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1 Carl J. Kunasek  
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Commissioner  
4

Arizona Corporation Commission  
AZ CORP COM DOCUMENT DOCKETED

5 ARIZONA CORPORATION COMMISSION JUN 01 2000

6 DOCKETED BY JM

7  
8 IN THE MATTER OF THE FILING BY  
9 ARIZONA WATER COMPANY OF  
10 PROPOSED TARIFF NO. TE-264,  
TREATED EFFLUENT SERVICE

W-01445A-00-0319

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OBJECTION TO PROPOSED  
TARIFF

The City of Casa Grande (Casa Grande) hereby moves to intervene in this matter for the following reasons:

1. Casa Grande is both the local government speaking for the citizens of the city and a customer of Arizona Water Company (AWC). This objection is filed in both capacities.
2. AWC's proposed effluent tariff may have a tremendous impact on the community, the city is therefore an appropriate party to file this Objection.
3. AWC's certificate of convenience and necessity does not apply to effluent and no tariff can be legally approved. In *Arizona Water Company v. City of Bisbee*, 172 Ariz. 176, 836 P.2d 389 (App. 1991), the Court of Appeals held that:

"Because effluent is not the same as the water that Arizona Water provides to its service area, we find no merit to Arizona Water's contention that the city is illegally competing with it."

In other words, AWC has already lost the issue represented by this tariff. In the context of this proposed tariff, the Bisbee Doctrine means that effluent is not a part of the AWC CC & N. Attached is Casa Grande's Response to Memorandum in Support of Injunctive Relief which was filed in federal court; the explanation of the

1 Bisbee Doctrine contained in that Memorandum is incorporated by this reference.

2 4. AWC's "tariff" concerning effluent is nothing other than an end run around the  
3 issues that have been presented to the Commission in the context of Reliant Energy  
4 and in AWC's federal court lawsuit against Casa Grande. It is not appropriate to  
5 hide a major issue as a routine "tariff." Since AWC will apparently seek effluent  
6 from others (it has no sewer business), there must not be ANY chance that a  
7 shortage in effluent supply will result in groundwater or CAP water being substituted  
8 for effluent. If there is such a chance, what will be the impact on existing and future  
9 potable water customers. Prior to consideration of any "tariff," these issues need  
10 to be examined and the Commission must see and approve any suggested contract  
11 for effluent service.

12 5. Any consideration of the proposed tariff, if the Commission were to conclude that  
13 the CC & N applies to effluent, would require examination of AWC's entire rate  
14 design for Casa Grande in the context of a rate case. Casa Grande requests that  
15 this proposed "tariff" be sent to the Hearing Division for the entry of a procedural  
16 order followed by proper hearings.

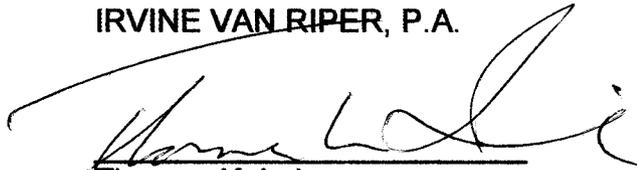
17 6. The proposed tariff does not contain guarantees that AWC's potable water  
18 customers will never be charged for any expense related to the service of effluent.  
19 The Arizona Department of Environmental Quality regulates effluent which requires  
20 a completely separate delivery system, inspections, licenses, etc. All such  
21 expenses, and the administrative burden, must not impact the users of potable  
22 water.

23 The City of Casa Grande must protect the public health and economic future of its  
24 citizens.

25 The City of Casa Grande respectfully requests that the proposed tariff be denied  
26 or, alternatively, be sent to the Hearing Division for the scheduling of appropriate hearings.

1                    RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of June, 2000.

2                    IRVINE VAN RIPER, P.A.

3                    

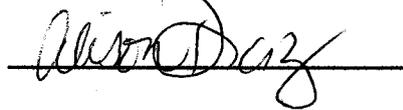
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9  
10 ORIGINAL and 25 copies filed this 1<sup>st</sup> day  
11 of June, 2000, with the Director of the Utilities  
12 Division of the Arizona Corporation Commission  
13 by filing the same with Docket Control.

14 COPY faxed and mailed this  
15 1<sup>st</sup> day of June, 2000,  
16 to:

17 James R. Livingston  
18 President  
19 Arizona Water Company  
20 P.O. Box 29006  
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13 UNITED STATES DISTRICT COURT  
14 DISTRICT OF ARIZONA

15 ARIZONA WATER COMPANY, an Arizona  
16 corporation,

17 Plaintiff,

18 vs.

19 CITY OF CASA GRANDE, a municipal  
20 corporation of the State of Arizona,

21 Defendant.

22 Case No. CIV 00-0354-PHX-ROS

23 **RESPONSE TO MEMORANDUM  
24 IN SUPPORT OF INJUNCTIVE  
25 RELIEF**

26 Defendant City of Casa Grande ("City") submits the following Response to Plaintiff  
27 Arizona Water Company's ("AWC") Memorandum in Support of Injunctive Relief dated  
28 March 24, 2000. By Count Four of its Verified Complaint, AWC seeks a preliminary  
injunction. The Court must deny the requested preliminary injunction because AWC has  
not satisfied the standard for granting injunctive relief.

This Response is supported by the following Memorandum of Points and Authorities  
and the record on file with the Court.



1 Because the City legally may serve effluent within AWC's CC&N, AWC cannot  
2 demonstrate the strong likelihood of success on the merits essential to a grant of  
3 preliminary injunctive relief. See Children of the Rosary v. City of Phoenix, 154 F.3d 972,  
4 975 (9th Cir. 1998); Johnson v. California State Bd. of Accountancy, 72 F.3d 1427, 1430  
5 (9th Cir. 1995); Dollar Rent A Car of Washington, Inc. v. Travelers Indem. Co., 774 F.2d  
6 1371, 1374 (9th Cir. 1985); Regents of the University of Calif. v. American Broadcasting  
7 Cos., Inc., 747 F.2d 511, 515 (9th Cir. 1984). Since AWC's CC&N does not encompass  
8 effluent produced by the City's wastewater treatment plant, there can be no  
9 uncompensated taking of AWC's property or inverse condemnation if the City serves that  
10 effluent to Reliant and others. Similarly, since "improper interference" is an essential  
11 element of the tort, see Snow v. Western Savings & Loan Ass'n., 152 Ariz. 27, 33-34, 730  
12 P.2d 204, 211-12 (1986), the City would not be tortiously interfering with AWC's contractual  
13 relations if it supplied effluent to Reliant.<sup>2</sup>

14 In addition, because both AWC and the City have agreed that "no water delivery  
15 would take place for this cooling water" for Reliant "for a year or more," Transcript of March  
16 9, 2000, TRO Hearing at 8-9 (quoted in AWC's Response to Defendant's Motion to  
17 Dismiss and/or Motion for Abstention at 4), AWC has failed to demonstrate that it would  
18 be irreparably harmed in the absence of a preliminary injunction, because there is no  
19 urgency.

20 Finally, AWC has completely failed to demonstrate that preliminarily enjoining the  
21 City from contracting with Reliant to serve effluent would further "advancement of the public  
22 interest." Dollar Rent A Car, 774 F.2d at 1374. See also Regents of the University of  
23 Calif., 747 F.2d at 515. AWC has admitted that it cannot provide effluent to Reliant for use  
24

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25 <sup>2</sup>In Edwards v. Anaconda Co., 115 Ariz. 313, 316, 565 P.2d 190, 193 (App.  
26 1977), the Arizona Court of Appeals stated that a competitor cannot be liable for the tort  
27 of intentional interference with business expectancies, because the actions of a  
28 business competitor are "privileged."

1 as cooling water, unless it obtains it from the City or some other source. AWC  
2 Memorandum at 2; Verified Complaint at ¶ 23. Thus, since AWC has no effluent, it would  
3 provide Reliant with potable water to cool its generators, which would be repugnant to the  
4 "water conservation policies of" Arizona. City of Bisbee, 172 Ariz. at 179, 836 P.2d at 392.

5 For these reasons, the Court must deny AWC's request for a preliminary injunction.

## 6 II. ARGUMENT

### 7 A. Applicable Standard For A Preliminary Injunction.

8 The Ninth Circuit has repeatedly applied the following "traditional test" for issuance  
9 of a preliminary injunction:

10 Under this traditional test a preliminary injunction is justified when: (1) the  
11 moving party has established a strong likelihood of success on the merits;  
12 (2) the balance of irreparable harm favors the moving party; and (3) the  
13 public interest favors the issuance of an injunction.

14 Regents of the University of Calif., 747 F.2d at 515. See also Johnson, 72 F.3d at 1430;  
15 Dollar Rent A Car, 774 F.2d at 1374; American Motorcyclist Ass'n v. Watt, 714 F.2d 962,  
16 965 (9<sup>th</sup> Cir. 1983); Sierra Club v. Hathaway, 579 F.2d 1162, 1167 (9<sup>th</sup> Cir. 1978).

17 The Ninth Circuit has also established an "alternative test" for issuance of  
18 preliminary injunctive relief:

19 Alternatively, a court may issue a preliminary injunction if the moving party  
20 demonstrates either a combination of probable success on the merits and  
21 the possibility of irreparable injury or that serious questions are raised and  
22 the balance of hardships tips sharply in his favor.

23 Johnson, 72 F.3d at 1430 (quoting Martin v. Int'l Olympic Comm., 740 F.2d 670, 675 (9<sup>th</sup>  
24 Cir. 1984)).

25 The "alternative test" is a more "liberal" standard which favors granting an injunction.  
26 See American Motorcyclist Ass'n, 714 F.2d at 965. However, even though the "alternative  
27 test" does not "expressly recite the public interest as a factor to be considered," Id. at 967,  
28 the United States Supreme Court has held that "the public interest is a factor which courts  
must consider in any injunctive action in which the public interest is affected." Id. (citing

1 Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 102 S. Ct. 1798, 1803, 72 L.Ed.2d 91  
2 (1982)).

3       Regardless of which standard is applied, AWC has failed to demonstrate that it is  
4 entitled to preliminary injunctive relief. Each factor to be considered is discussed below.

5 **B. AWC Has Failed To Establish A Likelihood Of Success On The Merits.**

6       "[A] party challenging governmental action as an unconstitutional taking bears a  
7 substantial burden." Eastern Enterprises v. Apfel, 524 U.S. 498, 522, 118 S.Ct. 2131,  
8 2146, 141 L.Ed.2d 451 (1998). Because Arizona law allows the City to serve effluent  
9 within AWC's CC&N service area without first condemning any portion of AWC's public  
10 utility property or CC&N, AWC cannot demonstrate a strong likelihood of success on the  
11 merits. For this same reason, AWC cannot even show a "fair chance" of success on the  
12 merits.

13       AWC offers two arguments in support of its position. First, AWC maintains that City  
14 of Bisbee, which expressly held Bisbee was allowed to sell its effluent to Phelps Dodge,  
15 an AWC industrial customer, without having to acquire AWC's CC&N, has been  
16 superseded by statutory changes and subsequent case law. AWC Memorandum at 5-9.  
17 AWC asserts that prior to these changes Arizona law did not regard effluent as "water."  
18 Without any analysis, AWC also asserts that Bisbee is not applicable to this case. AWC  
19 Memorandum at 6.

20       AWC's contentions are without merit. Its claims simply repeat its already failed  
21 challenge in Bisbee. Also, the Arizona Legislature has not superseded Bisbee. That  
22 decision is dispositive against AWC's position here. Arizona's Legislature and courts  
23 always have recognized that effluent is water. See A.R.S. § 45-104(4) (formerly A.R.S.  
24 § 45-402(6)); Arizona Public Service Co. v. Long, 160 Ariz. 429, 438, 773 P.2d 988, 997  
25 (1989).

26       The Bisbee court correctly recognized that a city when disposing of its effluent by  
27  
28

1 sale to a customer within the CC&N area of a private water company is not illegally  
2 competing with the private water company. 172 Ariz. at 178-79, 836 P.2d at 391-92.  
3 Bisbee recognized that effluent is different from water that is not the product of a sewage  
4 system in that effluent is a potential health hazard and nuisance, is something which a city  
5 constantly must deal with, and must be disposed of without harm to the public. 172 Ariz.  
6 at 178, 836 P.2d at 391. See A.R.S. § 36-601(A)(5).<sup>3</sup> Thus, as part of its obligation to  
7 collect, transport, treat, and dispose of effluent, the City may sell effluent without regard  
8 to AWC's CC&N. See City of Bisbee, supra; Arizona Public Service Co. v. Long, supra;  
9 City of Phoenix v. Long, 158 Ariz. 59, 63, 761 P.2d 133, 137 (App. 1988), review denied  
10 (1988).<sup>4</sup>

11 The City's sale of effluent is an integral part of its obligation to dispose of effluent  
12 without harm to the public. To carry out this function, the Arizona Legislature and courts  
13 have recognized that the entity that collects, transports, and treats effluent must have  
14 broad discretion, subject only to the public health laws in operating such systems, in  
15 deciding how best to dispose of effluent. As held in Bisbee, the City's obligation to dispose  
16 of effluent without harm to the public is not limited by the CC&N rights of a private water  
17 company. AWC's CC&N does not prohibit or prevent the City from supplying or selling its  
18

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19 <sup>3</sup>A.R.S. § 36-601(A)(5) states:

20 A. The following conditions are specifically declared public  
21 nuisances dangerous to the public health: . . .

22 5. All sewage, human excreta, wastewater, garbage or other  
23 organic wastes deposited, stored, discharged or exposed so as to be a  
24 potential instrument or medium in the transmission of disease to or between  
any person or persons.

25 <sup>4</sup>The type of industrial user the city sells its effluent to is irrelevant. In Bisbee,  
26 Bisbee sold its effluent to the Phelps Dodge mine. In Long, the Phoenix area cities sold  
27 effluent to utilities for use at the Palo Verde Nuclear Generating Station. Here, AWC  
28 challenges the City's sale of effluent to an electrical power plant.

1 effluent to any third party other than AWC.

2 (1) City of Bisbee controls.

3 City of Bisbee is on all fours and dispositive of this issue in the City's favor. The  
4 parallels between the two cases are striking. Comparing the Bisbee opinion with AWC's  
5 Memorandum shows that AWC is making the exact same arguments to this Court  
6 (including citation to the same case authorities) under similar factual circumstances that  
7 were rejected by the Arizona Court of Appeals in Bisbee.

8 In City of Bisbee, AWC sought a "declaratory judgment, injunctive relief, and  
9 damages for inverse condemnation." 172 Ariz. at 177, 836 P.2d at 390. AWC seeks the  
10 same relief here. AWC's argument in Bisbee was that the "city's delivery of water [i.e.,  
11 effluent] within Arizona Water's certificated area constitutes a competing service in  
12 violation of A.R.S. §§ 9-515 and 9-516," and that "the city has taken its property without just  
13 compensation." Id. AWC insisted, "it [stood] ready, willing, and able to supply whatever  
14 water Phelps Dodge required for its leaching operation." Id. at 179, 836 P.2d at 392.  
15 Based on these arguments, AWC complained that Bisbee "owes it damages for inversely  
16 condemning its equipment and facilities by distributing effluent to [Phelps Dodge's] copper  
17 leaching operation." Id. AWC is making the exact same arguments here with respect to  
18 the City's plan to supply effluent to Reliant Energy for use in cooling its electric generators.

19 The Bisbee court was not persuaded by AWC's arguments and neither should this  
20 Court be persuaded. In rejecting AWC's contentions, the Bisbee court analyzed the nature  
21 of effluent and its treatment under Arizona law. The Bisbee court noted that effluent is  
22 defined separately from the definition of both groundwater and surface water under  
23 Arizona's water statutes (which remains the case today). See A.R.S. § 45-101(4)<sup>5</sup>

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24  
25  
26 <sup>5</sup>At the time of the Bisbee decision, this statutory provision was numbered A.R.S.  
27 § 45-402(6).

1 (effluent); A.R.S. § 45-101(4)<sup>6</sup> (groundwater); A.R.S. § 45-101(9)<sup>7</sup> (surface water). 172  
2 Ariz. at 178, 836 P.2d at 391. It also stated the public service corporation statutes define  
3 "sewerage system" separately from "water system". Id. The Bisbee court further found  
4 that laws governing effluent disposal are found in statutes on community facilities districts,  
5 see A.R.S. §§ 48-701 through 48-724, and on sanitary districts, see A.R.S. §§ 48-2001  
6 through 48-2085. Id.

7 The Bisbee court discussed Arizona Public Service v. Long, which it recognized as  
8 the only Arizona decision before then addressing the extent of a City's power to dispose  
9 of effluent. Id. It noted that AWC relied upon the Long court's statement, "while effluent  
10 is neither groundwater nor surface water, it certainly is water," to support its contention that  
11 the subject effluent sale constituted "water service" in violation of AWC's CC&N right. Id.

12 The Bisbee court thus understood effluent was "water" at the time of its decision and  
13 before the amended definition of effluent and the other three statutory changes relied upon  
14 by AWC here. The Bisbee court rejected AWC's argument that the Long court's statement  
15 that effluent is water supported AWC's assertion that effluent sales involved "water service"  
16 which would be subject to and restricted by a private water company's CC&N. Id.

17 The Bisbee court further rejected the assertion that effluent could not be disposed  
18 of by sale within AWC's CC&N because the recognition that effluent is water does nothing  
19 to alter the Long court's holding that the cities in Long were free to contract for disposition  
20 of the effluent. Id. While recognizing that effluent is water, the Bisbee court held that  
21 Bisbee was not competing with AWC, even though AWC was "ready, willing, and able" to  
22 serve Phelps Dodge's industrial water needs. 172 Ariz. at 179, 836 P.2d at 392. It  
23 recognized that a city, when dealing with effluent, is dealing with a fluid different from water

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24  
25 <sup>6</sup>At the time of the Bisbee decision, this statutory provision was numbered A.R.S.  
§ 45-101(4).

26  
27 <sup>7</sup>At the time of the Bisbee decision, this statutory provision was numbered A.R.S.  
§ 45-101(6).

1 which is not a product of a sewage system:

2 In order to dispose of [effluent] without injury to others, a city may often be  
3 confronted with the necessity of choosing between several different plans,  
4 and in the selection of the plan to be followed we think it should be permitted  
5 to exercise a wide discretion. . . . Sewage is something which the City has  
6 on its hands, and which must be disposed of in such a way that it will not  
7 cause damage to others. . . . [W]e would not care to hold that in disposing  
8 of sewage the city could not adopt some means that would completely  
9 consume it.

10 172 Ariz. at 179, 836 P.2d at 392 (quoting Wyoming Hereford Ranch v. Hammond Packing  
11 Co., 33 Wyo. 14, 236 P. 764 (1925)).

12 Effluent is the product of waste, a public nuisance, and a city must dispose of it  
13 without harm to the public. See A.R.S. § 36-601(A)(5). Effluent is different than water  
14 which is not a product of a sanitary sewer because of the public health considerations  
15 recognized by Bisbee, Long, and the Arizona Legislature. This difference is further  
16 reflected in a city's absolute obligation to dispose of effluent without harm to the public.

17 The Bisbee court further emphasized that the subject effluent was not produced  
18 through AWC's service facilities. 172 Ariz. at 179, 836 P.2d at 392. The effluent was  
19 produced through Bisbee's sewage treatment facility and the water was transported  
20 through a pipeline supplied by Phelps Dodge. Id. The Bisbee court correctly found under  
21 Long that Bisbee's effluent sale to Phelps Dodge was a part of the city's disposal of  
22 effluent, and that Bisbee could dispose of its effluent in this manner without regard to  
23 AWC's CC&N. 172 Ariz. at 178-79, 836 P.2d at 391 and 392.

24 Bisbee is dispositive here. First, like Bisbee, Casa Grande is seeking to sell effluent  
25 to an industrial user within AWC's CC&N. Additionally, like Bisbee, the effluent at issue is  
26 produced through the City's sewage treatment facility and is planned to be conveyed  
27 through a City pipeline or pipeline supplied by the industrial user. Casa Grande's disposal  
28 of effluent through a sale to an electrical generating facility is comparable to Bisbee's  
disposal of its effluent to Phelps Dodge or the Phoenix area cities' disposal of effluent to  
the Palo Verde Nuclear Generating Station at issue in Long.



1 Long noting that "while effluent is neither groundwater nor surface water, it is certainly  
2 water." 160 Ariz. at 438, 773 P.2d at 997. The Long court also noted, "[s]ewage effluent  
3 is water that is left over after having been put to use." Id. at 437, 773 P.2d at 996. Thus,  
4 at the time Bisbee was decided effluent was considered a third category of water different  
5 from groundwater or surface water.

6 **b. The Arizona Legislature's narrowing of the definition of effluent  
7 does not alter the holding of Bisbee.**

8 AWC attempts to overcome Bisbee by arguing that the Legislature "abolished the  
9 prior, narrow definition [of effluent] on which Long and Bisbee relied." AWC Memorandum  
10 at 7. To the contrary, the Arizona Legislature narrowed the definition of effluent to  
11 specifically provide that effluent is the product of a sanitary sewer system:

12 "Effluent" means water that has been collected in a sanitary sewer for  
13 subsequent treatment in a facility that is regulated pursuant to §§ 49-361 and  
14 49-362. Such water remains effluent until it acquires the characteristics of  
15 groundwater or surface water.

16 A.R.S. § 45-101(3).

17 This definition codified the result in Long by more specifically describing the nature  
18 of effluent. Before Long, the Arizona Legislature broadly defined effluent to include:

19 water which, after being withdrawn as groundwater or diverted as surface  
20 water, has been used for domestic, municipal or industrial purpose and  
21 which is available for reuse for any purpose, whether or not the water has  
22 been treated to improve its quality.

23 A.R.S. § 45-402(6) [now A.R.S. § 45-101(3)]. The current definition of effluent specifies  
24 that it must result from a municipal sanitary sewer system. It excludes from its purview  
25 water which has been used for domestic, municipal, or industrial purposes but which has  
26 never been part of a sewer system regulated under A.R.S. §§ 49-361 and 49-362.

27 Significantly, both Casa Grande's effluent and the effluent at issue in Long and  
28 Bisbee fit within both the original and amended definition of effluent. Rather than alter the  
holdings of Long and Bisbee, the amended definition of effluent affirms those decisions by  
separately defining effluent from groundwater and surface water.

1 The Legislature's moving of the definition of effluent from the Groundwater  
2 Management Act to the beginning of the water title does nothing to advance AWC's  
3 position. The location of the definition is irrelevant. Effluent still remains an independent,  
4 third category of water that is not regulated as surface water and groundwater in Arizona.

5 c. **Arizona Municipal Water confirms that effluent remains**  
6 **unregulated.**

7 AWC contends that effluent is now regulated under the state's water laws, relying  
8 upon Arizona Municipal Water, supra. The Arizona Municipal Water court directly  
9 addressed whether certain statutory provisions that allow the Arizona Department of Water  
10 Resources ("ADWR") to count recovered effluent in determining compliance with the  
11 groundwater conservation requirements of the Second Management Plan adopted by  
12 ADWR under the Groundwater Management Act constitute regulation of effluent. 181 Ariz.  
13 at 140, 888 P.2d at 1327 These statutes addressed by Arizona Municipal Water are the  
14 same statutes AWC attempts to rely upon here to support its argument that effluent is now  
15 regulated under the state's water laws. However, the Arizona Court of Appeals in that case  
16 specifically stated in two separate references the opposite proposition: "we conclude that  
17 counting recovered effluent [for purposes of municipal conservation compliance  
18 calculations] is not the regulation of effluent," id.; "counting recovered effluent is not the  
19 same as regulation of effluent," 181 Ariz. at 146, 888 P.2d at 1333.

20 The Arizona Legislature amended A.R.S. §§ 45-467, 45-576, and 45-452 as a  
21 legislative recognition and codification of Long that a reference to surface water and  
22 groundwater did not include effluent because effluent is a separate category of water. This  
23 was recognized by the Arizona Municipal Water court: "the new definition of 'effluent'  
24 indicates that the legislature views effluent as an independent source of 'water' as that  
25 term is used throughout the Groundwater Code." 181 Ariz. at 144, 888 P.2d at 1331. The  
26 amendments to these three statutes do not regulate effluent. They only allow effluent to  
27 be counted as an independent source of water for purposes, of those sections.

1           **(3) The City Has Broad Powers Over Its Sewage System, Including the**  
2           **Power To Dispose Of Effluent By Sale, Without Being Limited By AWC's**  
3           **CC&N.**

4           Arizona municipalities are given broad powers over the operation of their sewage  
5 systems and the disposal of effluent. See, e.g., A.R.S. §§ 9-276, 9-522 and, 9-521. The  
6 cities' power to operate their sewage systems derives from their statutory power to operate  
7 utility undertakings. See City of Phoenix v. Long, 158 Ariz. at 62, 761 P.2d at 135.  
8 Pursuant to A.R.S. § 9-521(5)(a), the Arizona Legislature has defined utility undertakings  
9 to included "[e]lectric light or power, water, storm water, sewer, gas, common carrier of  
10 passengers, garbage or rubbish plant or system, including but not limited to disposal,  
11 treatment or reduction plants, buildings, incinerators, dams and reservoirs." These  
12 statutory provisions give cities expansive power to build sewer systems and regulate their  
13 use. See City of Phoenix, 158 Ariz. at 62, 761 P.2d at 136. This allows cities properly to  
14 fulfill their important public health duties in operating such systems. Id.

15           The Arizona Supreme Court has recognized that "adequate sewage disposal is not  
16 merely desirable, it is a stark necessity." City of Scottsdale v. Municipal Court, 90 Ariz.  
17 393, 398, 368 P.2d 637, 640 (1962). Thus, Arizona has established that municipalities  
18 must have broad discretion in providing its sewage service to most effectively meet their  
19 duties to the public in furnishing these services. See A.R.S. § 9-537. As noted by the City  
20 of Phoenix court:

21           Effluent is not property acquired, held or used by the cities for the benefit of  
22 the public. Rather, it is a noxious by-product of the treatment of sewage  
23 which the cities must dispose of without endangering the public health and  
24 without violating any federal or state pollution laws. **How they dispose of**  
25 **it is left to the discretion of the cities.**

26           158 Ariz. at 63, 761 P.2d at 137 (emphasis added). In operating its sewage system and  
27 disposing of sewage effluent, the City of Casa Grande is performing a critical public health  
28 function. Public health concerns are paramount in such disposal.

          AWC contends that the City's discretion over its disposal of effluent is limited by

1 AWC's CC&N, and the City may not sell effluent to customers within the CC&N. This  
2 argument runs contrary to the City's powers and discretion concerning the manner in which  
3 it operates its sewage systems. AWC's position also would run contrary to the public  
4 health by significantly limiting the City's authority to dispose of effluent in this fashion.

5 The Arizona Supreme Court in Long and the Court of Appeals in Bisbee recognized  
6 the important public health function involved in the disposal of effluent and the need not  
7 to limit the cities' discretion over such disposal by stating the following:

8 It is well known that the disposition of sewage is one of the important  
9 problems that embarrass municipalities. **In order to dispose of it without**  
10 **injury to others, a city may often be confronted with the necessity of**  
11 **choosing between several different plans; and in the selection of the**  
12 **plan to be followed we think it should be permitted to exercise wide**  
13 **discretion.** In determining how it will make a proper disposition of that which  
14 may be termed a potential nuisance, we think the city should not be  
15 hampered by a rule that would always require the sewage to be treated as  
16 waste or surplus waters. **Sewage is something which the city has on its**  
17 **hands, and which must be disposed of in such a way that it will not**  
18 **cause damage to others.** It would often be considered the height of  
19 efficiency if it could be disposed of in some other manner than by  
20 discharging it into a stream. **Even in this state, where the conservation**  
21 **of water for irrigation is so important, we would not care to hold that in**  
22 **disposing of sewage that the city could not adopt some means that**  
23 **would completely consume it.**

24 Arizona Public Service v. Long, 160 Ariz. at 434-35, 773 P.2d at 1017-18 (quoting  
25 Wyoming Hereford Ranch, 33 Wyo. 14, 236 P. 764); City of Bisbee, 172 Ariz. at 179, 836  
26 P.2d at 392. See also Reynolds v. City of Roswell, 99 N.M. 84, 88, 654 P.2d 537, 541  
27 (1982).

28 The City is involved in one of the most important, if not the most important, public  
health function when it disposes of effluent. Long, Bisbee, and the other authorities cited  
above demonstrate that Casa Grande's ability to dispose of its effluent by sale to an  
industrial customer within AWC's CC&N area is not limited in any way by such CC&N.

### C. AWC Has Failed To Show Irreparable Harm.

"An essential prerequisite to the granting of a preliminary injunction is a showing of  
irreparable injury to the moving party in its absence." Dollar Rent A Car, 774 F.2d at 1375

1 (citing County of Santa Barbara v. Hicckel, 426 F.2d 164, 168 (9<sup>th</sup> Cir. 1970)). However, "a  
2 party is not entitled to a preliminary injunction unless he or she can demonstrate more than  
3 simply damages of a pecuniary nature." Regents of the University of Calif., 747 F.2d at  
4 519 (citing Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d  
5 1197, 1202 (9<sup>th</sup> Cir. 1980)). "This is nothing more than a corollary to the principle that the  
6 exercise of equitable jurisdiction is predicated on the absence of an adequate remedy at  
7 law." Id.

8 Here, it is not disputed that it will be a year or more before Reliant Energy will  
9 require water to cool its electric generators. The plant is still under construction. See  
10 Transcript of March 9, 2000, TRO Hearing at 8-9. Neither the City nor AWC will begin to  
11 provide water to Reliant Energy tomorrow or any time in the near future. What this means  
12 is that there is no urgency or compelling reason justifying issuance of a preliminary  
13 injunction. This also necessarily means that AWC will not suffer irreparable injury if a  
14 preliminary injunction is not granted and that the balance of hardships cannot "tip sharply"  
15 in AWC's favor.

16 The fact that Reliant Energy will not need water for cooling purposes in the near  
17 future dictates that AWC would have an adequate remedy at law in the form of money  
18 damages for any compensable injuries it may sustain as a result of any illegal action by the  
19 City. As emphasized in the City's Motion to Dismiss, the proper forum for AWC to seek  
20 relief is Arizona's state courts, particularly the pending condemnation action currently  
21 before the Arizona Court of Appeals, not this Court.

22 Furthermore, AWC has failed to explain how "[t]he City's threatened actions work  
23 a substantial detriment on the citizens of the City." AWC Memorandum at 13. The exact  
24 opposite is true. This case is about the provision of effluent to industrial entities, such as  
25 Reliant Energy. Casa Grande's citizenry would realize a benefit if the City were able to  
26 recoup some of the cost of operating its wastewater treatment plant and dispose of the  
27

1 effluent in an environmentally sound manner by selling it to Reliant and others for industrial  
2 use.

3 **D. Granting An Injunction Would Not Further The Public Interest.**

4 This leads to the final deficiency of AWC's Memorandum. AWC has utterly failed  
5 to demonstrate that granting a preliminary injunction would further the public interest. The  
6 exact opposite is true.

7 If this Court were to enjoin the City from serving effluent to Reliant and other  
8 industrial water users within AWC's CC&N area, it is highly probable that AWC would  
9 supply them with CAP and/or groundwater for their industrial purposes. For example,  
10 Reliant would end up using potable water better suited to domestic use to cool its electric  
11 generators. This is because AWC is not a public service corporation "engaged in collecting,  
12 transporting, treating, purifying and disposing sewage through a system." City of Bisbee,  
13 172 Ariz. at 177, 836 P.2d at 390 (quoting Ariz. Const. art. 15, § 2). It is engaged in  
14 "furnishing water for irrigation, fire protection, or other public purposes." Id. AWC is a  
15 "private water company" that "distributes or sells groundwater." A.R.S. § 45-402(30)(a).  
16 AWC does not own facilities that produce effluent and has admitted that it would be  
17 dependent upon the City and other unspecified entities to supply a source of effluent that  
18 it could sell to Reliant for cooling its electric generators. AWC Memorandum at 2; Verified  
19 Complaint at ¶ 23.

20 Such a misuse of potable water would be repugnant to the "water conservation  
21 policies" of Arizona:

22 Arizona Water insists that it stands ready, willing, and able to supply  
23 whatever water [Phelps Dodge] requires for its leaching operation. The  
24 water it could supply, however, would be water that could otherwise be used  
25 for drinking water, fire protection, and irrigation. "It is, and has ever been, the  
26 policy of this state to make the largest possible use of the comparatively  
27 limited quantity of water within its boundaries." Pima Farms Co. v. Proctor,  
28 30 Ariz. 96, 102, 245 P.2d 369, 371 (1926). It would contradict the water  
conservation policies of this state to use such water for a leaching operation  
when the city's effluent, which is not otherwise usable, already serves that  
purpose admirably.

1 City of Bisbee, 172 Ariz. at 179, 836 P.2d at 392. The same would be true if AWC were  
2 to serve Reliant Energy with potable water to cool its electric generators.

3 As in Bisbee, AWC maintains here that it was ready, willing and able to serve  
4 Reliant Energy's water needs that would be better served by the City's effluent. As in  
5 Bisbee, the groundwater and/or CAP water AWC would be supplying to Reliant and other  
6 industrial users could be better used for residential purposes. If the City of Casa Grande  
7 is not authorized to dispose of its effluent by sale to industrial customers within AWC's  
8 CC&N to offset its tremendous costs of collecting, transporting, treating and disposing  
9 effluent, its effluent would potentially remain unused as a water resource or disposed of  
10 outside of the Casa Grande area.

11 As in Bisbee, the City's effluent is unusable for potable water purposes. The  
12 industrial customer in question (Reliant Energy) is located almost adjacent to the City's  
13 sewage treatment plant. As part of its effluent disposal function and in the interest of  
14 important public policy, the City should be entitled to dispose of effluent by sale without  
15 interference from AWC for the electrical generation water needs of an electrical power  
16 plant which is located within AWC's CC&N.

17 **III. CONCLUSION**

18 For the reasons set forth above, the City of Casa Grande requests that the Court  
19 enter an Order denying AWC's request for a preliminary injunction included as Count Four  
20 of the Verified Complaint.

21 RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of April, 2000.

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7 ORIGINAL and ONE COPY of the  
8 foregoing filed this 7<sup>th</sup> day of  
9 April, 2000, with the Clerk of  
10 the United States District Court.

11 COPY of the foregoing faxed and  
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