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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

- JEFF HATCH-MILLER - Chairman
- WILLIAM A. MUNDELL
- MARC SPITZER
- MIKE GLEASON
- KRISTIN K. MAYES

2005 DEC -11 P 3: 52
 AZ CORP COMMISSION
 DOCUMENT CONTROL

IN THE MATTER OF THE APPLICATION OF ARIZONA WATER COMPANY, AN ARIZONA CORPORATION, TO EXTEND ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY AT CASA GRANDE, PINAL COUNTY, ARIZONA) DOCKET NO. W-01445A-05-0469)) RESPONSES TO STAFF REPORT AND) CITY OF ELOY'S TESTIMONY)))
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A November 10, 2005 Procedural Order in this matter provided that Arizona Water Company (the "Company") may file responses to the Staff Report and Intervenor the City of Eloy (the "City") testimony on or before December 1, 2005. The Company hereby files its responses to both documents.

I. RESPONSES TO STAFF REPORT

A. Post-Hearing Conditions

In the Executive Summary and at pages 5-6 of the Staff Report, Staff recommends that the Company file with Docket Control the following items:

1. An amended legal description excluding Parcels 2 and 8 (as designated in the Company's application) that are within the corporate city limits of the City.
2. A copy of the fully executed main extension agreements for water facilities for each parcel within the extension area within 365 days of a decision in this matter.

- 1 3. A copy of the Arizona Department of Environmental Quality Approval to
2 Construct for the facilities needed to serve the requested areas within one year
3 of the effective date of an order in this proceeding.
- 4 4. A copy of each of the developer's Certificate of Assured Water Supply, stating
5 that there is adequate water supply, where applicable or when required by
6 statute, within one year of the effective date of the final decision and order
7 issued pursuant to the Company's application.

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9 Staff further recommends that the Commission's Decision granting the Certificate of
10 Convenience and Necessity ("CCN") be considered null and void should the Company fail to
11 meet Conditions Nos. 2, 3 and 4, above within the time specified.

12 The Company objects to the foregoing conditions as follows:

- 13 1. With respect to the condition concerning deleting areas within the corporate city
14 limits of the City, elsewhere in the Staff Report it appears that the Staff's
15 recommendation concerning Parcels 2 and 8 is related, in part, to the Company's
16 current lack of a City franchise or permit for those areas. The Company will
17 address that issue elsewhere in these responses. Otherwise, what the Staff
18 Report and City's testimony overlook is that it is the Commission's duty to
19 provide for utility service that is in the public interest and it is the public interest
20 that governs the issuance of a CCN. *James P. Paul Water Co. v. Arizona*
21 *Corporation Commission*, 137 Ariz. 432, 434, 671 P.2d 410, 412 (Ariz.App.
22 1982). No Arizona statute, court decision, or rule or regulation gives a
23 municipal provider any preference or advantage or assumed priority to provide
24 the water service that a public service corporation like the Company can
25 provide. In addition, the Company has received written requests to provide
26 water service to each parcel, copies of those requests for water service were
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filed with the application, and the Company can provide the facilities needed to serve Parcels 2 and 8 subject to the Commission's rules and the Company's tariffs. The public interest is best served by granting the Company's Application as to Parcels 2 and 8, as well as the remaining areas in the Application.

2. With respect to the remaining parcels, the Company objects to the requirement of conditions 2, 3 and 4 above for Parcel 1. As the Company detailed in its application, it is already providing water service to approximately 200 customers in this area, and has been doing so for a number of years. It is not necessary to apply any of the provisions of conditions 2, 3 and 4 to this parcel.
3. With respect to Parcels 2 through 8, respectively, under current development schedules, 365 days after the date of the decision is not a sufficient time to satisfy these conditions. In recent Company applications, the Commission has routinely approved a period of two years after the date of the decision for filing notice of satisfaction of each provision of conditions 2, 3 and 4, and the Company submits that a two-year period should be used in this case. In addition, as each of the provisions of conditions 2, 3 and 4 are solely within the control of the developer, the Company submits that the decision should not be automatically considered null and void if the Company is unable to obtain the documentation that conditions 2, 3 and 4 require. Instead, the Company should be permitted to file an explanation of the status of its efforts to obtain the documents required by each condition if those conditions are not met within two years, with the Commission retaining jurisdiction to enter further orders as appropriate.

1 B. The City Franchise Issue

2 Judging from the second and third paragraphs of page 5 of the Staff Report, the primary
3 reason that the Staff is recommending that Parcels 2 and 8 not be added to the Company's CCN
4 is that the Company does not currently have a City franchise. The basis for that Staff
5 recommendation is erroneous under Arizona law.

6 First, Arizona law specifically provides that a CCN applicant shall submit evidence that
7 the applicant has received the required "...consent, franchise or *permit* of the proper county, city
8 and county, municipal or other public authority." A.R.S. 40-282.B (emphasis supplied) Indeed,
9 the Commission has recently approved a CCN for the Company in Casa Grande based on Casa
10 Grande's having issued permits rather than a franchise. See Decision No. 66894, Finding of Fact
11 No. 11 (April 6, 2004)¹. As the Company's counsel informed the Staff during the Staff's review
12 of the application in this docket, the Company will obtain permits (or even a franchise) from the
13 City as necessary to provide water service to customers within the city. The Company currently
14 operates without municipal franchises in the municipalities of Apache Junction, Bisbee, Pinetop-
15 Lakeside and Sierra Vista.

16 In addition, in his testimony filed on November 10, 2005, Mr. Olson did not testify that
17 the City would not issue permits or a franchise to the Company, or that the Company could not
18 obtain them through the normal application process as did Arizona Public Service Company and
19 Southwest Gas Corporation, each of which, the Company is informed, has a City franchise.

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23 ¹ "The Company's franchise for Casa Grande expired on January 18, 2003 and since the Company has been
24 unable to secure approval of a City Council resolution which authorizes a new franchise, the Company has been
25 operating by using the City's right-of-way permits which the City issues to non-franchise holders when construction
26 takes place in City rights-of-way. These permits require the Company to pay a City construction inspection fee
27 equal to three percent of the construction costs of each project in City rights-of-way rather than the franchise fee
28 under the expired agreement." (Decision No. 66894, p.3, l. 8-15)

1 Second, under A.R.S. 40-282.D, if a CCN applicant desires to exercise a right or
2 privilege under a franchise or permit which it contemplates securing, but which has not yet been
3 issued, the Commission "... may thereupon make an order declaring that it will thereafter ...
4 issue the desired certificate upon terms and conditions it designates, after the corporation has
5 obtained the contemplated franchise or permit". Id. The Commission has entered such orders in
6 the past despite the Staff Report's suggestions otherwise. There is no reason why the
7 Commission should not follow that longstanding practice in this case.
8

9 Finally, the Company objects to the Staff's conclusion, in paragraph 4 on page 5 of its
10 report, that the certification of Parcels 2 and 8 to the Company may create ... "an infringement or
11 encroachment without permission if approved by the Commission." The fact that the Company
12 has, for over 50 years in some cases, pursuant to CCNs issued by the Commission, provided
13 water service within the municipal boundaries of cities and towns such as Casa Grande, Superior,
14 Coolidge, and several others, demonstrates the utter fallacy of this conclusion. In addition, each
15 of the reasons provided above, e.g. that the Commission considers the public interest in
16 considering CCN applications, that it may issue orders preliminary, and that the City has not
17 denied a Company permit or franchise application (and it may be unlawful to do so, based on the
18 City's treatment of other utilities), also proves that this conclusion is flatly incorrect.
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20 II. RESPONSES TO THE CITY'S TESTIMONY

21 The City has filed testimony prepared by Doug Olson, City water/wastewater system
22 manager. The Company responds to the testimony as follows:
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- 24 1. At page 3 of his testimony, Mr. Olson testifies that he believes the Company
25 does not have a City franchise or license authorizing the use of public rights of
26 way. But he does not (and can not) state that the City would not issue a
27 franchise or permit because the City has issued franchises to Arizona Public
28 Service Company and Southwest Gas Corporation, and any refusal to issue

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permits or a franchise to the Company would be a violation of equal protection under the Arizona Constitution. *Trust v. County of Yuma*, 203 Ariz. 272, 69 P.3d 510 (Ariz.App.Div.1 2003).

2. At page 3, line 47, Mr. Olson testifies that he "anticipates" that the Arizona Department of Water Resources will issue a modified designation of the City's assured water supply designation. The Commission should accord no weight to this because the issue in this case is whether the Company has the water supply needed to serve the areas in the Application – which it does. (See Staff Report at page two and accompanying Memorandum of Marlin Scott, Jr.)
3. At page 4, beginning on line 59, Mr. Olson testifies, with respect to Parcel 3 which is not located within the corporate city limits of the City, that the City would "like to serve this parcel". But the property owner has requested the Company, not the City, to serve this Parcel. The record in this case shows that the Company is ready, willing and able to serve the parcel, as requested by the owner, and accordingly this Commission should, in the public interest, authorize the Company to do so.

RESPECTFULLY SUBMITTED this 1st day of December, 2005.

ARIZONA WATER COMPANY

By: Robert W. Geake
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Post Office Box 29006
Phoenix, Arizona 85038-9006

1 Original and thirteen (13) copies of the foregoing filed this 1st day of December 2005 with:

2 Docket Control Division
3 Arizona Corporation Commission
4 1200 West Washington Street
5 Phoenix, Arizona 85007

6 A copy of the foregoing was hand-delivered this 1st day of December 2005 to:

7 Honorable Amy B. Bjelland
8 Administrative Law Judge
9 Hearing Division
10 Arizona Corporation Commission
11 1200 West Washington
12 Phoenix, AZ 85007

13 A copy of the foregoing was faxed this 1st day of December 2005 to:

14 Thomas H. Campbell
15 Michael T. Hallam
16 Lewis and Roca
17 40 N. Central Avenue
18 Phoenix, AZ 85004
19 Attorneys for the City of Eloy

20 And a copy of the foregoing was mailed this 1st day of December 2005 to:

21 Christopher Kempley, Chief Counsel
22 Legal Division
23 Arizona Corporation Commission
24 1200 West Washington Street
25 Phoenix, Arizona 85007

26 Ernest G. Johnson
27 Director, Utilities Division
28 Arizona Corporation Commission
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By: Robert W. Yeake