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1 FENNEMORE CRAIG, P.C.  
A Professional Corporation  
2 Jay L. Shapiro (No. 014650)  
Patrick J. Black (No. 017141)  
3 3003 North Central Avenue  
Suite 2600  
4 Phoenix, Arizona 85012  
Telephone (602) 916-5000

5 Attorneys for Coronado Utilities, Inc.

6 **BEFORE THE ARIZONA CORPORATION COMMISSION**

7 IN THE MATTER OF THE APPLICATION  
8 OF CORONADO UTILITIES, INC. FOR A  
CERTIFICATE OF CONVENIENCE AND  
9 NECESSITY TO PROVIDE WASTEWATER  
SERVICE IN PINAL COUNTY, ARIZONA.

DOCKET NO. SW-04305A-05-0086

10 IN THE MATTER OF THE APPLICATION  
11 OF CORONADO UTILITIES, INC., AN  
ARIZONA CORPORATION, FOR  
12 AUTHORITY TO ISSUE SHORT AND  
LONG-TERM DEBT INSTRUMENTS IN  
13 CONNECTION WITH FINANCING THE  
ACQUISITION OF THE WASTEWATER  
14 UTILITY PLANT OF BHP COPPER INC.  
AND CONSTRUCTING IMPROVEMENTS  
15 THERETO.

DOCKET NO. SW-04305A-05-0087

**LEGAL ANALYSIS REGARDING  
WHETHER BHP COPPER INC. IS A  
PUBLIC SERVICE CORPORATION**

**(Consolidated)**

16  
17 Pursuant to the procedural Order dated August 2, 2005, Applicant Coronado Utilities, Inc.  
18 (“Applicant” or “Coronado”) hereby submits its legal analysis concerning whether BHP Copper  
19 Inc. (“BHP”) is a public service corporation providing wastewater utility services that are subject  
20 to regulation by the Arizona Corporation Commission (“Commission”).

21 Applicant respectfully submits that the issue of whether BHP is subject to Commission  
22 regulation is not relevant to whether Coronado is a fit and proper entity to receive the requested  
23 CC&N. Moreover, uncontroverted evidence in this case shows that BHP is not going to continue  
24 to provide wastewater service to residents of San Manuel, Arizona indefinitely. Therefore, the  
25 element of need is clearly established irrespective of BHP’s regulatory status. Nevertheless, in  
26 order to assist the presiding Administrative Law Judge and the Commission in reaching a

1 decision, Coronado has conducted the requested legal analysis, which, as explained below, shows  
2 that BHP is not, and has never been a “public service corporation” (“PSC”) under Arizona law.  
3 BHP has never operated the wastewater collection system and treatment plant (“WTP”) in San  
4 Manuel, Arizona for profit. Rather, BHP’s provision of wastewater utility service to the San  
5 Manuel residents was a subsidized benefit purely incidental to BHP’s copper mining business.

6 **I. FACTUAL BACKGROUND.**

7 San Manuel is located in the southeast corner of Pinal County, about 45 miles northeast of  
8 Tucson. Mining activities began in the area in approximately 1881. Magma Copper Co. (a  
9 predecessor to BHP, hereinafter referred to collectively as BHP), began development of the ore  
10 body that became the San Manuel Mine in 1948. (Affidavit of Gerald R. Brunskill dated August  
11 30th, 2005 (“Aff.”), ¶ 7).<sup>1</sup> Large-scale development of the area occurred between 1952 and 1956,  
12 spurred by a \$94 million investment by the U.S. Reconstruction Finance program. (Aff., ¶ 8).  
13 The San Manuel Mine was expanded and the San Manuel Plant (located approximately seven  
14 miles south of the Mine), was constructed to process ore from the Mine. (Aff., ¶ 9). In 1954, as  
15 part of its expansion of its mining operation, BHP constructed the Town adjacent to the Plant,  
16 including homes for employees and service providers that directly supported the mining  
17 operations. (Aff., ¶ 10). The first production of copper from the Plant occurred on January 8,  
18 1956. (Aff., ¶ 11).

19 The San Manuel Plant was a fully integrated operation designed to convert copper  
20 sulphide ore into high-grade market copper. (Aff., ¶ 12). The facilities consisted of a copper  
21 concentrator, copper smelter, three sulfuric acid plants, an electrolytic copper refinery and a  
22 continuous cast copper rod plant. (Aff., ¶ 13). These main production units were supported and  
23 serviced by facilities that included a powerhouse, an oxygen plant, sulfuric acid storage and  
24 loading facilities, offices, maintenance shops, warehouses, a railroad, and the WTP. (Aff., ¶ 14).

25  
26 <sup>1</sup> A copy of Mr. Brunskill’s affidavit is attached hereto as Exhibit A.

1 The WTP was also used to serve the Town. (Aff., ¶ 15). Initially, all the Town property  
2 and housing were owned and managed by a separate BHP corporation called the San Manuel  
3 Townsite Company, and the buildings were leased to the employees. (Aff., ¶ 16). Wastewater  
4 services were originally provided to lessees as part of a uniform, lump sum waste disposal service  
5 charge of \$11- \$15/month, which included garbage and bulk trash pick-up in addition to sewage  
6 collection and disposal. (Aff., ¶ 17). The Townsite Company incurred substantial losses from its  
7 inception, but charges were intentionally kept low and subsidized by BHP for the benefit of the  
8 employees. (Aff., ¶ 18). In 1962, the Townsite Company was dissolved as a separate corporation  
9 and its functions taken over directly by BHP. (Aff., ¶ 19).

10 The land and housing were gradually sold off to the residents in several phases, beginning  
11 with a small percentage (*e.g.*, 15%) in the late 1960s and early 1970s. (Aff., ¶¶ 20, 22). However,  
12 sales were generally made only to mine employees or service providers, and early sales were  
13 subject to a 10-year option in favor of BHP designed to ensure that residential sales and rental  
14 prices remained artificially low. (Aff., ¶ 21). The bulk of the sales (approximately 85%)  
15 occurred from approximately 1987-1991. (Aff., ¶ 22). In 1987, the garbage and bulk trash pick-  
16 up and disposal service was taken over by an independent business, and the transition to private  
17 billing for wastewater service occurred in January, 1988. (Aff., ¶ 23). BHP reduced the waste  
18 disposal charge to reflect the reduced scope of services *i.e.*, wastewater service only. (Aff., ¶ 24).  
19 The charge was set at \$48/year (effectively \$4/month), an amount that has never been raised.  
20 (Aff., ¶ 24). The Town remains unincorporated, and currently includes a total of approximately  
21 1250 homes and 4,100 people. (Aff., ¶ 26).

22 BHP suspended underground mining at San Manuel in June 1999, and announced on  
23 January 15, 2002, that it would be closing the Mine. (Aff., ¶ 27). On October 22, 2003, BHP  
24 announced that the Plant also would be permanently closed. (Aff., ¶ 28). The closure process is  
25 now well underway, and constitutes one of the largest mine closure projects ever undertaken in  
26

1 the state of Arizona. (Aff., ¶ 29). The project is scheduled for completion by the end of 2007.  
2 (Aff., ¶ 30).

3 In November 2004, BHP entered into a Purchase Agreement (“Agreement”) with  
4 Coronado Utilities (“Coronado”) for the sale of approximately 84 acres encompassing the WTP.<sup>2</sup>  
5 (Aff., ¶ 31). The Agreement requires Coronado to seek a CC&N from the ACC authorizing  
6 Coronado to provide wastewater service to the Town. (Aff., ¶ 32). At the same time, Pivotal  
7 Utility Management, L.L.C. (“Pivotal”), an affiliate of Coronado entered into an Operation and  
8 Maintenance Agreement with BHP to operate and manage the current WTP pending construction  
9 of a new WTP that will eventually serve existing and future customers.<sup>3</sup> (Aff., ¶ 33). Pivotal has  
10 been operating the WTP since November 10, 2004. (Aff., ¶ 34).

## 11 **II. LEGAL ANALYSIS.**

### 12 **A. BHP is Not a “Public Service Corporation” Because BHP Has Never Engaged** 13 **in the Sewage System Business “for Profit”.**

#### 14 **1. Only Sewage Systems Operated for Profit Qualify as Public Service** 15 **Corporations.**

16 Under Arizona law, only those businesses expressly listed in the Arizona Constitution are  
17 considered public service corporations (“PSCs”). *Rural/Metro Corp. v. Arizona Corp. Comm’n*,  
18 129 Ariz. 116, 117, 629 P.2d 83, 84 (Ariz. 1981). There is no presumption that a business is a  
19 PSC. *Mohave Disposal, Inc. v. City of Kingman*, 184 Ariz. 368, 371, 909 P.2d 435, 438 (Ariz.  
20 App. 1995). “Public service corporations” are defined under the Arizona Constitution as:

21 All corporations other than municipal engaged in furnishing gas,  
22 oil, or electricity for light, fuel, or power; or in furnishing water for  
23 irrigation, fire protection, or other public purposes; or in  
24 furnishing, for profit, hot or cold air or steam for heating or cooling  
25 purposes; or engaged in collecting, transporting, treating, purifying  
26 and disposing of sewage through a system, for profit; or in  
transmitting messages or furnishing public telegraph or telephone

25 <sup>2</sup> A copy of the Agreement is attached to Coronado’s CC&N Application.

26 <sup>3</sup> *Id.*

1 service, and all corporations other than municipal, operating as  
2 common carriers, shall be deemed public service corporations.

3 Arizona Const. Art. 15 § 2 (emphasis added). The plain meaning of this definition indicates the  
4 sewage systems may qualify as PSCs only if operated “for profit.”<sup>4</sup> “For profit” is not defined in  
5 the Arizona Constitution, the PSC statutes, or the ACC’s regulations, but *Merriam Webster’s*  
6 *Collegiate Dictionary* (10<sup>th</sup> ed.) defines “profit” as:

- 7 1: a valuable return: gain
- 8 2: the excess of returns over expenditure in a transaction or series of transactions;  
9 *especially*: the excess of the selling price of goods over their cost
- 10 3: net income usually for a given period of time
- 11 4: the ratio of profit for a given year to the amount of capital invested or to the value  
12 of sales
- 13 5: the compensation accruing to entrepreneurs for the assumption of risk in business  
14 enterprise as distinguished from wages or rent.<sup>5</sup>

15 By contrast, the other types of corporations potentially covered by the definition *i.e.*, those  
16 involved in the gas, oil, electricity, water, telegraph, telephone or common carrier businesses, are  
17 not subject to the “for profit” requirement under the PSC definition. The “for profit” requirement  
18 is also reflected in the statute that defines “sewer corporation” as “including “every person  
19 owning, controlling, operating or managing any sewage system for profit.” A.R.S. § 40-201. The  
20 statutory definitions applicable to other types of PSCs such as “electric generation service,” “gas

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21 <sup>4</sup> The “common carrier” aspect of the definition of PSC does not apply here. “Common carriers” include, with some  
22 redundancy: “All electric, transmission, telegraph, telephone, or pipeline corporations, for the transportation of  
23 electricity, messages, water, oil, or other property for profit....” A.R.S. Const. Art. 15 § 10. The Attorney General  
24 rejected the argument that sewage disposal companies could be included by virtue of the common carrier definition,  
25 as “pipeline corporations,” and therefore concluded they were not PSCs. 1970 Ariz. Op. Atty. Gen. R-39 (February  
26 11, 1970). (This occurred before the Arizona Constitution was amended to expressly include for profit sewage  
systems as PSCs).

<sup>5</sup> Arizona courts, like the Supreme Court of the United States, adhere to the rule of constitutional construction  
requiring each provision to be given effect. *See Corporation Commission v. Pacific Greyhound Lines*, 54 Ariz. 159,  
172, 94 P.2d 443, 448 (1939), *citing Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60. Undefined terms should be  
given their ordinary, common sense meaning. *Williams v. Pipe Trades Indus. Program of Ariz.*, 409 P.2d 720, 724  
(Ariz. 1966).

1 plant,” telecommunications corporation,” and “water system,” conspicuously do not include the  
2 “for profit” limitation. *Id.*

3 The history of the PSC definition and related case law confirms the plain meaning of the  
4 “for profit” limitation. Prior to 1974, only “air or steam” companies were subject to the “for  
5 profit” condition. Other types of companies argued unsuccessfully that their not-for-profit status  
6 meant they were not PSCs. *See, e.g., Natural Gas Service Co. v. Serv-Yu Coop.*, 69 Ariz. 328,  
7 681, 213 P.2d 677, 681, *on rehearing*, 70 Ariz. 235, 219 P.2d 324 (Ariz. 1950) (rejecting the  
8 natural gas cooperative’s position that the ACC could only regulate “public service corporations  
9 when operated ‘for profit’”). In 1970, the Arizona Attorney General concluded that sewage  
10 disposal corporations were not within the definition of PSCs, whether for profit or not (the  
11 constitutional definition at that time did not include the sewage system clause).<sup>6</sup> In 1972, a  
12 proposed constitutional amendment to the PSC definition to include corporations “engaged in  
13 furnishing sewage disposal . . . service” failed.<sup>7</sup> Two years later, after the proposed sewage  
14 system language had been narrowed to expressly include the “for profit” limitation, the  
15 constitutional amendment finally passed. Based on this historical context, it is clear that the  
16 citizens of Arizona intended that only “for profit” sewage system companies be considered as  
17 PSCs.

18 In fact, the Commission itself has previously acknowledged that the term “for profit” has a  
19 modifying and limiting effect. In *Re Southwest Transmission Cooperative, Inc.*, Decision No.  
20 66835 (ACC 2004), the Commission interpreted “for profit” in the definition of “common  
21 carrier” to modify only the immediately antecedent terms “other property,” and not all of the  
22 preceding terms (“electricity,” etc.).<sup>8</sup> As in the definition of “common carrier,” in the definition

23 <sup>6</sup> 1970 Ariz. Op. Atty. Gen. R-39 (February 11, 1970). The Attorney General advised that “only by constitutional  
24 amendment could such corporations be declared to be public service corporations, and thereby to control of rates and  
charges and conditions of service....” *Id.*

25 <sup>7</sup> *See State of Arizona Referendum and Initiative Publicity Pamphlet 1972*, p. 14.

26 <sup>8</sup> *See fn. 3, infra.*

1 of PSC, the sewer system clause immediately precedes "for profit." Consistency dictates that  
2 only "for profit" sewage system operators qualify as PSCs. Moreover, the Commission has also  
3 long recognized that the non-profit status of a service provider is a key criteria militating against  
4 PSC status even in the absence of an express "for profit" condition. *See Commission Policy*  
5 *Directive to the Utilities Division on Review and Processing of Applications for an Adjudication*  
6 *not A Public Service Corporation*, Decision No. 55568 dated May 7, 1987, at 2.

7 **2. BHP Has Never Provided Wastewater Utility Service for Profit.**

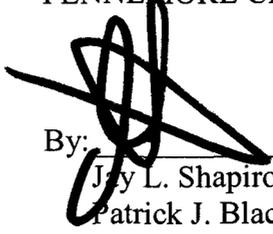
8 The facts show that BHP's operation of the WTP has not been for profit and that BHP has  
9 never intended to make a profit. BHP has charged the Town homeowners only a nominal fee for  
10 sewage disposal service (\$48 per year for the last 18 years). (Aff., ¶ 24). In addition, many users  
11 (approximately 20%) have refused to pay even this token fee, secure in the assumption that BHP  
12 had neither the time nor inclination to pursue non-payers. (Aff., ¶ 25). BHP has never terminated  
13 service for failure to pay the token fee. (Aff., ¶ 25).

14 BHP's provision of sewage system service for the Town has caused it to incur a  
15 significant loss. Over the last three years alone, BHP has incurred an operating loss of at least  
16 \$493,000 due to operation of the Collection system WTP. (Aff., ¶ 35). (This figure  
17 underestimates the actual loss, because it does not include any overhead cost allocation, such as  
18 for management, accounting, finance, etc.) (Aff., ¶ 35). Undoubtedly, similar losses were  
19 incurred over the history of the WTP, but BHP did not maintain separate accounting records for  
20 the WTP while the Plant was in operation and has never attempted to quantify the magnitude of  
21 the losses because the WTP was operated primarily to treat the sewage discharges emanating  
22 from the Plant offices and sanitary facilities as incidental to its mining operations. (Aff., ¶ 36).  
23 BHP's closure decision rendered the sewage system service no longer incidental to its mining  
24 operations, at which point BHP began planning to transition the provision of wastewater utility  
25 services to a qualified provider capable of supporting the needs of the Town and the anticipated  
26

1 future growth in the area. (Aff., ¶ 37). Coronado's application followed. Thus, in summary,  
2 BHP's involvement in the wastewater utility business could not be any further from "for profit."  
3 Therefore, BHP is not a PSC.

4 DATED this 31<sup>st</sup> day of August, 2005.

FENNEMORE CRAIG, P.C.

6  
7  
8 By: 

Jay L. Shapiro  
Patrick J. Black  
Attorneys for Coronado Utilities, Inc.

10 ORIGINAL and 15 copies delivered this  
11 31<sup>st</sup> day of August, to:

12 Docket Control  
13 Arizona Corporation Commission  
14 1200 West Washington Street  
Phoenix, Arizona 85007

15 COPY hand-delivered this 31<sup>st</sup> day of August, 2005:

16 David Ronald  
17 Legal Division  
18 Arizona Corporation Commission  
1200 W. Washington St.  
19 Phoenix, AZ 85007

20 COPY sent via e-mail and U.S. Mail  
this 31<sup>st</sup> day of August, 2005:

21 Jane Rodda, Administrative Law Judge  
22 Hearing Division  
23 Arizona Corporation Commission  
400 West Congress  
24 Tucson, Arizona 85701

25 By: Whitney A. Burk  
26 1704339.1

# EXHIBIT

# A

1 FENNEMORE CRAIG, P.C.  
A Professional Corporation  
2 Jay L. Shapiro (No. 014650)  
Patrick J. Black (No. 017141)  
3 3003 North Central Avenue  
Suite 2600  
4 Phoenix, Arizona 85012  
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15 THERETO.

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**AFFIDAVIT OF GERALD R. BRUNSKILL**

**(Consolidated)**

16  
17 STATE OF ARIZONA )  
18 County of Pinal ) ss:

19 Gerald R. Brunskill, being first duly sworn upon his oath, deposes and says as follows:

20 1. I am over the age of 18 and am competent to testify as to the matters set forth herein  
21 and would so testify if called upon to do so.

22 2. I have personal knowledge of the matters set forth herein, except those matters stated  
23 upon information and belief, which matters I believe to be true. My personal knowledge is based  
24 upon my observations and personal participation in the events described herein, my review of  
25 relevant documentation, and my conversations with others having personal knowledge of the issues  
26 discussed herein.

1           3.     I have been employed by BHP Copper Inc., San Manuel Division ("BHP"), for 26  
2 years.

3           4.     I have been the Manager, Closure Operations, since September, 2002.

4           5.     Prior to that, I was Manager, Concentrator Operations.

5           6.     As Manager, Closure Operations, my duties include overseeing the management of  
6 the WTP during closure, and the transition of the wastewater treatment plant ("WTP") to a  
7 qualified operator.

8           7.     Magma Copper Co. (a predecessor to BHP, hereinafter referred to collectively as  
9 BHP), began development of the ore body that became the San Manuel Mine in 1948.

10          8.     Large-scale development of the area occurred between 1952 and 1956, spurred by  
11 a \$94 million investment by the U.S. Reconstruction Finance program.

12          9.     The San Manuel Mine was expanded and the San Manuel Plant (located  
13 approximately seven miles south of the Mine), was constructed to process ore from the Mine.

14          10.    In 1954, as part of its expansion of its mining operation, BHP constructed the  
15 Town adjacent to the Plant, including homes for employees and service providers that directly  
16 supported the mining operations.

17          11.    The first production of copper from the Plant occurred on January 8, 1956.

18          12.    The San Manuel Plant was a fully integrated operation designed to convert copper  
19 sulphide ore into high-grade market copper.

20          13.    The facilities consisted of a copper concentrator, copper smelter, three sulfuric  
21 acid plants, an electrolytic copper refinery and a continuous cast copper rod plant.

22          14.    These main production units were supported and serviced by facilities that  
23 included a powerhouse, an oxygen plant, sulfuric acid storage and loading facilities, offices,  
24 maintenance shops, warehouses, a railroad, and the WTP.

25          15.    The WTP was also used to serve the Town.

26

1           16.    The Town residences and associated buildings were originally owned and  
2 managed by the San Manuel Townsite Company, a subsidiary of BHP, and leased to company  
3 employees or those service employees who directly supported the mining operations.

4           17.    BHP did not originally charge residents separately for sewage disposal service.  
5 BHP charged a monthly fee of \$11-\$15 for waste disposal in the late 1970's and early 1980's,  
6 which included both garbage pick-up and bulk trash disposal, as well as sewage disposal.

7           18.    The Townsite Company lost money, and was supported by payments from BHP.

8           19.    In 1962, BHP decided to dissolve the Townsite Company, and its functions were  
9 taken over by BHP directly.

10          20.    Beginning in the late 1960s, BHP began to sell its housing, on a very limited basis,  
11 to its employees and to service providers who directly supported the mining operations.

12          21.    Sales were generally financed by BHP, and conditioned upon a 10-year right of  
13 first refusal for BHP in order to preserve the relatively low housing costs.

14          22.    The bulk of the company owned housing (approx. 85%) was sold off in the late  
15 1980's and early 1990's.

16          23.    In 1987, the garbage and bulk trash pick-up and disposal service were taken over  
17 by an independent business, and the transition to private billing occurred in January, 1988.

18          24.    BHP reduced the waste disposal charge to reflect the provision of sewage service  
19 only, and set the rate at \$48 per year. This fee remains in effect today.

20          25.    Approximately 20% of the annual sewage system invoices were not paid, and BHP  
21 has never pursued collection actions against non-payers nor has it terminated service to the non-  
22 payers.

23          26.    The Town remains unincorporated, and currently includes a total of approximately  
24 1250 homes and 4,100 people.

25          27.    BHP suspended underground mining at San Manuel in June 1999, and announced  
26 on January 15, 2002, that it would be closing the Mine.

1           28.    On October 22, 2003, BHP announced that the Plant also would be permanently  
2 closed.

3           29.    The closure process is now well underway, and constitutes one of the largest mine  
4 closure projects ever undertaken in the state of Arizona.

5           30.    The project is scheduled for completion by the end of 2007.

6           31.    BHP reached an agreement with Coronado Utilities, Inc. and Pivotal Utility  
7 Management, L.L.C. in November, 2004 providing for the operation and eventual sale of the  
8 WTP.

9           32.    The Agreement requires Coronado to seek a CC&N from the ACC authorizing  
10 Coronado to provide wastewater service to the Town.

11          33.    At the same time, Pivotal Utility Management, L.L.C. ("Pivotal"), an affiliate of  
12 Coronado entered into an Operation and Maintenance Agreement with BHP to operate and  
13 manage the current WTP pending construction of a new WTP that will eventually serve existing  
14 and future customers.<sup>1</sup>

15          34.    Pivotal has been operating the WTP since November 10, 2004.

16          35.    Accounting data for the last three years indicates BHP lost at least \$493,000 over  
17 the three-year period of 2002-2004, not including any charges for overhead (management,  
18 accounting, peak work support, equipment support etc.). The revenue collected for sewage  
19 treatment service has averaged about \$60,000 per year, while direct costs alone have averaged  
20 \$228,000 per year.

21          36.    BHP did not maintain separate accounting records for the WTP while the Plant  
22 was in operation, and has never attempted to quantify the magnitude of the losses because the  
23 WTP was operated primarily to treat the sewage discharges emanating from the Plant offices and  
24 sanitary facilities as incidental to its mining operations.

25 \_\_\_\_\_  
26 <sup>1</sup> *Id.*

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37. BHP's closure decision rendered the sewage system service no longer incidental to its mining operations, at which point BHP began planning to transition the WTP to a qualified provider capable of supporting the needs of the Town and the anticipated future growth in the area.

38. BHP has never realized a profit from the operation of the WTP; on the contrary, the system has been a significant expense, and the sewage treatment service has been highly subsidized for the Town WTP users.

FURTHER AFFIANT SAYETH NOT.

Gerald R. Brunskill  
Gerald R. Brunskill

The foregoing instrument was acknowledged before me this 30 day of August, 2005, by Gerald R. Brunskill.

Kathryn L. McClure  
Notary Public

My Commission Expires:

6-10-08  
1704363/12923.001

