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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.	

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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

opposition to the Application of Woodruff Water Company ("WWC") for a CCN for water service. The Arizona Corporation Commission (the "Commission") should grant Arizona Water Company's Application and deny WWC's Application for at least four reasons:

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

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

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

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

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

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

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

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

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

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

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

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

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

The Arizona Supreme Court has also applied these principles in a case involving Arizona Water Company, reversing a Commission decision denying Arizona Water Company a CCN expansion in favor of a smaller, start-up company, as WWC is here. In Arizona Corporation Commission v. Arizona Water Company, 111 Ariz. 74, 523 P.2d 505 (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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applications for a CCN to deliver water to the area, and following a rehearing, the Commission granted the certificate to Fernandez. Id. Arizona Water Company sought judicial review by the superior court pursuant to A.R.S. § 40-254, and the superior court vacated the decision of the Commission, instead granting the certificate to Arizona Water Company. Id.

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

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

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

The public policy behind the proposition that the existing carrier should be awarded the neighboring CCN is well established in Arizona. The Arizona Supreme Court has recognized that "Arizona's public policy respecting public service corporations, such as water companies, is one of regulated monopoly over free-wheeling competition." James P. 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

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

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

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

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

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

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

> 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 . . . was, according to the 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 a cost of 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

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

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

> It is the policy of 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, . . . 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 opportunity to demonstrate its ability to give the required service.

Id. at 396 (emphasis added). The fact that the contested area lay outside the existing utility's certificated area "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 of favoring the prior utility in the field was equally applicable to such other territory." Id.

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

> 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 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.

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:

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"The only evidence submitted in this regard was [the developer's] testimony that 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 [developer] proposed to utilize in supplying this money, whether it would be by way of loan or otherwise." Id. at 398. This evidence is almost a mirror image of the WWC evidence concerning its alleged "financial capabilities" in this case.

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

C. The Commission's Task Force and Decision Acknowledges and Carries Forward These Principles Of Law.

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

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

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

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

Id. at ¶ 8 (emphasis added).

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

> Unless the Applicant is an existing public water utility in Arizona or is an affiliate of an Arizona public water utility, an Applicant for a new CC&N (i.e., not an extension 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

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

c. A copy of the Applicant's request for service from all water utilities serving within five (5) miles of the Applicant's requested area as well as the refusal to serve from all those water utilities.

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

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

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

In this contested matter, Arizona Water Company is a long-established, Class A water company with facilities within a couple of miles of the contested area, which Arizona Water Company's certificate surrounds on three sides. Arizona Water Company is also ready, willing and able to serve the contested area -- despite the developer's refusal to request service from Arizona Water Company. Tr. 664. In contrast, WWC is a start up 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

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

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

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

A. Overall Size and Resources.

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

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

B. Operational History and Reliability.

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

C. Corporate Focus.

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

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

D. Depth of Managerial Experience.

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

E. Number and Expertise of Employees.

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

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

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

G. **Depth of Financial Resources.**

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

H. **Number of Customers.**

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

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

I. Resources Immediately Available to Serve the Contested Area.

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

J. Water Quality.

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

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

K. <u>Rates and Cost to Customers</u>.

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

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

III. The Alleged Benefits of "Integrated" Water and Sewer Utilities in this Situation Are Non-Existent or Easily Provided by Arizona Water Company.

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

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

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

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

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

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

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

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

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

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

Moreover, Arizona Water Company Vice President and Treasurer Ralph Kennedy testified that the Sandia development also met the disproportionality prong of the test. Tr. 1263-65. For example, in the Coolidge system as a whole in the year 2003, Arizona Water Company received revenue of approximately $0.56 on every dollar invested in rate base. Tr. 1264; Exhibit AWC-25. In contrast, Arizona Water Company could expect to receive revenue of only $0.10 on every dollar of investment to serve Sandia in the first year, rising to approximately $0.35 on every dollar in the fifth year. Tr. 1264-65; Exhibit AWC-25. The contrast between current revenue of 56 cents on the dollar for the Coolidge system and 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.

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

> [M]ost subdivisions don't have customers on all 100 lots on day one. Therefore, the revenues coming in from those 100 lots are going to be slow at first, but the [water] company has to put in that money right up front. Therefore, the revenues that would come from that subdivision would be disproportionate to the investment.
>
> And the main reason for Rule 406, whether it's for the backbone plan or for the mains, is the Commission does not want the water companies taking the risk that a developer should be taking. Therefore, the risk of that development is going to be put on the developer, because if it was put on the water company and that development failed, then all the other customers of the water company would pick up that cost, where the Commission believes that cost should be picked up by the developer.
>
> So the refunds happen slowly over time, as the revenue coming in happens slowly over time. And if this rule works exactly like it's supposed to, then the investment by the company will start matching the revenues coming slowly as the refunds are made.

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

CONCLUSION

The Commission should grant Arizona Water Company's application for an extension of its CCN and deny WWC's request for a CCN for at least four reasons. First, Arizona law and public policy require granting the CCN to the established utility in an area, so long as it is ready, willing and able to serve, as is Arizona Water Company. Second, to 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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support granting the CCN to WWC. Fourth, Arizona Water Company's main extension policy fully complies with Commission rules.

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

DATED this 19th day of September, 2005.

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By _____

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[2] For the reasons set forth in this Brief, the May 20, 2003 [sic] letter submitted at the commencement of the hearing by the Cardon Hiatt Companies concerning the property in Section 19 immediately to the east of the Sandia development should be 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.

COPY of the foregoing
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Exhibit A

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 nonexisting 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, wiling 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 appellant 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 botaining 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.

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

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