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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE APPLICATION
OF WOODRUFF WATER COMPANY, INC.
FOR A CERTIFICATE OF CONVENIENCE
AND NECESSITY TO PROVIDE WATER
SERVICE IN PINAL COUNTY, ARIZONA.

DOCKET NO. W-04264A-04-0438

DOCKET NO. SW-04265A-04-0439

DOCKET NO. W-01445A-04-0755

**ARIZONA WATER COMPANY'S
CLOSING BRIEF**

IN THE MATTER OF THE APPLICATION
OF WOODRUFF UTILITY COMPANY,
INC. FOR A CERTIFICATE OF
CONVENIENCE AND NECESSITY TO
PROVIDE SEWER SERVICE IN PINAL
COUNTY, ARIZONA.

IN THE MATTER OF THE APPLICATION
OF ARIZONA WATER COMPANY, AN
ARIZONA CORPORATION, TO EXTEND
ITS EXISTING CERTIFICATES OF
CONVENIENCE AND NECESSITY AT
CASA GRANDE AND COOLIDGE, PINAL
COUNTY, ARIZONA.

Arizona Water Company hereby submits its Closing Brief in support of its Application to extend its existing Certificate of Convenience and Necessity ("CCN") to areas immediately contiguous to its existing Casa Grande and Coolidge service areas, and in

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1 opposition to the Application of Woodruff Water Company (“WWC”) for a CCN for water
2 service. The Arizona Corporation Commission (the “Commission”) should grant Arizona
3 Water Company’s Application and deny WWC’s Application for at least four reasons:

4 First, Arizona law and public policy require granting a CCN to the existing utility
5 and denying a CCN to a small, untested, start-up utility, so long as the existing utility is
6 ready, willing and able to provide service;

7 Second, to the extent any balancing test between competing applicants is justified,
8 which Arizona Water Company contends does not apply, Arizona Water Company prevails
9 on every relevant factor and should be granted the CCN;

10 Third, the alleged benefits of granting a CCN to WWC, that is, the purported
11 efficiencies resulting from WWC’s alleged ties to the wastewater service applicant
12 (Woodruff Utility Company), are either non-existent or can be easily matched by Arizona
13 Water Company; and

14 Fourth, WWC’s criticism of Arizona Water Company’s main extension policies
15 under A.C.C. R14-2-406 lacks any merit.

16
17 **I. Arizona Law and Public Policy Support Granting the CCN to the Existing**
18 **Utility, Arizona Water Company, and Denying a CCN to WWC, a Small,**
19 **Untested, Start-Up Company Lacking Experience and Any Reliable History of**
20 **Operations.**

21 **A. If An Existing Public Service Corporation Such As Arizona Water**
22 **Company is Ready, Willing and Able to Serve The Contested Area, As**
23 **Here, The Inquiry Is Over and Arizona Water Company Should Be**
24 **Awarded the CCN.**

25 As a matter of Arizona law, the decision in this case begins and ends with a simple
26 inquiry: Is Arizona Water Company, as the longtime existing water utility providing service
27 west, south and east of the contested area, ready, willing and able to serve that area? Since
28 the undisputed answer to this question is “yes,” under Arizona law, Arizona Water
Company must be granted the water CCN for the contested area.

1 The Arizona Supreme Court has recognized and applied this proposition for many
2 decades, and it is dispositive of this case. The proposition was directly applied in Arizona
3 Corporation Commission v. Fred Harvey Transportation Co., 95 Ariz. 185, 388 P.2d 236
4 (1964), a case involving competing applications for a CCN to provide bus service in
5 northern Arizona. In that case, Nava-Hopi Tours was certificated to provide daily trips to
6 the Grand Canyon from Flagstaff over a western route through Williams via State Highway
7 64, over a distance of 91 miles. 95 Ariz. at 187, 388 P.2d at 237. Nava-Hopi scheduled at
8 least one trip a day over that route, and some days provided as many three or four buses a
9 day. Id. at 188-89, 388 P.2d at 238. Fred Harvey, on the other hand, was certificated to
10 provide trips to the Grand Canyon over an eastern route via Cameron north on U.S.
11 Highway 89, over a longer route of 109 miles. 95 Ariz. at 187, 388 P.2d at 237. Fred
12 Harvey did not maintain any offices or facilities in Flagstaff and provided much more
13 infrequent service, sometimes operating only one bus a year. 95 Ariz. at 188, 388 P.2d at
14 238. When the new U.S. Highway 180/Snow Bowl route of only 80 miles was opened to
15 the Grand Canyon, both carriers sought the CCN to operate on the shorter route. The
16 Commission granted the certificate to the more established provider, Nava-Hopi, but the
17 superior court vacated that decision, effectively allowing both carriers to compete on the
18 same route. 95 Ariz. at 187-88, 388 P.2d at 237.

19 But, the Arizona Supreme Court reversed and applied the rule that is dispositive here:
20 the existing certificated utility should be awarded the new territory if it is ready, willing and
21 able to serve. Noting that “Arizona is a regulated monopoly state,” and that the superior
22 court had clearly erred when it allowed “free wheeling competition between two carriers,”
23 95 Ariz. at 188, 388 P.2d at 237, the Supreme Court affirmed the Commission’s decision to
24 grant the CCN to the far more established, existing carrier over a much less established
25 competitor. In fact, after noting that the Arizona rule is that the “existing” utility always has
26 first rights to the new territory, the Supreme Court went on to note that it did not even have
27 to apply that rule to award the route to Nava-Hopi, because Nava-Hopi prevailed (as
28

1 Arizona Water Company must here) in a balancing test between the two utilities in any
2 event:

3
4 We need not, however, turn this decision on the obvious fact that Nava-Hopi is in
5 reality the existing carrier between the two termini, Flagstaff and Grand Canyon, and
6 that therefore it had the right to the first opportunity to provide any extended or
7 additional service. . . . We will treat this case as if both Harvey and Nava-Hopi were
8 existing motor carriers in the field and that neither had an exclusive priority to extend
9 its service as a matter of right.

10 95 Ariz. at 188-89, 388 P.2d at 238 (citations omitted; emphasis added). The Supreme
11 Court went on to discuss the factors favoring Nava-Hopi over Fred Harvey, and held that
12 based on the evidence before the Commission Nava-Hopi should prevail. “The Commission
13 in selecting Nava-Hopi over Harvey was not unreasonable” 95 Ariz. at 190, 388 P.2d
14 at 238.

15 Arizona Corporation Commission v. Fred Harvey Transportation Co. is important to
16 the determination of this matter because the Arizona Supreme Court recognized that an
17 existing CCN holder (here, Arizona Water Company) has the priority and “first opportunity
18 to provide any extended or additional service” over the less established company (here,
19 WWC). 95 Ariz. at 189, 388 P.2d at 238. In this case, Arizona Water Company has an
20 even greater right and priority to extend service than did Nava-Hopi because WWC has
21 provided no utility service at all (aside from overseeing farmer Wuertz’ operation of his own
22 private well), as compared to the infrequent service of Fred Harvey that was still found to be
23 insufficient in Fred Harvey Transportation Co.

24 The Arizona Supreme Court has also applied these principles in a case involving
25 Arizona Water Company, reversing a Commission decision denying Arizona Water
26 Company a CCN expansion in favor of a smaller, start-up company, as WWC is here. In
27 Arizona Corporation Commission v. Arizona Water Company, 111 Ariz. 74, 523 P.2d 505
28 (1974), as in this case, the contested area was surrounded on three sides by Arizona Water
Company’s established certificated area and water utility distribution system facilities. Id.
at 75, 523 P.2d at 506. Arizona Water Company and R.J. Fernandez filed competing

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1 applications for a CCN to deliver water to the area, and following a rehearing, the
2 Commission granted the certificate to Fernandez. Id. Arizona Water Company sought
3 judicial review by the superior court pursuant to A.R.S. § 40-254, and the superior court
4 vacated the decision of the Commission, instead granting the certificate to Arizona Water
5 Company. Id.

6 The Arizona Supreme Court then affirmed the decision of the superior court, noting
7 that, in the area of public utilities, “Arizona is a regulated monopoly state.” Id. at 76, 523
8 P.2d 507. The Supreme Court summarized three findings of fact by the superior court that
9 the evidence fully supported:

- 10 • Arizona Water Company proposed to serve the area through a system of
11 “three inter-connected wells,” while Fernandez had just one well;
- 12 • Arizona Water Company already had a certificate of convenience and
13 necessity to serve water on three sides of the contested area, as well as water
14 mains nearby; and
- 15 • Arizona Water Company had already made a substantial investment in wells,
16 mains and water facilities in the area, such that Arizona Water Company
17 needed to spend only \$47,188 to serve the area; in contrast, Fernandez would
18 need to invest \$84,844 to serve the area.

19 Id. at 76-77, 523 P.2d 507-08. Based on these factual findings, the Supreme Court affirmed
20 the decision by the superior court awarding the contested area to Arizona Water Company:
21 “the evidence that the public interest would best be served by the certification of Fernandez
22 in place of Arizona Water Company is insubstantial as opposed to the evidence offered by
23 Arizona Water Company.” Id. at 77, 523 P.2d 508.

24 The public policy behind the proposition that the existing carrier should be awarded
25 the neighboring CCN is well established in Arizona. The Arizona Supreme Court has
26 recognized that “Arizona’s public policy respecting public service corporations, such as
27 water companies, is one of regulated monopoly over free-wheeling competition.” James P.
28 Paul Water Company v. Arizona Corporation Commission, 137 Ariz. 426, 429, 671 P.2d
404, 407 (1983); see also Arizona Corporation Commission v. Tucson Insurance & Bonding

1 Co., 3 Ariz. App. 458, 462, 415 P.2d 472, 476 (App. 1966)(“regulated monopoly rather than
2 free-wheeling competition”); Arizona Corporation Commission v. Fred Harvey
3 Transportation Co., 95 Ariz. 185, 188, 388 P.2d 236, 237 (1964)(“Arizona is a regulated
4 monopoly state”). “Under this system, the Commission is statutorily required to investigate
5 all applicants for a certificate of convenience and necessity for a given area . . . and to issue
6 a certificate only upon a showing that the issuance to a particular applicant would serve the
7 public interest.” James P. Paul, 137 Ariz. at 429, 671 P.2d at 407.

8 The fact that the Wuertz family, sellers of land to the Pivotal Group (“Pivotal”),
9 supports WWC’s application or made the initial request for service is of no moment: “A
10 property owner’s interests and desires must yield to the public convenience.” Arizona
11 Corporation Commission v. Tucson Insurance & Bonding Co., 3 Ariz. App. 458, 463, 415
12 P.2d 472, 477 (App. 1966)(denying petition by property owners who sought to set up their
13 own water company rather than receive water service from the certificated water company
14 in the area). The Arizona Supreme Court has also noted the benefit of granting certificates
15 to a single water company in a large area, rather than carving the area up among numerous
16 smaller companies: “Allowing the area to remain gerrymandered in small non-integrated
17 tracts served by different companies must inevitably injure both the consumer and the
18 companies.” Davis v. Corporation Commission, 96 Ariz. 215, 217, 393 P.2d 909, 910
19 (1964)(quoting the Commission).

20 Applying these principles to the facts in this case, the result is clear. WWC is a
21 startup operation with questionable capitalization and no track record whatsoever of
22 providing actual water utility service in the greater Casa Grande or Coolidge areas. Tr. 55-
23 58, 60-61, 70-72, 1386. Arizona Water Company established in this proceeding that it has
24 served the area for over fifty years and that it is ready, willing and able to provide service to
25 the contested area from a well-coordinated and engineered water utility system that includes
26 a grid of water production facilities and reservoirs, transmission and distribution mains that
27 are part of a master plan to serve the entire region. “Free wheeling competition” that serves
28

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1 the interests of only a comparatively small development is neither in the public interest nor
2 consistent with the greater good of the citizens of Coolidge and Casa Grande, and it is that
3 interest, as opposed to the varied development interests of the principals of WWC, that must
4 control here.

5
6 **B. The Principle of Law That An Existing Utility Should Be Awarded the
7 CCN Unless It is Unable or Unwilling to Serve Is Recognized In Other
8 Jurisdictions As Well.**

9 Case law from other jurisdictions also supports the proposition that, when two
10 competing utilities seek to serve in the same area, the more established utility should be
11 granted the right to serve, assuming that it is ready, willing and able to serve. A decision by
12 the Illinois Supreme Court, Citizens Valley View Co. v. Illinois Commerce Commission,
13 192 N.E.2d 392 (Ill. 1963)(attached at Exhibit A), involved facts nearly identical to those
14 presented here. In that case, an existing water company and developer-owned start-up
15 company both sought to serve the same subdivision southeast of an intersection. The
16 existing water company, Citizens Valley, possessed a certificate to serve subdivisions on the
17 other three corners of the intersection and operated an existing water utility system with 12
18 employees, besides other operations throughout the state. Id. at 394-95. Citizens Valley
19 estimated that it could serve the area at a cost of \$455,000. Id. at 395. In contrast, the
20 developer-owned start-up company, Sunny Acres, had minimal resources and no operating
21 history:

22 Sunny Acres at the time of the hearing was a new utility and had not yet commenced
23 business. It was not serving any area nor was it authorized to serve any. It had no
24 substantial assets, no utility management personnel, no engineers and no equipment.
25 One existing water well located on the property . . . was, according to the an
26 engineer, adequate to form part of the initial water system. All other facilities,
27 including water and sewer lines, would have to be newly constructed at a cost of
28 approximately \$1,210,000.

Id. at 394. However, the developer requested that his newly-organized water company
provide service, disputed the water main extension policy of Citizens Valley, and even

1 asserted that he would not develop the property if Citizens Valley were certified as the
2 provider. Id. at 395.

3 The commerce commission granted the certificate to the developer funded start-up,
4 but the Illinois Supreme Court reversed based on the “first in the field” doctrine:

5
6 It is the policy of this State, established by legislation for the regulation of all public
7 utilities, to provide the public with efficient service at a reasonable rate, by
8 compelling an established public utility occupying a given field to provide adequate
9 service and at the same time protect it from ruinous competition, . . . and, where
10 additional or extended service is required in the interest of the public and a utility in
11 the field makes known its willingness and ability to furnish the required service, the
12 Commerce Commission is not justified in granting a certificate of convenience and
13 necessity to a competing utility until the utility in the field has had an opportunity to
14 demonstrate its ability to give the required service.

15 Id. at 396 (emphasis added). The fact that the contested area lay outside the existing
16 utility’s certificated area “did not prevent the existing utility from making application for a
17 certificate to serve other territory adjacent to one of its lines and that the principle of
18 favoring the prior utility in the field was equally applicable to such other territory.” Id.

19 The Supreme Court further held - - in language that is particularly applicable to this
20 case - - that the personal business desires of the developer should be disregarded in favor of
21 the public interest:

22 The personal business desires of the subdivider and major shareholder of one
23 applicant, his stated refusal to subdivide unless his company is certified, and his
24 unwillingness to pay the cost of obtaining service from the existing company in
25 accordance with its rules previously approved by the Commission, are in no way
26 controlling as to the public interest and should not have been taken into consideration
27 by the Commission. Instead, even if it should be properly determined that Citizens
28 Valley is not entitled to any preference, the Commission’s order must be based
exclusively upon those considerations affecting the public interest, such as the
relative financial and technical capabilities of the two applicants and the nature of the
facilities proposed to be constructed by each.

Id. at 397-98 (emphasis added). The Illinois Supreme Court also held that the developer-
funded start-up company failed to present adequate evidence of its financial capability:

1 “The only evidence submitted in this regard was [the developer’s] testimony that he and his
2 brother were financially able to build these facilities and if necessary would furnish the
3 money to Sunny Acres. There was no disclosure as to the method the [developer] proposed
4 to utilize in supplying this money, whether it would be by way of loan or otherwise.” Id. at
5 398. This evidence is almost a mirror image of the WWC evidence concerning its alleged
6 “financial capabilities” in this case.

7 Other courts and jurisdictions have followed a similar “first in the field” rule. See,
8 e.g., Illini State Telephone Company v. Illinois Commerce Commission, 234 N.E.2d 769,
9 771 (Ill. 1968)(telephone company which was first in the field and contiguous to disputed
10 area had right to serve); Public Service Company v. Public Utilities Commission, 350 P.2d
11 543, 550-51 (Colo. 1960)(electrical utility which was first in the field had right to serve);
12 Burton v. Matanuska Valley Lines, Inc., 244 F.2d 647,652 (9th Cir. [Alaska] 1957)(bus
13 company which was first in the field had the right to serve); Chicago & West Towns
14 Railways v. Illinois Commerce Commission, 48 N.E.2d 320, 323-24 (Ill. 1943)(in contest
15 between competing utilities, public policy favors the established company over newcomers;
16 “If the company now occupying the field is incapable of providing adequate service, then,
17 and not until then, will a situation arise when the convenience and necessity may require the
18 establishment of another utility”).^{1/}

19
20 **C. The Commission’s Task Force and Decision Acknowledges and Carries**
21 **Forward These Principles Of Law.**

22 The Commission has also recognized the benefits of consolidating water service
23 CCNs in a small number of stable, established public utilities, rather than gerrymandering
24 an area among numerous smaller and separate utilities. Thus, in Decision No. 62993, dated

25
26 ^{1/} This case is cited by the Arizona Supreme Court as the basis for its comment in Fred
27 Harvey Transportation Co. that the existing utility in the field has the first priority
28 (see discussion infra). Arizona has thereby established its willingness to follow the
Illinois rule applied in Citizens Valley View Co..

1 November 3, 2000, the Commission approved task force recommendations intended to
2 “Reduce the number of small, non-viable water systems.” AWC Exhibit 13 at ¶ 4. The
3 Commission further approved a specific proposal by the Commission’s Staff (“Staff”)
4 concerning the establishment of new water companies:
5

6 The application for a new CC&N must show that an existing water company cannot
7 or will not serve the area being applied for. This showing must be made by
8 submitting service rejection letters from all of the “A” size water companies in the
9 state (there are 3) and at least five of the “B” size companies (there are 20). The five
10 B size companies contacted should include the B size companies that are
11 geographically closest to the applicant. The application must also be accompanied
12 by service rejection letters from all existing water companies within five miles of the
13 area being requested. In addition, the rejection letters must be accompanied by the
14 corresponding request for service that was made to each of the existing water
15 companies by the applicant.

16 Id. at ¶ 8 (emphasis added).

17 Following the Commission’s directive that Staff develop a detailed statement of
18 policy in this area, id. at ¶ 9, Staff filed a proposed policy on June 29, 2001. See WWC
19 Exhibit 45. Staff noted that the “Commission has established a policy goal of ensuring
20 Arizona’s water consumers are served by viable utilities.” Id., Attachment A at 1. Staff
21 further recommended that, “to assist the Commission in its goal to eliminate the
22 proliferation of non-viable water systems,” the Commission require that any new water
23 company seeking a CCN demonstrate that existing water companies refused to extend
24 service to the area:
25

26 Unless the Applicant is an existing public water utility in Arizona or is an affiliate of
27 an Arizona public water utility, an Applicant for a new CC&N (i.e., not an extension
28 to an existing CC&N) must demonstrate that existing water utilities have refused to
extend their territories to include the requested area. This demonstration shall be
made by the Applicant providing all the following:

- a. A copy of the Applicant’s request for service from all Class A water utilities in the State as well as the refusal to serve from all those Class A water utilities; and

- 1 b. A copy of the Applicant's request for service from all or at least five (5),
2 whichever is less, of the Class B water utilities serving within fifty (50) miles
3 of the Applicant's requested area as well as the refusal to serve from all those
4 Class B water utilities, and
- 5 c. A copy of the Applicant's request for service from all water utilities serving
6 within five (5) miles of the Applicant's requested area as well as the refusal to
7 serve from all those water utilities.

8 Id., Attachment A at 2 (emphasis added; notes removed).

9 These policies and Decision No. 62993 sparked testimony and argument during the
10 hearing of this matter as to whether or not the Commission had formally adopted these
11 principles. Arizona Water Company continues to assert that the language in Decision No.
12 62993 makes it clear that the policies have been adopted by the Commission and should be
13 applied here. But perhaps more importantly, the policies—which are completely consistent
14 with the Arizona law discussed in Subsections A and B above—stand uncontroverted as the
15 expression of controlling regulatory principles by the Task Force, and again, are quoted with
16 approval in Decision No. 62993. WWC presented no evidence that the public policy behind
17 these principles was unsound, but instead made only technical arguments that the principles
18 had not been officially adopted by the Commission. But WWC's position is a smokescreen
19 to obscure the fact that WWC cannot prevail when these sound regulatory principles are
20 applied to the facts of this case.

21 **D. Under These Well-Established Principles, Arizona Water Company Is**
22 **Entitled To the Award of the Water CCN For the Contested Area.**

23 In this contested matter, Arizona Water Company is a long-established, Class A
24 water company with facilities within a couple of miles of the contested area, which Arizona
25 Water Company's certificate surrounds on three sides. Arizona Water Company is also
26 ready, willing and able to serve the contested area -- despite the developer's refusal to
27 request service from Arizona Water Company. Tr. 664. In contrast, WWC is a start up
28 water company, organized by the developer, with minimal resources and no operational
 history. Awarding a CCN to WWC would frustrate the Commission's policy objective of

1 awarding CCNs to existing, established water utilities and would also frustrate Arizona
2 Water Company's goals of consolidating its Casa Grande and Coolidge systems, resulting
3 instead in the "gerrymandering" of the area into "small non-integrated tracts served by
4 different water companies," as decried by the Arizona Supreme Court. Davis, 96 Ariz. at
5 217, 393 P.2d at 910. As in Arizona Water Company, granting a CCN to WWC would
6 isolate an area surrounded on three sides (east, south and west) by Arizona Water
7 Company's existing certificated area and water system. Under Fred Harvey, Arizona Water
8 Company, Davis, and James P. Paul, as well as the announced policies and procedures of
9 the Commission, there is simply no need for any further analysis or balancing of
10 considerations: the CCN must be awarded to Arizona Water Company.

11
12 **II. To the Extent Any Balancing Test Is Appropriate, Arizona Water Company**
13 **Prevails on Every Relevant Factor.**

14 Under Arizona law and existing Commission policies, no need exists to engage in a
15 balancing test between a nearby existing established utility that is ready, willing and able to
16 serve the contested area, like Arizona Water Company, and a small, untested start-up utility
17 that plans to serve only its owner's own isolated development, such as WWC. However, if
18 the Commission were to engage in a balancing test, Arizona Water Company would prevail
19 on every relevant factor.

20 **A. Overall Size and Resources.**

21 Arizona Water Company is a long-established Class A water utility, Tr. 581, which
22 operates 22 different water systems in eight Arizona counties. Tr. 539. The company
23 operates 115 wells across the state, producing 55,000 gallons of water per minute, or 80
24 million gallons per day. Tr. 541. Statewide, Arizona Water Company operates 115 water
25 storage tanks, representing about 55 million gallons of storage. Tr. 541-42. Arizona Water
26 Company currently produces and delivers 14 billion gallons of water per year. Tr. 546. In
27 contrast, WWC plans to provide water service to a relatively small area (3,200 acres),
28 consisting of one development, Sandia. Ex. WWC-1, Attachment B-1; Tr. 44. WWC has

1 no resources to draw on outside of that area, Tr. 339-40, 349-50, and no plans to serve any
2 customers outside of that area. Tr. 160-61, 1387. While Arizona Water Company can
3 deliver 14 billion gallons of water per year; WWC has a current production capacity of zero.
4 Tr. 1390-91. In short, Arizona Water Company has a much larger area with which to
5 engage in regional interconnection and regional planning. Tr. 1385.

6 **B. Operational History and Reliability.**

7 Arizona Water Company has been in existence for 50 years, and expects to be around
8 for at least another 50 years. Tr. 545, 1221. During its 50 years of corporate existence,
9 Arizona Water Company has frequently been called upon to take over failing or defunct
10 water systems around the state, including a number of small, start-up companies begun by
11 developers, as is the situation with WWC. Tr. 568-71. Numerous other water systems also
12 receive their primary or backup water supplies from Arizona Water Company. Tr. 571-73.
13 In contrast, WWC was incorporated on March 31, 2004. WWC Ex. 1, Attachment G.
14 WWC's ultimate parent company (Pivotal, which is also the developer) never engaged in
15 the water utility business before, but instead engages in real estate development and a
16 myriad of other businesses. Tr. 60-61. Although Pivotal's CEO, Mr. Francis Najafi,
17 contended that Pivotal was committed to WWC, he also conceded that Pivotal might seek to
18 sell off the water company in the future. Tr. 70-72. While Arizona Water Company has a
19 very favorable track record on numerous points, WWC has no track record at all. Tr. 1386.

20 **C. Corporate Focus.**

21 Arizona Water Company only operates public water utility systems and has no other
22 business. Tr. 543, 862. Arizona Water Company takes a regional view towards water
23 service and is not focused on a particular stand-alone development. Tr. 601-02. As Arizona
24 Water Company President William M. Garfield testified, "Our sole purpose is a public
25 utility water service corporation." Tr. 601. In contrast, WWC's parent company never
26 engaged in the water utility business before filing WWC's application for a CCN. Tr. 60-
27 61. Instead, WWC's parent company has been primarily engaged in land development, Tr.
28

1 41, but also invests in hotels, spas, Internet domain name services, entertainment services
2 for hotels, vitamins and health supplements – not water utilities. Tr. 58-66.

3 **D. Depth of Managerial Experience.**

4 Arizona Water Company has a seven-member board of directors with a cumulative
5 210 years experience in operating water utilities. The average experience of each board
6 member is approximately 30 years. Tr. 541. Staff has worked with Arizona Water
7 Company's management for over 20 years. Tr. 1388-89. In contrast, WWC's President,
8 Frances Najafi, and its shareholder, Pivotal Sandia LLC, have never engaged in the water
9 utility business. Tr. 60-61. Three years ago, Pivotal hired Karl Polen, who worked on
10 utility issues for Robson Communities. Tr. 90. Pivotal plans for Mr. Polen to run WWC,
11 with numerous outside consultants brought in to plug the gaps. Tr. 49-50, 105, 130-32.
12 None of WWC's management level employees have water utility experience comparable to
13 those at Arizona Water Company. Tr. 1389.

14 **E. Number and Expertise of Employees.**

15 Arizona Water Company has approximately 175 employees, with each employee
16 having an average of ten years experience with Arizona Water Company. Tr. 540, 1216-17.
17 Approximately 100 of these employees are ADEQ certified operators, Tr. 543, and two are
18 certified backflow prevention specialists. Tr. 556. Arizona Water Company has its own
19 engineering department, operations staff, drafting department, meter repair and maintenance
20 facilities, accounting department (with C.P.A.s), billing department, in-house legal
21 department and ADEQ compliance specialists. Tr. 557-63, 867-68, 1214-1216. In contrast,
22 WWC has no current employees. Tr. 156, 447-48. Even after it begins operations, WWC
23 will have no certified operators on staff. Instead, WWC plans, in the future, to hire two of
24 "the best and the brightest" (at \$25,000 per year) as meter readers, and to conduct most of
25 its operations through outside contractors, including contracting with an outside consultant
26 to act as certified operator. Tr. 170, 446-47, 461-67, 486-87, 1275-76.
27
28

1 **F. Investment in Utility Plant and Facilities.**

2 Arizona Water Company has approximately \$225 million worth of utility plant in
3 service, with another \$10 million of construction work in progress. Tr. 544. This includes
4 wells, water storage tanks, booster pump stations, water transmission and distribution mains
5 and other utility plant facilities. Tr. 546. WWC currently has invested zero dollars in utility
6 plant, Tr. 157, and instead leases a Type 1 water right from Mr. Wuertz. Tr. 157. If WWC
7 receives a CCN, it says it plans to have approximately \$5.3 million of utility plant in service
8 by the end of the first year, and approximately \$8 million in service by the end of the fifth
9 year -- or an amount equal to about only 3 per cent of the total utility plant investment of
10 Arizona Water Company. WWC Ex. 1-B.

11 **G. Depth of Financial Resources.**

12 There is no doubt as to the financial viability of Arizona Water Company. Tr. 1369-
13 70. Arizona Water Company currently has a \$15 million line of credit. Tr. 547. To fund its
14 projects, Arizona Water Company is able to draw upon shareholder investment, short-term
15 lines of credit and long-term bonds. Tr. 599-600, 1217-19. In contrast, WWC's current
16 assets consist of a start-up infusion of paid-in capital of \$25,000. Tr. 55, 497-98. Although
17 Mr. Francis Najafi, Pivotal's CEO, has promised that Pivotal will provide further equity
18 capital "as needed," no promissory note or other written commitment exists between WWC
19 and Pivotal. Tr. 55-58, 448-49.

20 **H. Number of Customers.**

21 Arizona Water Company currently serves approximately 75,000 customers, and adds
22 approximately 4,000 customers per year. Tr. 539, 542, 1387-88. Arizona Water Company
23 is also experiencing accelerated growth of its customer base in the Coolidge and Casa
24 Grande areas, and thus Arizona Water Company's costs of service are shared by a much
25 larger group of customers. Tr. 550-51. WWC is currently serving only Howard Wuertz,
26 who turns on his own pump. Tr. 115, 153-54, 162, 1387-88. Even at full build out of the
27
28

1 Sandia project, WWC would have only 9,500 customers. Ex. WWC-1, Cover Letter dated
2 June 15, 2004.

3 **I. Resources Immediately Available to Serve the Contested Area.**

4 Arizona Water Company would serve the contested area from its Coolidge system,
5 which produces 6 to 7 million gallons of water per day, and has a storage capacity of 2
6 million gallons. Tr. 550. The Coolidge system has 13,510 acre feet of groundwater
7 available per year, plus 2,000 acre feet of CAP water. Tr. 553. Because of its size, Arizona
8 Water Company has a broad range of groundwater and other water supplies to draw upon
9 and a great amount of flexibility to meet the service needs of its customers. Tr. 602-06. In
10 addition, Arizona Water Company plans to begin construction soon on a plant to treat CAP
11 water for use in the Casa Grande and Coolidge systems, and expects the plant to be
12 operational by 2012. Tr. 608-09, 885-86. Arizona Water Company also plans to
13 interconnect its Casa Grande system (south and west of Sandia) and Coolidge system (east
14 of Sandia) in the future. Tr. 878-85. In contrast, WWC would have to meet all of its water
15 needs solely within its 3,200-acre area. Tr. 339-40, 349-50. During the hearings, WWC's
16 witnesses testified variously that WWC intends to drill two, four, five, six or eleven new
17 wells to serve its customers' needs. Tr. 117, 275, 335, 451-53, 808-10, 831. WWC
18 currently "operates" only one well, which serves untreated water to WWC's one customer,
19 but WWC's engineering witness was uncertain as to which well was actually being used.
20 Tr. 153-54, 353.

21 **J. Water Quality.**

22 Arizona Water Company has made substantial investments to comply with the new
23 arsenic standards. Tr. 545. Arizona Water Company is the only water company in Arizona
24 to have been awarded two EPA demonstration plants for arsenic treatment. Tr. 565. Even
25 so, Arizona Water Company does not anticipate any need to treat for arsenic in the Coolidge
26 system that will serve the Sandia development. Tr. 923-25, 931. In contrast, the existing
27 agricultural wells on the Sandia property have high levels of arsenic and fluoride
28

1 contamination, as well as nitrates and total dissolved solids. Tr. 164, 374-75, 943-49, 952-
2 59. Because of its confined area to drill wells, WWC has a very difficult (and costly)
3 tightrope to walk to comply with water quality standards. Tr. 832-33. Although WWC says
4 it plans to drill new wells, there is no certainty about the water quality in those wells until
5 after they are drilled. Tr. 329, 348, 378-80, 454, 473. WWC guesses that it will need to
6 invest \$1 million to treat arsenic and fluoride in the first five years, rising to \$2 million in
7 capital costs at full build out. Tr. 325-27, 363, 455-57, 1277-78. WWC's plans for water
8 treatment methodology have changed since it filed its CCN application, and WWC cannot
9 finally decide exactly what treatment methodology it will use until new wells are drilled.
10 Tr. 328-29. Moreover, WWC's testifying expert on design of its water treatment facilities,
11 Troy Bontrager (who received his civil engineering license the day before the date of the
12 Wood Patel report) testified that neither he nor anyone else at his firm, Wood Patel, had ever
13 before designed a fluoride or arsenic treatment plant. Tr. 329-334.

14
15 **K. Rates and Cost to Customers.**

16 Arizona Water Company proposes to charge customers in the contested area the same
17 rates that it charges customers in the Coolidge system, which could be as low as \$26 a
18 month for the average bill. Tr. 1221-28. Because of its size, expertise and efficiency,
19 Arizona Water Company is in a better position to provide lower cost service to customers in
20 the contested area. Tr. 589-92. A small, start-up, stand-alone developer-owned company,
21 like WWC, cannot offer such lower rates or rate stability to its customers. Tr. 593-94. In
22 fact, WWC's proposed rates constitute nothing more than projections for a company without
23 an operating history. Tr. 502. WWC's proposed rates (approximately \$47 per month for the
24 average bill) are, in fact, approximately 58% higher than Arizona Water Company's current
25 Coolidge system rates. Tr. 1228-30. If WWC receives the CCN and charges the rates its
26 plans to charge, the average customer at Sandia would pay at least \$20 per month more than
27 if Arizona Water Company provides the water service. Tr. 1230, 1243-44, 1386-87.
28

1 As noted by the Supreme Court in James P. Paul, when two competing utilities both
2 seek to serve in the same area, “the public interest is determined by comparing the
3 capabilities and qualifications of competitors vying for the exclusive right to provide the
4 relevant service. The amounts of time and money competitors must spend (at the
5 consumers’ ultimate expense) to provide service become primary determinants of the public
6 interest.” 137 Ariz. at 430, 671 P.2d at 408 (emphasis added). Again, Arizona Water
7 Company contends that this balancing test applies only where there is not an existing utility
8 like Arizona Water Company (which already nearly surrounds the contested area) that is
9 ready, willing and able to provide service. Nonetheless, under every conceivable factor in a
10 balancing test, Arizona Water Company prevails over WWC and should be awarded the
11 water CCN for the contested area.

12
13 **III. The Alleged Benefits of “Integrated” Water and Sewer Utilities in this Situation**
14 **Are Non-Existent or Easily Provided by Arizona Water Company.**

15 WWC has claimed throughout these proceedings that, if it receives a CCN, the public
16 will benefit from the alleged “integrated” water and sewer services that WWC will provide
17 together with a sewer company, Woodruff Utility Company, a separate entity also formed
18 by Pivotal. Staff recommended that WWC receive the CCN because of Staff’s unfounded
19 belief that it would be better for the Woodruff Utility Company to be associated with WWC
20 rather than standing alone. Tr. 1365-68. However, Staff could not name a single factor
21 other than the alleged corporate tie to a sewer company on which Staff based its opinion that
22 WWC should prevail over Arizona Water Company. Tr. 1392. In addition, Staff has little
23 or no support for its suggestion that financial and other ties actually exist between WWC
24 and the sewer company. Tr. 1393-96.

25 In contrast to WWC’s claims, Arizona Water Company already operates with
26 Commission knowledge and approval numerous water systems in areas where other entities
27 (municipal or private) provide sewer service. Tr. 610. Arizona Water Company has entered
28 into operating agreements in these areas to achieve efficiencies in billing and other areas,

1 such as providing information on new customers receiving water service. Tr. 610-12.
2 Arizona Water Company also works with sewer service entities to provide an integrated
3 solution for meeting an area's water needs, such as the use of effluent or reclaimed water for
4 turf and recharge recovery wells. Tr. 611-12. The goal of using renewable water sources to
5 meet demands can be effectively achieved with two separate entities providing water and
6 sewer service. Tr. 616-17. The alleged benefits of the "integrated" services of WWC and
7 the sewer company are, in this situation, insubstantial, and do not justify granting a CCN to
8 WWC in light of all of the factors as a whole.

9
10 Woodruff Utility Company and WWC are in fact two separate companies with no
11 connection other than their common ownership by the developer, Pivotal. Neither company
12 has any independent resources or financial strength other than what Pivotal decides to
13 provide, and the very fact that the two companies are incorporated separately suggests that
14 Pivotal desires convenience in selling them off separately. Moreover, the claim of alleged
15 efficiencies from "integrated" water and sewer services collapses before the fact of the
16 higher bills for both water and sewer service that Pivotal's customers will pay over what
17 they would pay if Arizona Water Company and the City of Coolidge provided those
18 services. Tr. 1230, 1243-44, 1386-87.

19 **IV. Arizona Water Company's Main Extension Policy Fully Complies with A.A.C.
20 R14-2-406.**

21 WWC has suggested that Arizona Water Company's main extension policy and use
22 of advances in aid of construction do not comply the Commission's rules. Tr. 441-43.
23 However, WWC's criticism of Arizona Water Company on this point lacks any merit. The
24 Commission's rules provide that a water utility can require refundable advances in aid of
25 construction from a developer for extensions of water mains and for additional facilities
26 when a two-prong test is met:

27 An applicant for the extension of mains may be required to pay to the Company, as a
28 refundable advance in aid of construction, before construction is commenced, the
estimated reasonable cost of all mains, including all valves and fittings.

- 1
2 1. In the event that additional facilities are required to provide pressure, storage
3 or water supply, exclusively for the new service or services requested, and the
4 cost of the additional facilities is disproportionate to anticipated revenues to be
5 derived from future consumers using these facilities, the estimated reasonable
6 cost of such additional facilities may be included in refundable advances in aid
7 of construction to be paid to the Company.

8 A.A.C. R14-2-406(B)(emphasis added); see also Tr. 725-26. Arizona Water Company
9 demonstrated that its proposed main extension agreement with Pivotal for the Sandia
10 development would comply with both the exclusivity and disproportionality prongs of this
11 test.

12 Concerning the exclusivity prong of the test, Arizona Water Company Vice
13 President-Engineering Michael J. Whitehead, testified that certain additional facilities would
14 be needed exclusively to serve the Sandia development. Tr. 913 (noting that WWC's own
15 engineering firm stated that Sandia would require at least six wells, a storage tank, treatment
16 facilities, and booster pump stations for service). The Commission has previously approved
17 Arizona Water Company line extension agreements that included such items in the category
18 of advances in aid of construction, Tr. 917, and Staff agreed with Arizona Water Company's
19 interpretation of the exclusivity test. Tr. 1347-48.

20 Moreover, Arizona Water Company Vice President and Treasurer Ralph Kennedy
21 testified that the Sandia development also met the disproportionality prong of the test. Tr.
22 1263-65. For example, in the Coolidge system as a whole in the year 2003, Arizona Water
23 Company received revenue of approximately \$0.56 on every dollar invested in rate base.
24 Tr. 1264; Exhibit AWC-25. In contrast, Arizona Water Company could expect to receive
25 revenue of only \$0.10 on every dollar of investment to serve Sandia in the first year, rising
26 to approximately \$0.35 on every dollar in the fifth year. Tr. 1264-65; Exhibit AWC-25.
27 The contrast between current revenue of 56 cents on the dollar for the Coolidge system and
28 the anticipated revenue of 35 cents on the dollar after five years of operation of the Sandia
system clearly demonstrates that the cost of the additional facilities for Sandia is
disproportionate to the anticipated revenue from those facilities. Tr. 1263-65.

1 Steve Olea, testifying for Staff, agreed with Arizona Water Company's interpretation
2 of R14-2-406(B) and the policy supporting the rule:
3

4 [M]ost subdivisions don't have customers on all 100 lots on day one. Therefore, the
5 revenues coming in from those 100 lots are going to be slow at first, but the [water]
6 company has to put in that money right up front. Therefore, the revenues that would
7 come from that subdivision would be disproportionate to the investment.

8 And the main reason for Rule 406, whether it's for the backbone plan or for
9 the mains, is the Commission does not want the water companies taking the risk that
10 a developer should be taking. Therefore, the risk of that development is going to be
11 put on the developer, because if it was put on the water company and that
12 development failed, then all the other customers of the water company would pick up
13 that cost, where the Commission believes that cost should be picked up by the
14 developer.

15 So the refunds happen slowly over time, as the revenue coming in happens
16 slowly over time. And if this rule works exactly like it's supposed to, then the
17 investment by the company will start matching the revenues coming slowly as the
18 refunds are made.

19 Tr. 1350-51 (emphasis added). Based on the testimony of Arizona Water Company's
20 witnesses and the supporting position of the Assistant Director of the Commission's
21 Utilities Division, Arizona Water Company's main extension policy fully complies with
22 Rule 14-2-406, and WWC's criticisms on this issue are groundless.

23 CONCLUSION

24 The Commission should grant Arizona Water Company's application for an
25 extension of its CCN and deny WWC's request for a CCN for at least four reasons. First,
26 Arizona law and public policy require granting the CCN to the established utility in an area,
27 so long as it is ready, willing and able to serve, as is Arizona Water Company. Second, to
28 the extent any balancing test applies (which Arizona Water Company contends it does not),
Arizona Water Company prevails over WWC on every relevant factor. Third, the alleged
benefits of "integrated" water and sewer service are nothing more than self-serving
statements by the developer who wants to control water supply at the expense of and to the
detriment of the customers. In any event, any such "benefits" are insubstantial and do not

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1 support granting the CCN to WWC. Fourth, Arizona Water Company's main extension
2 policy fully complies with Commission rules.

3
4 In summary, the water CCN should be granted to Arizona Water Company in the
5 entirety of the area for which it has applied.² Moreover, extending Arizona Water
6 Company's CCN to the Martin Ranch area has not been contested by WWC, is urgently
7 requested by Martin Ranch, and should be granted forthwith.

8 DATED this 19th day of September, 2005.

9 BRYAN CAVE LLP

10
11 By 
12 Steven A. Hirsch, #006360
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16 Attorneys for Arizona Water Company

17 ORIGINAL and 17 copies of the foregoing
18 filed this 19th day of September, 2005 with:

19 Docket Control Division
20 Arizona Corporation Commission
21 1200 West Washington Street
22 Phoenix, Arizona 85007
23

24
25 ² For the reasons set forth in this Brief, the May 20, 2003 [sic] letter submitted at the
26 commencement of the hearing by the Cardon Hiatt Companies concerning the
27 property in Section 19 immediately to the east of the Sandia development should be
28 disregarded. Cardon Hiatt's development cannot stand as an island surrounded by
Arizona Water Company's service area; good public policy and Arizona law support
Arizona Water Company's application to include this area within its CCN expansion.

1 **COPY** of the foregoing
2 mailed this 19th day
3 of September, 2005 to:

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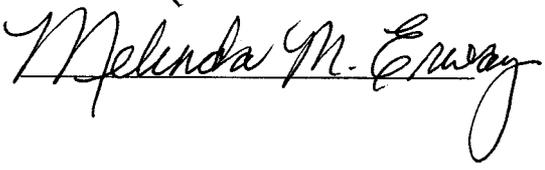


Exhibit A

Westlaw

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28 Ill.2d 294, 51 P.U.R.3d 89, 192 N.E.2d 392

(Cite as: 28 Ill.2d 294, 192 N.E.2d 392)

C

Supreme Court of Illinois.
CITIZENS VALLEY VIEW COMPANY,
Appellant,

v.

ILLINOIS COMMERCE COMMISSION et al.
(Sunny Acres Sewer & Water Co. et al.,
Appellees.)
No. 37037.

May 27, 1963.

As Modified on Denial of Rehearing Sept. 26, 1963.

Action by existing utility against Commerce Commission and newly formed utility to review Commission's order granting certificate of convenience and necessity to newly formed utility. The Circuit Court, Du Page County, Melvin F. Abrahamson, J., entered a judgment affirming the Commission's order and the established utility appealed. The Supreme Court, Hershey, J., held that order of Commerce Commission granting certificate of convenience and necessity to newly formed utility to operate water and sewer lines in proposed subdivision had to be reversed in absence of finding that existing utility, already servicing contiguous lands with water and sewer service, either was or was not able to service proposed subdivision.

Reversed and remanded with directions.

West Headnotes

[1] **Municipal Corporations** ⚡711
268k711 Most Cited Cases

[1] **Waters and Water Courses** ⚡202
405k202 Most Cited Cases

Order of Commerce Commission granting certificate of convenience and necessity to serve proposed subdivision with sewer and water was presumptively valid, and could not be set aside

unless found to be clearly unreasonable or contrary to an established rule of law.

[2] **Municipal Corporations** ⚡711
268k711 Most Cited Cases

[2] **Waters and Water Courses** ⚡202
405k202 Most Cited Cases

Order of Commerce Commission granting certificate of convenience and necessity to serve proposed subdivision with sewer and water line had to be supported by specific findings of fact, based on substantial evidence, indicating that basis for order was fair and not unreasonable.

[3] **Municipal Corporations** ⚡711
268k711 Most Cited Cases

[3] **Waters and Water Courses** ⚡202
405k202 Most Cited Cases

While "first in field doctrine" could not be employed to prevent newly formed utility, offering water and sewer service, from entering contiguous area or even same territory already served by a different utility, adjacent existing utility had right to seek to serve territory and show its willingness to provide service. S.H.A. ch. 111 2/3, § 56.

[4] **Municipal Corporations** ⚡711
268k711 Most Cited Cases

[4] **Waters and Water Courses** ⚡202
405k202 Most Cited Cases

Priority in filing of applications for certificate of convenience and necessity to serve proposed subdivision with sewer and water lines was entitled to little weight where there was nothing to indicate that subdivider, helping to form new utility, had at any time attempted to obtain needed services from existing utility which applied for certificate 56 days after filing of application by newly formed utility.

[5] **Municipal Corporations** ⚡711

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268k711 Most Cited Cases

[5] Waters and Water Courses ↪202

405k202 Most Cited Cases

Commerce Commission order granting certificate of convenience and necessity to newly formed utility to operate water and sewer lines in proposed subdivision had to be reversed in absence of finding that existing utility, already servicing contiguous lands with water and sewer service, either was or was not able to service proposed subdivision. S.H.A. ch. 111 2/3, § 73.

[6] Municipal Corporations ↪711

268k711 Most Cited Cases

[6] Waters and Water Courses ↪202

405k202 Most Cited Cases

Existing utility, servicing contiguous lands with water and sewer line, was entitled, if able, to serve proposed subdivision for which nonexistent utility had made application to service with sewer and water lines.

[7] Municipal Corporations ↪711

268k711 Most Cited Cases

[7] Waters and Water Courses ↪202

405k202 Most Cited Cases

Finding of Commerce Commission, that newly formed utility was financially able to furnish needed water and sewer services to proposed subdivision was not supported by substantial evidence.

*295 **393 Chapman & Cutler, Chicago (John N. Vander Vries, George H. Jirgal, and Gerald G. Imse, Chicago, of counsel), for appellant.

William G. Clark, Atty. Gen., Springfield (Edward V. Hanrahan, Special Asst. Atty. Gen., of counsel), for appellee Illinois Commerce Commission.

**394 Albert E. Jenner, Jr., Howard R. Barron, Richard L. Verkler, Frank E. Donahue, and William J. Walsh, Chicago (Thompson, Raymond, Mayer & Jenner, Chicago, of counsel), for appellee Sunny Acres Sewer & Water Co.

HERSHEY, Justice.

These proceedings began with the filing on May 23, 1960, by the Sunny Acres Sewer & Water Co. (hereinafter referred to as Sunny Acres), of a petition for a certificate of convenience and necessity to service some 800 acres of land in Du Page County with sewer and water. On June 14, 1960, Citizens Valley View Company (hereinafter referred to as Citizens Valley), sought to intervene in this proceeding, but on July 19, 1960, prior to any action by the Commission on the petition to intervene, *296 filed its own application to service the same area. After a hearing before a hearing examiner the Commerce Commission allowed the application of Sunny Acres and denied that of Citizens Valley. The latter filed an action against the Commission and Sunny Acres to review the Commission's order in the circuit court of Du Page County. This appeal, taken directly to this court pursuant to section 69 of 'An Act concerning public utilities' (Ill.Rev.Stat.1961, chap. 111 2/3, par. 73), is from a judgment of the circuit court affirming the Commission's order.

The position of Citizens Valley here is two-fold: first, that as an existing and operating sewer and water utility in this area adjacent to the property requiring water and sewer service it was entitled to a certificate of public convenience and necessity as against the competing newly organized and non-operating company in the absence of any proof or specific finding by the Commission that it was not ready, willing and able to provide the needed services; and, secondly, that the evidence overwhelmingly established that Citizens Valley could provide the area in question with water and sewer services more efficiently, at a lower cost and at lower rates than could Sunny Acres, a newly formed company, and, therefore, the order authorizing Sunny Acres to provide such services was contrary to the evidence and law.

The property that is the subject of this suit lies near the intersection of Butterfield Road, which runs east and west, and Illinois 53, a north-south highway in Milton and York townships in Du Page County, and is hereinafter referred to as the Johnson property. It lies generally south and east of this intersection extending at varying depths for approximately two

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miles along Butterfield Road. Valley View subdivision is south and west of this intersection; and a subdivision known as McIntosh subdivision is to the northwest of said intersection; and another known as the Butterfield subdivision is approximately *297 one-fourth to one-half mile east and north, abutting Butterfield Road. Just east of the Butterfield subdivision the Johnson property also extends to the north and lies on both sides of Butterfield Road. Upon 90 acres of the Johnson property lying adjacent to Butterfield subdivision and approximately one mile east of the above intersection an initial subdivision is proposed by one W. R. Johnson. The property sought to be served by Sunny Acres extends to the east another mile from the west edge of the proposed subdivision on both sides of Butterfield Road.

Sunny Acres at the time of the hearing was a new utility and had not yet commenced business. It was not serving any area nor was it authorized to serve any. It had no substantial assets, no utility management personnel, no engineers and no equipment. One existing water well located on the property owned by W. R. Johnson was, according to an engineer, adequate to form part of the initial water system. All other facilities, including water and sewer lines, would have to be newly constructed at an estimated cost of approximately \$1,210,000.

Citizens Valley had been formed in 1957 and at the time of the hearing was authorized **395 to serve the above-mentioned three subdivisions near the intersection of Butterfield Road and Route 53 and was actually rendering service to 230 homes in Valley View. This company was one of 11 Illinois subsidiaries of the Citizens Utilities Company (Delaware) operating in the Chicago area. The parent company also operated 11 other similar utility companies in other States. The Illinois companies jointly utilized twelve employees, including one manager, and five operators, as well as various trucks and other maintenance equipment. At the time of the hearing Citizens Valley water system consisted of two water wells in Valley View, a 180,000 gallon standpipe, 41,000 feet of pipe and 92 fire hydrants. Its sewer facilities included a

treatment *298 plant, 52,910 feet of pipe and 120 manholes. In connection with its proposed facilities to serve Butterfield subdivision, which were in the process of construction, a 10-inch water line had been installed along Butterfield Road, two new wells were proposed in the subdivision itself and an oxidation pond had already been built there. In order to serve the entire 800 acres applied for Citizens Valley would have to construct additional water wells and other facilities at an estimated cost of \$455,000, although the initial 90-acre subdivision could be served simply by extending the lines already proposed for the Butterfield subdivision.

In approving Sunny Acres' application the Commission found, among other things, that (1) Sunny Acres' application was filed 56 days prior to that of Citizens Valley; (2) the area proposed to be served consists of 800 acres of unsubdivided land not presently served by any water or sewer utility, 90% of which land is owned by W. R. Johnson, who is to be the major shareholder of Sunny Acres; (3) W. R. Johnson plans to subdivide in excess of 700 acres of said land commencing with an initial subdivision of 90 acres; (4) W. R. Johnson requested Sunny Acres to furnish the water distribution and sewage collection and disposal service to the entire above area, not just the 90-acre initial subdivision. Sunny Acres is ready, willing and able to furnish said facilities to the entire area and proposes to provide such service at its own expense as it is required; (5) Citizens Valley proposes to serve the above area upon the condition that all sewer and water main expense be paid by persons applying for service, who would be repaid to the extent of 40% of the actual cost of installation over a 10-year period; (6) Citizens Valley has been authorized to provide sewer and water utility service in three subdivisions lying to the west of the property in question, but is currently servicing only 230 homes in Valley View subdivision. This subdivision has a potential of 600 *299 homes and the sewage treatment plant lying to the south of Valley View subdivision was designed to serve 600 homes. This capacity has been reduced due to existing sanitary water board standards. In the event appellants were certified to serve the area in

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question it would have to build a new plant or subsequently increase the capacity of its present facility; (7) the owner of the property has not requested appellant to provide utilities and will not develop said property should appellant be certified; (8) Sunny Acres has adequate financial resources available to enable it to furnish the requested services; (9) there is a present and future need for public sewer and water service in the area involved; there is no such service presently nor is there any available, and the public convenience and necessity require the granting of Sunny Acres' application; (10) Sunny Acres should be authorized to place in effect the rates, rules, regulations and conditions of service proposed by it.

[1][2] The Commission's order is considered presumptively valid and cannot be set aside unless found to be clearly unreasonable or contrary to an established rule of law. (Chicago, North Shore and Milwaukee Railroad Co. v. Commerce Comm., 354 Ill. 58, 188 N.E. 177.) Said order must, however, be supported by specific findings of fact based upon substantial ****396** evidence indicating that the basis for said order is fair and not unreasonable. Chicago, Rock Island and Pacific Railway Co. v. Commerce Comm., 346 Ill. 412, 179 N.E. 126.

In support of its first position hereinbefore set forth Citizens Valley contends, that the record establishes that it is the existing utility in the field, that it is entitled to a preference over Sunny Acres, a newcomer in the field, and that before a certificate of convenience and necessity could be issued to Sunny Acres a specific finding should have been made as to whether or not Citizens Valley was ready, willing and able to serve the area in question.

In Chicago & West Towns Railways, Inc. v. Commerce Comm., 383 Ill. 20, 26- 28, 48 N.E.2d 320, 323-324, this court stated 'The public ***300** policy underlying the granting of certificates of convenience and necessity to a newcomer in the field of transportation as against the rights of one already in the field and rendering service was fully considered in Egyptian Transportation System, Inc. v. Louisville & N. R. Co., 321 Ill. 580, 152 N.E. 510, 512, * * *. We know of no reason why the

principles announced in the foregoing decisions should be departed from. * * * In our opinion the foregoing cases conclusively establish the right of appellants to have an opportunity as a regulated monopoly to render whatever service convenience and necessity may require, and it is only when it has been demonstrated that it is unable either from financial or other reasons to properly serve the public that a competing carrier will be allowed to invade the field. As the record stands the question was raised by the answer of appellants, and also by the offer of West Towns, but no evidence was taken by the commission which would justify it in granting a certificate of convenience and necessity to a competing carrier, until it has been established the utility in the field, was unable to render the service. The commission should have made findings upon this proposition.' (Italics added.)

In the case of Bartonville Bus Line v. Eagle Motor Coach Line, 326 Ill. 200, 157 N.E. 175, we held that 'It is the policy in this State, established by legislation for the regulation of all public utilities, to provide the public with efficient service at a reasonable rate, by compelling an established public utility occupying a given field to provide adequate service and at the same time protect it from ruinous competition, (Illinois Power & Light Corp. v. Commerce Comm., 320 Ill. 427, 151 N.E. 236), and, where additional or extended service is required in the interest of the public and a utility in the field makes known its willingness and ability to furnish the required service, the Commerce Commission is not justified in granting a certificate of convenience and necessity to a competing utility until the utility in the field has had an ***301** opportunity to demonstrate its ability to give the required service (Egyptian Transportation System v. Louisville & Nashville Railroad Co., 321 Ill. 580, 152 N.E. 510) * * *.'

A situation similar to that presented by the present case was involved in Illinois Power and Light Corp. v. Commerce Comm., 320 Ill. 427, 151 N.E. 236, cited in the above paragraph, in that the area there in dispute was not within the territory actually certified to the existing utility, the Illinois Power and Light Corporation. We held there that this fact

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did not prevent the existing utility from making application for a certificate to serve other territory adjacent to one of its lines and that the principle favoring the prior utility in the field was equally applicable to such other territory. Similarly the property involved in this case has not actually been certified to Citizens Valley, but it is, as hereinbefore set forth contiguous, except for highways, to other areas that have been certified to Citizens Valley.

[3] 'The first in the field' doctrine is not to be employed to totally prevent another from entering a contiguous area, or for that matter, even the same territory. (**397Eagle Bus Lines v. Commerce Commission, 3 Ill.2d 66, 119 N.E.2d 915.) The Public Utility Act itself, section 55, states that '(n)o certificate of public convenience and necessity shall be construed as granting a monopoly or an exclusive privilege, immunity or franchise'. Nevertheless, Citizens Valley, as the adjacent existing utility, would certainly have a right to seek to serve the territory and to show that it had the ability and willingness to provide the service.

[4][5] Citizens Valley, by seeking to file its intervening petition in the proceedings begun by Sunny Acres to obtain a certificate to serve the area in question and by the filing of a petition to obtain a certificate itself, has demonstrated its willingness and readiness to serve this area. By submitting in detail its plans for the construction of the sewer and water facilities needed to service this territory, its proposed rates for such services, and evidence concerning *302 the existing conditions surrounding this territory, Citizens Valley did present to the Commerce Commission the question of its ability as the existing utility to render the services required in this area.

However, an examination of the findings of the Commission reveals that no finding as to whether or not Citizens Valley, the existing utility, was able to serve this was made. Perhaps the Commission felt that because, as specifically found by the Commission, Sunny Acres application was filed 56 days prior to that of Citizens Valley, the latter was not entitled to any preference even though it was the existing utility in the field and that it was

unnecessary to make any specific finding as to Citizen Valley's ability to serve this area. We have held that priority in the filing of an application may be considered under certain circumstances, where it appears that the purpose of the late application is to block the competitor. (Black Hawk Motor Transit Co. v. Commerce Comm., 383 Ill. 57, 48 N.E.2d 341.) However, this element is entitled to little weight in the case here presented where there is nothing in the record to indicate that the subdivider at any time even attempted to obtain the needed services from the existing utility, which the record shows were immediately available to the initially planned 90-acre subdivision. Furthermore, Citizens Valley sought to intervene shortly after the filing by Sunny Acres of its application and thereafter filed its own application to serve this area, both prior to any action being taken by the Commission on Sunny Acres' application. Under these circumstances the fact that Sunny Acres filed its application first does not, in our opinion, in any way reduce the preference to which Citizens Valley as the existing utility is entitled, or relieve the Commission of the obligation of rendering specific findings relative thereto. The Commission failed to find either that Citizens Valley was able to serve the area in question or was not able to do so and for this reason alone its order must be *303 set aside and the cause remanded so that such a finding can be made.

[6] In support of its second position Citizens Valley contends that the Commission did not consider specifically the merits of its plan to serve the area or its claim that it could, through the use of a large integrated system, provide the needed services more efficiently and at reduced rates. Our holding that Citizens Valley, as the existing utility, is entitled, if able, to service the disputed area will require that these matters now be considered by the Commission and findings made thereon and the arguments made in support of this position will not be considered further. However, certain of the Commission's findings that were clearly erroneous, even apart from the failure to consider adequately the question of Citizens Valley's ability to serve the property in dispute, should be commented upon further since they could conceivably form the basis

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for a new order in this case.

The personal business desires of the subdivider and major shareholder of one applicant, his stated refusal to subdivide unless his company is certified, and his unwillingness to pay the cost of obtaining **398 service from the existing company in accordance with its rules previously approved by the Commission, are in no way controlling as to the public interest and should not have been taken into consideration by the Commission. Instead, even if it should be properly determined that Citizens Valley is not entitled to any preference, the Commission's order must be based exclusively upon those considerations affecting the public interest, such as the relative financial and technical capabilities of the two applicants and the nature of the facilities proposed to be constructed by each.

[7] The Commission's special finding that Sunny Acres is financially able to furnish the needed services is not supported by substantial evidence. The only evidence submitted in this regard was Joseph Johnson's testimony that *304 he and his brother were financially able to build these facilities and if necessary would furnish the money to Sunny Acres. There was no disclosure as to the method the Johnsons proposed to utilize in supplying this money, whether it was to be by way of loan or otherwise. The entire sum of \$1,210,000 needed to build the facilities is shown on the pro forma balance sheet as 'accounts payable' and the company's proposed net worth is shown to be only \$1,000. No provision for the retirement of this \$1,210,000 obligation was disclosed in the pro forma operating statement or otherwise, and no interest on said debt was taken into account in arriving at the anticipated \$28,000 annual net income. Obviously more evidence as to the proposed financial structure of Sunny Acres and its method of obtaining investment capital is necessary. If it is anticipated that much of this money is to be borrowed, then some consideration in the annual operating statement must be given to the payment of interest or if none is to be charged then that fact should be made known. Citizens Valley presented the consolidated balance sheet of the parent corporation as well as other evidence concerning its

ability to borrow needed funds at reasonable interest rates. Yet the Commission made no finding whatever as to its financial ability to undertake the project proposed for the 800 acres here involved. This is an important factor and, even aside from the question of preference of the existing company, the Commission's failure to base its order in part upon the relative financial capabilities of the two applicants was error.

The judgment of the circuit court of Du Page County affirming the Commission's order is reversed and the cause is remanded with directions that the order be set aside and the cause remanded to the Commission for further proceedings not inconsistent with this opinion.

Reversed and remanded, with directions.

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