Reliant to allow AWC to prolong its current mode of operation. In that mode, water quality is addressed only on a short-term basis through blending, renewable water resource implementation is not planned, and AWC is not a designated assured water provider. Accordingly, residential growth must join a replenishment district which has uncapped costs for water service in the future.
3. Permanent use of groundwater or CAP water for Reliant Energy's plant is not an acceptable course of action in Arizona where the water resources need to be protected and are highly regulated. The Arizona Department of Water Resources (ADWR) is not going to grant an exception for your service of CAP water to a large-scale user such as Reliant without a plan to cease the use of CAP in a delineated time period.

EXHIBIT A

4. The City will be actively addressing, with the various regulatory agencies having oversight of AWC, its concerns about AWC's lack of plans to bring renewable water sources into the community. Your client's lack of plans leaves Casa Grande without an assured water provider.

5. The City will be actively addressing with the Corporation Commission, when AWC requests expansions to its certificate of convenience and necessity (CC&N), AWC's lack of investment in renewable water resource development or water quality solutions other than blending the groundwater from all well sites so it is of acceptable standards.

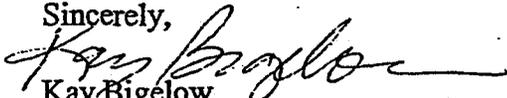
6. Continuation of the pending litigation or the potential for future condemnation actions instituted by the City based on its concerns will cause uncertainty in AWC's ability to accurately forecast its actions and their results.

For these reasons, the City desires to discuss solutions which may include elements such as the following:

- The City would agree not to institute a condemnation action for CC&N areas and AWC facilities for some defined time period.
- The City would agree not to appeal or would withdraw its appeal of Judge Campbell's ruling.
- The City would serve effluent to Reliant; and thus, at least lessen AWC's problems with violating the GPCD limitations.
- AWC would agree to withdraw its request for costs and attorney fees. Each party would bear its own costs and attorney fees.
- AWC would commit to a plan for bringing renewable water resources into the City over a designated time period and with a designated implementation plan.
- AWC would commit to preparing itself and applying to the Arizona Department of Water Resources for its designation as an assured water provider within a specified time period.
- In return for the City's assumption of the obligation to pay the future CAP holding costs on a certain portion of AWC's CAP allocation for the Casa Grande area, AWC would relinquish ownership of that portion to the City or a water provider designated by the City.

If the City and AWC can cooperate to serve Reliant, both our clients and our clients' customers can benefit. I will be calling you next Monday to hear about your client's reaction to this letter. Please feel free to contact me before then if I can be of assistance.

Sincerely,


Kay Bigelow
Casa Grande City Attorney

cc: Ken Buchanan, Casa Grande City Manager
David Greeson, Reliant Energy
Steven Hirsch, Bryan Cave L.L.P.

B

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8 Attorneys for Plaintiff Arizona Water Company

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA

12 Arizona Water Company, an Arizona
13 corporation;

14 Plaintiff,

15 vs.

16 City Of Casa Grande, a municipal corporation
17 of the State of Arizona,

18 Defendant.

19 CIV. 00-0354 PHX PGR

20 PLAINTIFF ARIZONA WATER
21 COMPANY'S MEMORANDUM IN
22 SUPPORT OF INJUNCTIVE RELIEF

23 SUMMARY OF ARGUMENT

24 This is an action brought under 42 U.S.C. § 1983 and supplemental state
25 theories to enjoin an Arizona municipal corporation and its agents from depriving a public
26 service corporation of its federally-protected property rights. Plaintiff Arizona Water
27 Company possesses a Certificate of Convenience and Necessity ("CCN") granted by the
28 Arizona Corporation Commission for the provision of water service in the City of Casa
Grande and surrounding areas. This CCN gives Arizona Water Company the exclusive

EXHIBIT B

1 right to provide water service to the geographical area described in the CCN. An existing,
2 major industrial customer of Arizona Water Company's, Reliant Energy, is developing a
3 large steam generation electricity production plant within Arizona Water Company's Casa
4 Grande CCN Area. Defendant City of Casa Grande ("City") covets Arizona Water
5 Company's exclusive right to serve, and has previously attempted to acquire that property
6 interest, first by holding a public vote in 1990, as is statutorily required, on the question of
7 whether the City should enter the water business (the proposition convincingly failed), then
8 by attempting to condemn Arizona Water Company's CCN last year (the condemnation
9 attempt was dismissed because the required affirmative public vote had not been achieved).

10 While Arizona Water Company and Reliant Energy were negotiating the
11 terms of an agreement to provide the power plant with the water service it needs to develop
12 its facilities, the City approached Reliant Energy and insisted that it immediately execute a
13 water service agreement with the City instead. The City also intervened in a pending
14 Arizona Corporation Commission proceeding involving Reliant Energy in an attempt to
15 coerce Reliant Energy to sign such an agreement. The City conditioned the withdrawal of
16 its opposition upon Reliant Energy's willingness to enter into a water service agreement
17 with the City instead of with Arizona Water Company.

18 A City--Reliant Energy water service agreement would thwart Arizona Water
19 Company plans already in place for substantial water supply and distribution system
20 improvements and would drastically and adversely affect its ability to serve other
21 customers in the area with Central Arizona Project water, with effluent produced by the
22 City and other sources, and with potable water. In a hearing before this Court on March 9,
23 2000, the City agreed not to enter into such an agreement without ample prior notice to this
24 Court and Arizona Water Company, to allow briefing and argument of the issues
25 presented. For the reasons set forth in Arizona Water Company's Verified Complaint and
26 Affidavit of William M. Garfield, an order enjoining the City from entering into a water
27 service contract with Reliant Energy is appropriate and necessary to preserve Arizona
28 Water Company's constitutionally-protected property rights, and to prevent the irreparable

1 harm that would result to Arizona Water Company if the City is allowed to provide water
2 service to Reliant Energy.

3 I. Arizona Water Company is entitled to relief under 42 U.S.C. § 1983 for the
4 City's intentional violations of Arizona Water Company's constitutionally-
5 protected property interests.

6 A. The City is threatening to unlawfully take Arizona Water Company's
7 protected property interests as the exclusive provider of water service to
8 Reliant Energy.

9 The nexus between federal remedies and the City's conduct is set forth in
10 detail in Arizona Water Company's response to the City's motion to dismiss and/or for
11 abstention filed this date. Arizona Water Company possesses a CCN granted by the
12 Arizona Corporation Commission under A.R.S. §§ 40-281 et seq. Arizona Water
13 Company's CCN is an exclusive franchise or regulated monopoly within its CCN area (the
14 "Casa Grande CCN Area") to provide water service to all customers located there. James
15 P. Paul Water Co. v. Arizona Corporation Comm., 137 Ariz. 426, 429, 671 P.2d 404, 407
16 (1983). In fact, the Arizona Supreme Court has specifically held that once a public utility
17 receives a CCN for a particular area and provides adequate service, no other entity may
18 compete with the utility:

19 Once granted the certificate confers upon its holder an exclusive right to
20 provide the relevant service for as long as the grantee can provide adequate
21 service at a reasonable rate. If a certificate of convenience and necessity with
22 our system of regulated monopoly means anything, it means that its holder
23 has the right to an opportunity to provide the service it was certified to
24 provide. Only upon a showing that the certificate holder, presented with a
25 demand for service which is reasonable in light of projected need, has failed
26 to supply such service at a reasonable cost to customers, can the Commission
27 alter its certificate. Only then would it be in the public interest to do so.

28 Id. at 429, 671 P.2d at 407. Indeed, without such a monopoly, the utility would have no
reason to make necessary investments and construct sufficient facilities to meet the needs
of water users in its CCN. Id. at 429, 671 P.2d at 407.

1 Although a city has the right under certain circumstances to provide water service,
2 Arizona has specifically declared that it is the public policy of the State that a city may not
3 provide water service within a CCN held by a private utility “unless or until that portion of
4 the plant, system and business of the utility used and useful in rendering such service in the
5 area in which the city or town seeks to serve, has been acquired.” A.R.S. § 9-516(A); City
6 of Mesa v. Salt River Project Agric. and Power Dist., 92 Ariz. 91, 100-102, 373 P.2d 722,
7 729 (1962), appeal dismissed, 372 U.S. 704 (1963); City of Tucson v. Polar Water Co., 76
8 Ariz. 404, 407, 265 P.2d 773, 775 (1954). Arizona courts have squarely held “that the
9 statutory provisions of A.R.S. §§ 9-515, 9-516 and 9-522 do not allow the City to provide
10 utility service in a certificated area unless it has first acquired the property interest of the
11 holder of the certificate for the area to be served.” Sende Vista Water Co. v. City of Phoenix,
12 172 Ariz. 42, 45, 617 P.2d 1158, 1161 (App. 1980). Thus, the City has no right to provide
13 water service anywhere within Arizona Water Company’s Casa Grande CCN Area.

14 As established in the Verified Complaint and Affidavit of William M. Garfield,
15 the City has engaged in direct discussions with Reliant Energy, a major customer of Arizona
16 Water Company within its Casa Grande CCN Area, and, until consenting to the TRO relief
17 Arizona Water Company sought on March 9, was on the brink of contracting with Reliant
18 Energy in derogation of Arizona Water Company’s exclusive property interests. Arizona
19 Water Company seeks an order enjoining the City from entering into such an agreement.

20 **B. The City has previously attempted, and consistently failed, to acquire**
21 **Arizona Water Company’s exclusive right to serve Reliant Energy.**

22 The City has acknowledged Arizona Water Company’s exclusive rights to
23 provide water service to customers within its CCN area by two prior attempts to acquire
24 this right. First, in 1990, the City Council adopted a resolution calling for a public vote on
25 the question of whether the City should enter the water business by acquiring the plant,
26 property and CCN area of Arizona Water Company (Verified Complaint, ¶ 5). The vote
27 failed decisively, with 1,025 “No” votes to 746 “Yes” votes. (Id.). The City called for the
28 public vote because A.R.S. § 9-514 mandates that the condemnation of Arizona Water

1 Company's public utility plant and property and CCN area cannot be accomplished without
2 prior voter approval.

3 Having failed to achieve the necessary affirmative public vote, the City next
4 decided to attempt a condemnation of Arizona Water Company's public utility plant and
5 property and CCN area anyway. That action was filed in state court on May 14, 1999. It
6 was dismissed on November 17, 1999 on the specific ground that the City failed to comply
7 with the public vote requirement in A.R.S. § 9-514 (Verified Complaint, ¶ 9; Affidavit of
8 William M. Garfield, ¶ 4 and Exhibit "A" to that Affidavit).

9 Having failed to obtain public approval, then having failed in its attempt to
10 condemn Arizona Water Company's Casa Grande CCN Area without a public vote, the
11 City has now decided to attempt to bypass Arizona Water Company and to provide water
12 service to Reliant Energy anyway. In direct violation of A.R.S. § 9-516 and Arizona Water
13 Company's vested and exclusive property rights to provide water service to Reliant Energy
14 (Arizona Water Company's existing customer), the City seeks to enter into a water service
15 contract with Reliant Energy without first acquiring "that portion of the plant, system and
16 business of the utility used and useful in rendering such service in the area in which the
17 city or town seeks to serve," as required by A.R.S. § 9-516(A). There is no justification for
18 the City's conduct, and injunctive relief is entirely appropriate to preserve Arizona Water
19 Company's constitutionally-protected property interests, as well as to allow Reliant Energy
20 to receive dependable, consistent and legal water service from Arizona Water Company.

21 C. The Arizona Legislature has expanded the definition of "effluent," and
22 Arizona Water Company v. Bisbee is inapplicable to the circumstances of
23 this case.

24 During the March 9 hearing, the City's counsel contended that Arizona Water
25 Company v. City of Bisbee, 172 Ariz. 176 , 836 P.2d 389 (App. 1991) permits the City to
26 sell its effluent to Arizona Water Company's customers without the necessity of acquiring
27 Arizona Water Company's CCN. However, City of Bisbee has been superseded by
28

1 statutory changes and intervening case law, and is inapplicable to the facts of this case in
2 any event.

3 Understanding City of Bisbee first requires a discussion of a prior Arizona Supreme
4 Court decision, Arizona Public Service Company v. Long, 160 Ariz. 429, 773 P.2d 988
5 (1989). Long involved whether downstream effluent users could compel a number of cities
6 to continue disposing of their effluent into a stream because the downstream users had
7 become accustomed to using the effluent. The cities preferred to sell their effluent to
8 another user. Thus, Long concerned whether effluent was groundwater or surface water
9 subject to claims of prior appropriation by downstream users, or, in contrast, whether the
10 effluent was something other than water that the cities could dispose of without being
11 subject to the rules governing the disposition of groundwater or surface water. The Long
12 court noted that the then-current statutory definition of effluent¹ distinguished effluent
13 from both groundwater and surface water. 160 Ariz. at 435, 773 P.2d at 995. Ultimately,
14 Long held that effluent was neither groundwater nor surface water, and that therefore the
15 cities could dispose of it without violating the rights of the prior downstream appropriators.
16 160 Ariz. at 438, 773 P.2d at 997. The Long court struggled to make this determination
17 because of the Legislature's virtual silence on the issue of effluent, and in fact invited the
18 Legislature to act: "The legislature is free to regulate or control the use and disposition of
19 effluent. We invite its attention to that need." Id. at 438, 773 P.2d at 997. Notably, Long
20 did not touch upon the question presented here: whether a city can sell its effluent to a
21 public service corporation's existing customer within a public service corporation's CCN.

22
23 ¹ During the relevant period at issue in City of Bisbee, A.R.S. §45-402(6) defined effluent
24 as follows:

25 Effluent means water which, after being withdrawn as groundwater or
26 diverted as surface water, has been used for domestic, municipal or industrial
27 purposes and which is available for reuse for any purpose, whether or not the
28 water has been treated to improve its quality.

1 City of Bisbee was decided under the same statutory definition of “effluent” as was
2 Long, and relied heavily on both Long and that older definition of effluent. City of Bisbee
3 involved whether the City could deliver its minimally-treated effluent to a Phelps Dodge
4 mine facility located within Arizona Water Company’s CCN. Unlike the circumstances in
5 this case, an emergency situation existed at that time in Bisbee; the EPA had determined
6 that the City of Bisbee’s effluent fell below federal water protection requirements. Id. at
7 177, 836 P.2d at 390 (“It is not fit either for irrigation purposes or for human
8 consumption.”) However, Phelps Dodge could use the effluent for its leaching operations.

9 In City of Bisbee, Division Two of the Arizona Court of Appeals held that Bisbee
10 could sell its effluent to a mining user within these narrow circumstances, even when the
11 user was located within a public service corporation’s CCN. The Bisbee court focused on
12 the statutory definition of effluent as “separate from the definition of both groundwater and
13 surface water.” 172 Ariz. at 176, 836 P.2d 389. The Bisbee court stated:

14 In summary, we hold that the effluent in question is neither groundwater nor
15 surface water. Whether diverted by appropriation or withdrawn from the
16 ground, after use by the municipalities the water loses its original character
17 as groundwater or surface water and becomes, instead, just what the statute
18 describes – effluent.

19 City of Bisbee, 172 Ariz. at 178 , 836 P.2d at 391 (quoting Long, 160 Ariz. at 438, 773
20 P.2d at 997).

21 In response to Long, and after the Bisbee action was decided in the trial court, the
22 Arizona Legislature abolished the prior, narrow, definition on which Long and Bisbee
23 relied, and adopted a new definition of effluent:

24 Effluent means water that has been collected in a sanitary sewer for
25 subsequent treatment in a facility that is regulated pursuant to §§ 49-361 and
26 49-362. Such water remains effluent until it acquires the characteristics of
27 groundwater or surface water.

28 A.R.S. § 45-101(4) (formerly A.R.S. § 45-402(6)).

1 Importantly, the Legislature moved the definition of effluent from the Groundwater
2 Code (A.R.S. § 45-401 et seq., Chapter Two of Title 45) to the General Provisions
3 governing the entire water title (A.R.S. § 45-101 et seq., Chapter One of Title 45). The
4 Legislature also amended numerous other provisions of Arizona water law to include
5 effluent within various statutes relating to water. See Arizona Municipal Water Users
6 Ass'n v. Arizona Dep't of Water Resources, 181 Ariz. 136, 143-46, 888 P.2d 1323, 1329-
7 33 (App. 1994) (discussing amendments to A.R.S. §§ 45-467, 45-576 & 45-452).

8 Construing the amended statutory regime, the Arizona Court of Appeals held that
9 “water” now included groundwater, surface water and effluent:

10 Throughout the Groundwater Code, the legislature used the general term
11 “water” when it intended to refer to water from all sources. . . . And, when
12 the legislature meant to distinguish between different sources of water, it
13 used the specific terms “groundwater” or “surface water.” . . . [Moreover,]
14 the Department [of Water Resources] has interpreted the term “water” as
15 used in A.R.S. section 45-561(11), to mean water from all sources, not just
16 groundwater.

17 Id. at 142, 888 P.2d at 1329. The Court of Appeals subsequently held that under the new
18 definition of effluent, “effluent means water” and this “new definition of ‘effluent’
19 indicates that the Legislature views effluent as an independent source of ‘water’ as that
20 term is used throughout the Groundwater Code.” Id. at 144, 888 P.2d at 1331. The court
21 continued:

22 Although the term ‘water’ in the groundwater code includes both
23 groundwater and surface water, neither of these latter terms include each
24 other. And, after Long, neither ‘groundwater’ not ‘surface water’ includes
25 ‘effluent.’ Consequently, although no amendment was necessary to clarify
26 those statutes in which the legislature used the all-inclusive term ‘water,’ the
27 post-Long amendments add a third source of water – effluent – to the context
28 of those statutes employing the much narrower statutory language
specifically referring only to groundwater and surface water.

Id. at 144, 888 P.2d at 1330. Thus, under current Arizona law applicable to this case, the
service of effluent constitutes “water service.”

1 The City admitted as much in its letter to Arizona Water Company dated December
2 14, 1999, which contains the "Re:" line, "Service of Water to Reliant Energy Desert Basin,
3 L.L.C." See Exhibit "B" to Garfield Affidavit (emphasis added). Since Arizona Water
4 Company's CCN gives the Company an exclusive right to provide "water" to customers in
5 its Casa Grande CCN Area, the City cannot provide water to Reliant Energy without
6 violating A.R.S. § 9-516(A).

7
8 **C. Injunctive relief is appropriate under 42 U.S.C. § 1983.**

9 Arizona Water Company's CCN is a constitutionally-protected property
10 interest. As is set forth in more detail in Arizona Water Company's response brief on the
11 jurisdictional issues filed this date, property interests are created by independent sources such
12 as state law. See Board of Regents v. Roth, 408 U.S. 564 (1972); Wedges/Ledges, Cal. v.
13 City of Phoenix, 24 F.3d 56 (9th Cir. 1994). Since the CCN statutes (A.R.S. §§ 40-281 et
14 seq.) and the statute prohibiting municipal competition (A.R.S. § 9-516(A)) are couched in
15 mandatory terms, a federally-protected property interest arises from the Arizona Corporation
16 Commission's grant of a CCN to Arizona Water Company. See Association of Orange
17 County Deputy Sheriffs v. Gates, 16 F.2d 733, 734 (9th Cir. 1983), cert. denied 446 U.S. 837
18 (1984), and other cases cited in the response brief filed this date.

19 The City's interference with Arizona Water Company's federally-recognized
20 property rights creates an action in this Court under 42 U.S.C. § 1983. Monell v. New York
21 City Dept. of Social Servs., 436 U.S. 658 (1978). Federal question jurisdiction is appropriate
22 in this Court under 28 U.S.C. §§ 1331 and 1343(3), as well as 28 U.S.C. § 1367 as to
23 supplemental state claims which are transactionally related to the federal claim, as Arizona
24 Water Company's claims are here. Id. Under these circumstances, the City, and all persons
25 acting in concert with the City under color of law (such as the mayor and council), should be
26 enjoined from such conduct. See Ex Parte Young, 209 U.S. 123 (1908); Powell v. Jarvis,
27 460 F.2d 551 (2d Cir. 1972) and Shelton v. McCarthy, 699 F. Supp. 412 (W.D.N.Y. 1988)
28 (appropriate for district court to grant injunctive relief when it is shown that a state actor has

1 threatened to take action that would result in a deprivation of a constitutional right); Woods
2 v. Wright, 334 F.2d 369 (5th Cir. 1964) (district court has a duty to impose injunctive relief
3 when there is a deprivation of a constitutional right).

4 **II. The City's tortious interference with Arizona Water Company's present and**
5 **prospective contractual relationships also forms the basis for injunctive relief.**

6 Arizona recognizes interference with contractual relations as a basis for tort
7 liability. Wagenseller v. Scottsdale Mem'l Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985) (en
8 banc). The prima facie elements of the tort are as follows:

- 9 1. A valid contractual relationship or business expectancy;
- 10 2. Knowledge of the relationship or expectancy by the interferor;
- 11 3. Intentional interference with the relationship, or knowledge with
12 substantial certainty that interference would result from the interferor's conduct causing or
13 inducing a breach or termination of the relationship of expectancy;
- 14 4. Damage as a result of the interference; and
- 15 5. Interference that is improper.

16 Snow v. Western Savs. & Loan Ass'n., 152 Ariz. 27, 33-34, 730 P.2d 204, 211-12 (1986)
17 (in banc); Wagenseller, 147 Ariz. at 386, 388, 710 P.2d at 1041, 1043. Arizona also
18 recognizes the tort of interference with a prospective business advantage, where an
19 interferor's improper acts damage a prospective contractual relationship between two
20 parties. See Edwards v. Anaconda Co., 115 Ariz. 313, 314-315, 565 P.2d 190, 191-192
21 (App. 1977). Specifically, this cause of action exists when an interferor "induces or
22 otherwise purposely causes a third person not to . . . enter into or continue a business
23 relation with another." Id. at 315, 565 P.2d at 192.

24 In its Verified Complaint and Affidavit of William M. Garfield, Arizona Water
25 Company has demonstrated that the City is liable for each of these torts as an interferor with
26 Arizona Water Company's contractual relationship with Reliant Energy. Arizona Water
27 Company is the only water provider lawfully permitted to provide water service to Reliant
28 Energy by virtue of it being located in Arizona Water Company's Casa Grande CCN Area.

1 Indeed, Reliant Energy is already an Arizona Water Company customer. The City's attempts
2 to contract with Reliant Energy are therefore unlawful, improper per se, and constitute
3 tortious interference with contract under Arizona law. Arizona Water Company is ready,
4 willing and able to continue serving Reliant Energy, and is prepared to enter into a formal
5 agreement for the provision of all of the water it needs for its power plant (Garfield Affidavit,
6 ¶ 7). Moreover, Arizona Water Company has planned the development of its water supply
7 sources and expansion of its distribution system for the specific purpose of serving Reliant
8 Energy and neighboring industries within its Casa Grande CCN Area (Garfield Affidavit, ¶¶
9 5, 6 and 9). The City incontrovertibly knows of this relationship and expectancy; it has
10 already attempted to step into Arizona Water Company's shoes at least twice (by its failed
11 public vote and its failed condemnation action). Having been popularly, judicially and legally
12 blocked in these efforts, following the City's threats to do so (Verified Complaint, ¶¶ 15, 16;
13 Garfield Affidavit ¶¶ 10, 11 and Exhibits "B" and "C" to the Affidavit), the City has
14 improperly and intentionally interfered with the contractual relationship between Arizona
15 Water Company and Reliant Energy. If the City is allowed to provide water service to
16 Reliant Energy, Arizona Water Company's constitutionally-protected right to provide that
17 service will be violated. Arizona Water Company will suffer substantial and irreparable
18 injury as a result of these unlawful and improper actions, both in terms of lost revenues and
19 effects on its existing and planned operations and orderly development of its water supply
20 sources and water distribution system.

21 Finally, the City's conduct is improper and smacks of bad faith. See
22 Restatement (Second) of Torts § 767 (1979). Arizona Water Company has offered to
23 purchase effluent produced by the City (Garfield Affidavit, ¶ 19). There is no legitimate
24 economic interest to be served by the City other than its desire to economically injure
25 Arizona Water Company as retribution for successfully defending against the City's recent
26 condemnation attempt. The City has in effect blackmailed Reliant Energy by filing papers in
27 opposition to permits needed for its plant and offering to withdraw these objections if Reliant
28 Energy signs an illegal water service agreement with the City rather than a legal agreement

1 with Arizona Water Company (Garfield Affidavit, ¶ 12, Exhibit "D" to the Affidavit). The
2 City's interference is motivated by spite and ill-will, has been carried out in knowing
3 violation of Arizona law, both of which are concepts to be weighed in the determination of
4 whether the interferor's acts are improper under the Restatement analysis of the tort, which
5 has been adopted by Arizona's courts. Id.; see Wagenseller, 147 Ariz. at 386, 388, 710 P.2d
6 at 1041, 1043. Most importantly, as demonstrated above, the City's conduct is flatly
7 unlawful; this compellingly demonstrates that its conduct is improper. Id. at comment d.
8 Equitable relief is available and appropriate under these circumstances. See Restatement
9 (Second) of Torts, § 766, comment u.; § 766B, comment g (1979).

10 **III. Arizona Water Company has met the standard for injunctive relief.**

11 It is well established that a request for injunctive relief is appropriate and
12 should be granted upon a showing of either (i) a combination of probable success on the
13 merits and the possibility of irreparable injury, or (ii) that serious questions are raised and
14 the balance of hardship tips sharply in the movant's favor. Johnson v. California State Bd.
15 of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995); Dollar Rent-A-Car v. Travelers
16 Indemnity Co., 774 F.2d 1371, 1374-1375 (9th Cir. 1985). The Ninth Circuit has
17 recognized that the test represents a "continuum of equitable discretion whereby the greater
18 the relative hardship to the moving party, the less probability of success must be shown."
19 Regents of Univ. of Cal. v. ABC, Inc., 747 F.2d 511, 515 (9th Cir. 1984).

20 In this case, Arizona Water Company has compellingly demonstrated both
21 hardship and probability of success on the merits. There is no legitimate defense for the
22 City's conduct in blatantly attempting to serve customers in Arizona Water Company's
23 Casa Grande CCN Area without first lawfully acquiring that CCN area by condemnation or
24 otherwise. This improper conduct is further compounded by the City's intentional
25 interference with Arizona Water Company's contractual and business relationship with
26 Reliant Energy. It is especially inequitable and improper that the City is attempting to do
27
28

1 so after having failed to obtain voter approval and having twice failed to acquire legally
2 Arizona Water Company's property interests in its CCN area.

3 The hardship on Arizona Water Company if the injunction does not issue is
4 easily demonstrated. The City would be free to coerce Reliant Energy to sign an illegal
5 water service agreement and to start providing effluent to Reliant Energy, rendering water
6 supply and distribution facilities established and planned by Arizona Water Company
7 useless or less useful. The City's threatened actions work a substantial detriment on the
8 citizens of the City, who are also Arizona Water Company's customers. If it were later
9 determined that the City's actions were illegal, it would be a substantial hardship on both
10 Arizona Water Company and Reliant Energy to withdraw from the City's provision of
11 water service and reconnect to a different water distribution system to receive legal water
12 service.

13 In comparison, there is no hardship on the City if injunctive relief were
14 entered. The City is under no pressure to dispose of effluent, as Arizona Water Company
15 and other parties stand ready to purchase that effluent. There is no social or other purpose
16 to be served by the City's interference with Reliant Energy, or any of Arizona Water
17 Company's other existing or prospective customers. Moreover, Arizona Water Company
18 has clearly raised serious questions going to the merits of the case.

19 . . .

20 . . .

21 . . .

22 . . .

23 . . .

24 . . .

25 . . .

26 . . .

27 . . .

28 . . .

1 **VI. Conclusion.**

2 For the foregoing reasons, Plaintiff, Arizona Water Company requests that
3 the City of Casa Grande be enjoined from entering into a water service agreement with
4 Reliant Energy, as requested in the Verified Complaint.

5 RESPECTFULLY SUBMITTED this 24th day of March, 2000.

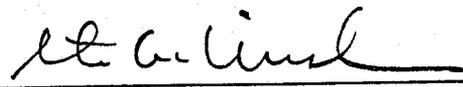
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7
8 By 

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APR 11 2006 6:08
 U.S. DISTRICT COURT
 DISTRICT OF ARIZONA
 BY: _____

6 Attorneys for Plaintiff Arizona Water Company

7
 8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE DISTRICT OF ARIZONA
 10

11 Arizona Water Company, an Arizona
 12 corporation;
 13 Plaintiff,
 14 vs.
 15 City Of Casa Grande, a municipal corporation
 16 of the State of Arizona,
 17 Defendant.
 18

CIV. 00-0354 PHX PGR

**PLAINTIFF ARIZONA WATER
 COMPANY'S REPLY IN SUPPORT
 OF ITS MOTION FOR
 INJUNCTIVE RELIEF**

19
 20 Plaintiff Arizona Water Company submits the following reply in support of its
 21 motion for injunctive relief to enjoin the City of Casa Grande (the "City") from depriving
 22 Arizona Water Company of its constitutionally-protected property rights in its Casa Grande
 23 CCN Area. In its Response, the City relies heavily upon a single superseded and irrelevant
 24 case. However, the relevant statutes have been amended. As a result, Arizona Water
 25 Company now enjoys greater property rights than recognized in the cases cited by the City,
 26 compelling a different result in this case.
 27
 28

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EXHIBIT C

1. **I. The City Has Failed to Dispute Any of the Facts Presented by Arizona Water**
2. **Company.**

3. The City's Response ignores, and thus concedes the facts alleged in Arizona Water
4. Company's Verified Complaint and the Affidavit of William Garfield. For example, the
5. City concedes that Arizona Water Company possesses a valid Certificate of Convenience
6. and Necessity ("CCN") and that an existing industrial customer of Arizona Water
7. Company, Reliant Energy Basin L.L.C. ("Reliant Energy") is located within that valid
8. CCN area. The City also concedes that although it has twice sought to condemn Arizona
9. Water Company's CCN, once through an election in 1990 and more recently in a dismissed
10. condemnation action filed in 1999, both efforts failed.

11. The City also does not dispute the fact that it is carrying out its promise to disrupt
12. Arizona Water Company's efforts to continue providing water service in Casa Grande. See
13. Exhibit B to Affidavit of William Garfield. Moreover, the City does not dispute that it has
14. attempted to force Reliant Energy to buy water from the City in blatant disregard of the
15. City's obligation to exercise the power of eminent domain and to pay just compensation for
16. the taking of Arizona Water Company's exclusive right to be the water service provider to
17. Reliant Energy. The City offers no defense of its actions interfering with Arizona Water
18. Company's business expectations and customer relations, or the City's attempt to coerce
19. Arizona Water Company into surrendering its constitutionally-protected property rights.

20. The City does not dispute the fact that Arizona Water Company has
21. comprehensively planned for and stands ready to serve water to Reliant Energy, including
22. Central Arizona Project water and reclaimed water from the City and from sources other
23. than the City, and that Reliant Energy is already receiving water service from Arizona
24. Water Company. Finally, the City never disputes the fact that it could simply sell its water
25. to Arizona Water Company on the same terms as it could sell it to Reliant Energy. The
26. City has simply refused to do so, with no explanation or justification for its conduct.
27.
28.

1 **II. The City's Violation of Arizona Water Company's Federally-Protected**
2 **Property Rights Threatens Irreparable Harm to Arizona Water Company.**

3 The City contends that "it will be a year or more before Reliant Energy will require
4 water" and therefore "there is no urgency or compelling reason" for a preliminary
5 injunction. Response at 15. But that is misleading because it ignores the fact that
6 irreparable harm to Arizona Water Company arises from the City's present and ongoing
7 efforts to force Reliant Energy to sign a contract with the City (instead of Arizona Water
8 Company) as soon as possible. The City's counsel admitted in this Court that the City
9 would not willingly defer the signing of such a contract:

10 [W]e would agree that if an agreement were signed, we'd notify Arizona Water
11 Company and the Court before the agreement was implemented. . . . AWC for
12 some reason wants the agreement not to be signed. We find that completely
13 unacceptable

14 [T]he city has authorized me to state for the Court today that we know for sure that
15 nothing would be signed within the next two weeks. I can't say much after that --
16 because the city is dynamic.

17 Transcript of TRO Hearing on March 9, 2000 at 8-9, attached as Exhibit A. This Court
18 repeatedly pressed the City on its "reluctance to simply say 'Okay, we won't do anything
19 until, judge, you have had an opportunity to determine whether or not [the Court] has
20 jurisdiction'" *Id.* at 26. Eventually, the City agreed merely that "if the [City] council
21 finds a contract acceptable before the mayor's authorized to sign, we'll come back and tell
22 you." *Id.* at 33.

23 Thus, the irreparable harm in this case exists because of the City's determination to
24 force a quick executed contract with Reliant Energy in direct violation of Arizona Water
25 Company's CCN rights. It is not the construction schedule and completion date of Reliant
26 Energy's plant that matter. Rather, it is the fact of a very real and impending likelihood
27 that Arizona Water Company's contractual relationship with Reliant, as well as Arizona
28 Water Company's efforts to secure and provide reliable water services to its customer, are
 in danger of being disrupted and irreparably harmed if this Court does not intervene. The

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1 City's signing of a contract with Reliant Energy will deprive Arizona Water Company of
2 the benefit of its master plans to secure, supply, and deliver reliable water supplies to
3 Reliant Energy and its other customers in the area, as set forth in the Verified Complaint
4 and Arizona Water Company's opening memorandum. The City refused to delay forcing
5 Reliant Energy to sign a contract until the legality of the City's conduct could be
6 determined, necessitating this action. The threat of irreparable harm exists as long as the
7 City continues to refuse to agree not to contract with Reliant Energy. The City describes
8 such a delay as "completely unacceptable." *Id.* at 9. The irreparable harm exists because
9 of the City's intransigence, and the City could resolve many of the issues in this lawsuit by
10 simply agreeing to sell its water to Arizona Water Company.

11 **III. An Injunction Against the City Would Protect the Public Interest.**

12 The City contends that granting an injunction against the City's conduct would
13 somehow harm the public interest and violate water conservation policies. Response at 15-
14 17. That's just not true.

15 As the City admits, Arizona Water Company is a private water company which
16 "distributes or sells groundwater." A.R.S. § 45-402(30)(a). Arizona Water Company also
17 distributes and sells surface water, specifically, "central Arizona project water." A.R.S. §
18 45-101(9). Arizona Water Company is also in the planning process to obtain treated
19 wastewater supplies produced by Ross Abbott Laboratories and Frito-Lay, two other
20 industries located in its Casa Grande CCN Area. Verified Complaint, ¶¶ 11, 14. Thus,
21 Arizona Water Company has plans to receive water from numerous sources to serve
22 Reliant Energy and other customers. Moreover, Arizona Water Company's practices are
23 overseen by numerous state agencies and entities ranging from the Arizona Corporation
24 Commission to the Department of Water Resources, all of which have an interest in
25 enforcing water conservation policies.

26 It is Arizona Water Company, not the City, that has been the consistent steward of
27 the City's water supply and distribution system for decades. This action has been filed to
28 prevent the City's disruptive interference and to protect Arizona Water Company's rights

1 and investment in the water supply that serves Casa Grande. The provision of CAP water,
2 as opposed to groundwater, to Reliant Energy is the essence of good stewardship of water
3 resources in the area. The City's interference with the company's contractual relationship
4 with Reliant would prevent that use of CAP water.

5 Moreover, Arizona Water Company has repeatedly offered to purchase the City's
6 water and supply it to Reliant Energy and others through an Arizona Water Company
7 distribution system. See Exhibit C to Garfield Affidavit. The City has consistently
8 rejected that offer. The City even contends in its Response that Arizona Water Company
9 should not be allowed to provide the City's water to Reliant Energy because then Arizona
10 Water Company "would be dependent upon the City." Response at 16. The City
11 illogically argues that it will never sell its water to Arizona Water Company because
12 Arizona Water Company and its customers would then make beneficial use of it. The
13 City's position results from spite rather than from any actual concern about water
14 management issues.

15 The City also ignores the logical consequences of its argument. Any alleged
16 "misuse of potable water," Response at 16, would be caused by the City's refusal to sell its
17 water to Arizona Water Company, not by the conduct of Arizona Water Company. The
18 City seeks to coerce this Court much as it seeks to coerce Arizona Water Company and
19 Reliant Energy: let the City violate Arizona Water Company's CCN or else the City will
20 do everything it can to disrupt water service in Pinal County. See Exhibit B to Garfield
21 Affidavit. This Court should not permit such misconduct by the City, which will not even
22 allow its citizens to vote on its grandiose and misguided schemes to try to get into the
23 water utility business.

24 **IV. The City of Bisbee Case, Which Differs on Both the Facts and the Law, Does**
25 **Not Control This Situation.**

26 Rather than disputing the facts alleged in the Verified Complaint and the Affidavit
27 of William Garfield, the City confuses and deflects the issues by relying upon Arizona
28 Water Company v. City of Bisbee, 172 Ariz. 176, 836 P.2d 389 (App. 1991). The City

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1 misunderstands the holding of Bisbee and the significance of 1991 amendments to A.R.S. §
2 45-101. The Bisbee decision depended on the court's analysis of "the nature of effluent."
3 172 Ariz. at 177, 836 P.2d at 390. The relevant statute in Bisbee defined "effluent" as a
4 type of water which remained effluent whether it had been treated or untreated:

5 "Effluent" means water which, after being withdrawn as groundwater or diverted as
6 surface water, has been used for domestic, municipal or industrial purposes and
7 which is available for reuse for any purpose, whether or not the water has been
8 treated to improve its quality.

9 A.R.S. § 45-402 (1980)(emphasis added); see also Bisbee, 172 Ariz. at 178, 836 P.2d at
10 391. Under this older statute, "effluent" (as distinguished from groundwater and surface
11 water) remained "effluent" regardless of whether it was treated or not. Moreover, under
12 the older statutory scheme, "effluent" also apparently remained "effluent" in perpetuity, no
13 matter what later use was found for it.

14 In Bisbee, the city had failed to treat its effluent sufficiently so as to comply with
15 the standards set by the Environmental Protection Agency. See 172 Ariz. at 177, 836 P.2d
16 at 390. Thus, only very limited uses existed for Bisbee's effluent:

17 The effluent contains pathogenic bacteria, fecal coliform bacteria, and metals such
18 as arsenic and cadmium. It is not fit for either irrigation purposes or for human
19 consumption. . . .

20 The effluent that the city is delivering to [Phelps Dodge] is not usable for
21 drinking purposes, irrigation, or fire protection purposes. It is usable for nothing
22 other than [Phelps Dodge's] leaching operation.

23 172 Ariz. at 177, 179, 836 P.2d at 390, 392.

24 The City mischaracterizes Bisbee, stating that the case "expressly held Bisbee was
25 allowed to sell its effluent to Phelps Dodge." Response at 5 (emphasis added); see also id.
26 at 6 (claiming that "the City may sell effluent without regard to AWC's CC&N," citing
27 Bisbee). In contrast, the Bisbee decision consistently stated that Bisbee "delivered,"
28 "provided" or "furnished" effluent to Phelps Dodge. See, e.g., 172 Ariz. at 176, 836 P.2d
at 389.

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1 In fact, Bisbee never sold effluent to Phelps Dodge. See Bisbee's Response to the
2 Petition for Review in Arizona Water Company v. City of Bisbee attached as Exhibit B at
3 p. 6 ("Bisbee receives no monetary remuneration from Phelps Dodge for transfer of the
4 sewage effluent."). Rather, Bisbee allowed Phelps Dodge to make use of the virtually
5 unusable effluent after Phelps Dodge leased pumps and a pipeline to transport the effluent
6 to Phelps Dodge's leaching operation. See 172 Ariz. at 177, 836 P.2d at 390. Moreover,
7 Arizona Water Company was not dealing with a situation involving tortious interference
8 with its contract and business relations, nor did its lawsuit include such a claim.

9 Thus, the Bisbee case stands only for the proposition that, under a now superseded
10 definition of "effluent," a city could give away a generally unusable "public and
11 environmental nuisance" and "noxious by-product" to the only entity which could
12 discharge it as part of its copper leaching operation. 172 Ariz. at 178, 836 P.2d at 391.

13 The facts and law in this action differ materially from the facts and law presented in
14 Bisbee. First, the Arizona Legislature has amended the definition of "effluent" to make it
15 "substantially different from the pre-amendment version."¹ Arizona Municipal Water
16 Users Ass'n v. Arizona Department of Water Resources, 181 Ariz. 136, 144, 888 P.2d
17 1323, 1331 (App. 1994). The current definition of "effluent" changed the prior definition
18 in a number of ways:

19 "Effluent" means water that has been collected in a sanitary sewer for subsequent
20 treatment in a facility that is regulated pursuant to §§ 49-361 and 49-362
21 [Wastewater Collection and Treatment]. Such water remains effluent until it
22 acquires the characteristics of groundwater or surface water.

23 A.R.S. § 45-101(4)(effective until January 1, 2001). The statute in turn defines "Sanitary
24 sewer" as "any pipe or other enclosed conduit that carries, among other substances, any

25
26 _____
27 ¹ The Arizona Legislature no doubt made these revisions at the "invitation" of the Arizona
28 Supreme Court in Arizona Public Service Co. v. Long, 160 Ariz. 429, 438, 773 P.2d 988, 997
(1989).

1 water-carried wastes from the human body from residences, commercial buildings,
2 industrial plants or institutions.” A.R.S. § 45-101(8).

3 The current definition of “effluent” thus involves at least three elements not present
4 in the former statutory definition: (1) the water must be “collected in a sanitary sewer”; (2)
5 the water must be collected for “subsequent treatment” in a wastewater treatment facility;
6 and (3) the water loses its character as “effluent” when it “acquires the characteristics of
7 groundwater or surface water.” Moreover, the definition of “surface water” explicitly
8 includes water resulting from wastewater treatment facilities:

9 “Surface water” means the waters of all sources, flowing in streams, canyons,
10 ravines or other natural channels, or in definite underground channels, whether
11 perennial or intermittent, floodwater, wastewater or surplus water

12 A.R.S. § 45-101(9)(emphasis added). Comparing the two statutory definitions of
13 “effluent” shows that the City’s water remains “effluent” for only a short time, that is,
14 while “collected in a sanitary sewer.” A.R.S. § 45-101(4). Once the City’s water leaves
15 the sanitary sewer and the City treats it in a wastewater plant, the water no longer fits the
16 current statutory definition of “effluent.” Id. Moreover, Bisbee clearly does not stand for
17 the proposition that a city can sell groundwater or surface water to customers within a
18 public service corporation’s CCN without first condemning and paying for the CCN right;
19 such a result would turn water and public utility law on its ear and violate the sanctity of
20 Arizona Water Company’s CCN right. See James P. Paul Water Co. v. Arizona Corp.
21 Comm’n 137 Ariz. 426, 671 P.2d 404 (1983); See also City of Tucson v. Polar Water Co.,
22 76 Ariz. 404, 408-09, 265 P.2d 773, 775-76 (1954).

23 Besides changes in the law, the facts here differ dramatically from those presented
24 in Bisbee. Unlike Bisbee, the City has treated and improved the quality of its so-called
25 “effluent.” Bisbee could not obtain a clean water permit to discharge its effluent, and thus
26 provided the effluent at no charge to Phelps Dodge. In this case, the City’s water, while
27 not drinkable, presumably meets federal EPA standards and can be used for both irrigation
28 and fire protection. In contrast to the virtually useless effluent in Bisbee, the City’s water

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1 could be used by Arizona Water Company's customers for numerous purposes. Moreover,
2 the City seeks to sell this usable water to Arizona Water Company's customer, Reliant
3 Energy. See Affidavit of William Garfield, ¶ 8. In contrast, Bisbee sought to give away a
4 "noxious by-product" to the only entity that could make use of it.

5 Thus, this action has little, if anything, in common with Bisbee. Bisbee sought to
6 give away its noxious and barely-treated effluent under a superseded statutory scheme that
7 preserved "effluent" from transformation into another form of water. The Bisbee court
8 thus held that "[b]ecause effluent is not the same as the water that Arizona Water provides
9 to its service area," Bisbee did not engage in illegal competition. See 172 Ariz. at 178, 836
10 P.2d at 391 (emphasis supplied). But here the City is trying to sell exactly the same type of
11 water that Arizona Water Company is prepared to provide to its present customer, Reliant
12 Energy. While Arizona Water Company certainly disputed the result in Bisbee, the City in
13 the present case is engaging in a considerably more egregious and disruptive interference
14 with Arizona Water Company's CCN and the Company's efforts to secure and provide
15 reliable water supplies for Reliant and its other customers in Casa Grande.

16 **V. The City's Other Cases Also Fail to Support the City's Position.**

17 In addition to Bisbee, supra, the City cites Arizona Public Service Co. v. Long, 160
18 Ariz. 429, 773 P.2d 988 (1989), for the proposition that "the City may sell effluent without
19 regard to AWC's CC&N." Response at 6. Long also fails to support the City's argument.
20 First, the Supreme Court decided Long under the superseded statutory definition of
21 "effluent" in effect prior to the 1991 amendments. See 160 Ariz. at 435, 773 P.2d at 995.
22 Based on that definition, the Supreme Court held that "one can only conclude by this
23 definition that effluent is something other than groundwater or surface water." Id. at 435,
24 773 P.2d at 995. In contrast, as set forth above, the current and controlling definition of
25 "effluent" provides that effluent can be treated and "acquire the characteristics of
26 groundwater or surface water." A.R.S. § 45-101(4).

27 Unlike Bisbee and this action, the sale in Long involved delivery of water to the
28 Palo Verde Nuclear Generating Station, which is located outside of any public service

1 corporation's CCN, and thus would not constitute a sale to a customer within a private
2 water company's CCN, as here. In this unique (and inapplicable) context and under an
3 older and superseded statutory definition, the Long court held that "the Cities can put its
4 [sic] sewage effluent to any reasonable use that it [sic] sees fit." 160 Ariz. 435, 773 P.2d
5 995. However, Long has no relevance to the circumstances here: a municipality's bald-
6 faced attempt to coerce an existing customer of a water utility within that utility's
7 certificated area to buy water from an outside party against the wishes of the customer and
8 the public utility CCN holder. No such issue arose in Long because the effluent sales did
9 not violate any utility's CCN (in fact, Arizona's utilities generally welcomed the decision
10 because it benefited their Palo Verde plant). Because of this wide divergence from the
11 facts here, as well as the change in the statutory definition of "effluent," Long does not
12 support the City's attempt to violate Arizona Water Company's CCN and to force Arizona
13 Water Company's customers to buy the City's water. Nor would an injunction barring the
14 City from violating Arizona Water Company's Casa Grande CCN Area have any effect on
15 the continued ability of metropolitan Phoenix cities to deliver effluent to the Palo Verde
16 plant.

17 The City also cites Wyoming Hereford Ranch v. Hammond Packing Co., 236 P. 764
18 (Wyo. 1925), overruled on other grounds, Horse Creek Conservation Dist. v. Lincoln Land
19 Co., 59 P.2d 763 (Wyo. 1936), and Reynolds v. City of Roswell, 654 P.2d 537 (N.M.
20 1982), both of which have no relevance to this action. As Long noted, Wyoming Hereford
21 merely held that "the sale by Cheyenne of sewage effluent that was discharged directly into
22 the buyer's ditch was valid, but that portion of the effluent that was discharged into a creek
23 was public water subject to appropriation." 160 Ariz. at 435, 773 P.2d at 995. Similarly,
24 Reynolds merely held that the New Mexico State Engineer could not require the City of
25 Roswell to continue to discharge sewage effluent into a river, stating "[t]he right of an
26 appropriator to reuse his waste waters has been explicitly recognized . . ." 654 P.2d at 541.
27 Neither case involved a city attempting to force the sale of its sewage effluent to the
28

1. customers of a water utility within the water utility's certificated area, and for that reason
2. they have no applicability here.

3
4 **VI. Conclusion.**

5 For the foregoing reasons and the reasons stated in its opening memorandum,
6 Plaintiff Arizona Water Company requests that this Court enjoin the City of Casa Grande
7 from entering into a water service agreement with Reliant Energy, as requested in the
8 Verified Complaint. Injunctive relief is appropriate as a matter of law based on the
9 uncontroverted facts presented to the Court.

10 RESPECTFULLY SUBMITTED this 14th day of April, 2000.

11 BRYAN CAVE LLP

12
13 By 

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15 Rodney W. Ott, #016686

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ARIZONA WATER COMPANY,) :	No. 2000-354 PHX PGR
)	
Plaintiff,)	Phoenix, Arizona
)	March 9, 2000
vs.)	10:04 A.M.
)	
CITY OF CASA GRANDE,)	
)	
Defendant.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

TEMPORARY RESTRAINING ORDER HEARING

Court Reporter:	William A. McNutt III, RMR
	230 N. First Ave., Room 7404
	Phoenix, Arizona 85025
	(602) 253-0707

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

WM. A. MCNUTT III, RMR

1 some final determinations, again with an effluent model.
2 And we believe that Arizona Water Company's known about that
3 for the last year.

4 So, until this action was filed 13 days ago, AWC
5 has not bothered to make this complaint in any of the
6 forums, the Corporation Commission, which under Arizona law
7 is frequently referred to as the fourth branch of
8 government, or in the state court actions.

9 So there is no likelihood also of Arizona Water
10 Company prevailing on the merits in this case. We cite in
11 our motion this morning the City of Bisbee case. And that's
12 Arizona Water Company, same company, versus City of Bisbee.
13 The issue was could Bisbee serve effluent within AWC.

14 THE COURT: We're kind of getting into the merits
15 here, trying to find out the status right at this moment.
16 But is there a pen poised to the --

17 MR. IRVINE: We have no agreement that's been
18 negotiated. We don't know that we -- we would be just
19 stunned if there was anything signed with anyone next couple
20 of weeks. There is no pen poised.

21 We have -- we -- we -- I told Mr. Hirsch last week
22 and -- that we would agree that if an agreement were signed,
23 we'd notify Arizona Water Company and the Court before the
24 agreement was implemented. And as you just heard from both
25 of us, no water delivery would take place for this cooling

1 water for a year or more.

2 AWC for some reason wants the agreement not to be
3 signed. We find that to be completely unacceptable because,
4 you know, when would the pen be poised? Until there's a
5 signed agreement, what could we bring back to the Court to
6 find out about?

7 If someone says, "Please, Judge, order that this
8 agreement not be implemented," if it's not signed, we don't
9 know that's an agreement and there would be a ripeness
10 issue, I guess, of what would be before the Court.

11 So, I tend -- the city has authorized me to state
12 for the Court today that we know for sure that nothing would
13 be signed within the next two weeks. I can't say much after
14 that that -- because the city is dynamic.

15 There's a Corporation Commission action that may
16 be scheduled later this month. We don't know that yet. The
17 Corporation Commission hasn't put our -- they're scheduled
18 for later this month. And a variety of other things has
19 happened.

20 Then lastly, on the temporary restraining order
21 issue, the -- there would be no irreparable harm, since no
22 delivery of water would occur. So we don't see the need for
23 a temporary restraining order.

24 And with, you know, great respect for the Court,
25 we think this is a state court action. We've been arguing

1 get into the merits of the application for temporary
2 restraining order.

3 I'm trying to focus on whether or not the court
4 should enter an order now, acknowledging that there's
5 jurisdictional questions, or to have status quo in place so
6 that the court can, in the orderly course of business,
7 consider your motion to dismiss, which I have to say on its
8 face raises some substantial issues.

9 MR. IRVINE: Well, okay. On that issue, Your
10 Honor, I would go to the fact that there would be no water
11 delivered. You know, we --

12 THE COURT: But if a contract is entered into,
13 then there's no question that we have an additional party
14 that would have to be participating in these proceedings I
15 presume, that certainly other proceedings or other state
16 court actions, as well as claims for damages by Reliant,
17 against the City of Casa Grande for breaching that
18 agreement, if it turns out that there was an improper
19 agreement.

20 So, you know, I have a hard time understanding the
21 city's --

22 MR. IRVINE: Our -- our -- our re --

23 THE COURT: -- reluctance to simply say, "Okay, we
24 won't do anything until, judge, you have an opportunity to
25 determine whether or not it has jurisdiction or should

1 proposal that would be incorporated into an order, state the
2 avowals of counsel, and it would state the briefing on the
3 motion to dismiss would proceed in the ordinary course and
4 be set for oral argument.

5 And in the meantime, if Reliant Energy tendered a
6 contract, or if the pen began to become poised, consistent
7 with the avowals of counsel here in court, that the Court
8 and Arizona Water Company would be notified and proceedings
9 had as were necessary at that point, either by briefing or
10 the argument on the point accelerated.

11 THE COURT: Mr. Irvine, why don't we just step up
12 so that we're both there at the same time.

13 What about the court's consideration on the motion
14 to dismiss and briefing?

15 MR. IRVINE: We're willing to proceed on an
16 accelerated basis. But we're also, as I've told you, and
17 the city attorney's authorized me to say, that if the
18 council finds a contract acceptable before the mayor's
19 authorized to sign, we'll come back and tell you.

20 THE COURT: Well, one of you wants to follow the
21 local rule, and one side wants to accelerate. So I would
22 think that then you should be agreeable to some type of
23 acceleration, Mr. Hirsch.

24 MR. HIRSCH: Yes.

25 THE COURT: You're the one that's seeking a

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JAN 15 1992

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ACTION _____

By: Tom R. Clark
Scott H. Gan

SUPREME COURT, STATE OF ARIZONA

ARIZONA WATER COMPANY, an)
Arizona corporation,)
)
Plaintiff/Appellant,)
)
-vs-)
)
CITY OF BISBEE,)
)
Defendant/Appellee.)
_____)

No. _____
Appeal Court #2 CA-CV 91-0027
Arizona Superior Court,
Cochise County #CV 89-00229
**RESPONSE TO PETITION FOR
REVIEW**

The CITY OF BISBEE ("Bisbee"), pursuant to Rule 23(e) of the Arizona Rules of Civil Appellate Procedure, A.R.S. Vol. 17B, responds to ARIZONA WATER COMPANY's ("AWC") previously filed Petition for Review, as follows:

I. INTRODUCTION

AWC has mischaracterized the decision of the Court of Appeals, and attempts to broaden the scope of the decision in hopes that this Court will grant review. For example, AWC suggests that the Court of Appeals opinion could be read:

".... to give municipalities an unlimited right to dispose of water from their sewage treatment plants (and probably from any nonpotable source), including the right to treat the water to drinking or irrigation water standards and to sell that water in competition with a regulated public service water utility, in contravention to A.R.S. §§ 9-515 and 9-516." (Petition, pg. 3.)

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2 fire protection or human consumption, constitute the provision of a
3 competing public water service?
4

5 IV. FACTS MATERIAL TO THE CONSIDERATION OF THE ISSUE

6 PRESENTED

7
8 Bisbee processes sewage effluent through its Mule Gulch
9 Wastewater Treatment Facility, which is located within AWC's service
10 area. In 1986, after the U.S. Environmental Protection Agency
11 notified Bisbee that the discharge of sewage effluent from the
12 wastewater treatment facility did not meet federal requirements,
13 Bisbee contracted with Phelps Dodge to deliver 100,000 to 300,000
14 gallons of sewage effluent per day to the Phelps Dodge leaching
15 operation. In return, Phelps Dodge leased two pumps and a pipeline
16 to Bisbee for transporting the effluent from the treatment plant to
17 the leaching operation. Bisbee receives no monetary remuneration
18 from Phelps Dodge for transfer of the sewage effluent. The effluent
19 contains pathogenic bacteria, fecal coliform bacteria and metals
20 such as arsenic and cadmium, and is not fit for irrigation, fire
21 protection or human consumption. (Appendix 1, Bisbee's Opposition
22 to AWC's Motion for Summary Judgment and Statement of Facts, at
23 Exhibit 1.)

24 When AWC learned of Bisbee's delivery of sewage effluent, it
25 demanded that Bisbee cease "providing water service" within AWC's
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