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BEFORE THE ARIZONA CORPORATION COMMISSION

~~W- 03512A-01-0464~~

Docket No. ~~W-013512A-01-0464~~

9 PINE WATER COMPANY, an Arizona  
corporation,

10 Complainant,

COMPLAINANT'S SURREPLY TO  
RESPONDENTS' MOTION TO DISMISS

11 v.

12 STRAWBERRY HOLLOW  
 13 DEVELOPMENT, INC., an Arizona  
 corporation, STRAWBERRY HOLLOW  
 14 PROPERTIES, L.L.C., an Arizona limited  
 liability company, STRAWBERRY  
 15 HOLLOW PROPERTY OWNER'S  
 ASSOCIATION, INC., an Arizona nonprofit  
 16 corporation,

17 Respondents.

Arizona Corporation Commission

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 19 Complainant, Pine Water Company ("Pine Water"), recognizes the unusual nature of a  
 20 surreply brief. Nevertheless, Pine Water is compelled to respond to the unfounded and distorted  
 21 allegations that comprise Respondents' Reply to Pine Water's Response ("Reply"). Respondents'  
 22 allegations are directed at the propriety of Pine Water's actions as well as those of its counsel,  
 23 and, if not corrected, threaten the integrity of this proceeding.

24 Respondents' Misrepresentation No. 1: Pine Water engaged in improper discovery tactics  
 25 concerning the District, using this proceeding as a "fishing expedition" in anticipation of Pine  
 26 Water's action against Gila County. (Reply at 2).

1 In order to appreciate the absurdity of this allegation, one must understand the sequence of  
2 events leading to Pine Water's action against Gila County:

- 3 • April 10, 2001: Strawberry Hollow Development, Inc. receives a public report  
4 and begins selling lots at Strawberry Hollow with the intent to act as "water  
5 provider" to those lots. See Complaint at Tabs A, B and D.
- 6 • June 6, 2001: Pine Water initiates this action to protect rights conferred by the  
7 Commission under Pine Water's certificate of convenience and necessity  
8 ("CC&N").
- 9 • June 28, 2001: Respondents answer Pine Water's complaint, and counterclaim  
10 seeking deletion from Pine Water's CC&N.
- 11 • June 14 through August 3, 2001: Pine Water conducts discovery and answers  
12 Respondents' data requests.
  - 13 ➤ July 10, 2001: Loren Peterson, on behalf of Respondents, explains under oath  
14 that no district will be formed:
    - 15 Mr. Shapiro: "There's no improvement district that's going to  
16 provide water service?"
    - 17 Mr. Peterson: "To my understanding right now, that's correct."
    - 18 Mr. Shapiro: "Do you have any plans to form one that would  
19 provide service?"
    - 20 Mr. Peterson: "No."<sup>1</sup>
  - 21 ➤ August 1, 2001: Pine Water learns of rumors that, contrary to his deposition  
22 testimony, Mr. Peterson is planning to form an improvement district
  - 23 ➤ August 3, 2001: Pine Water sends its data request to Respondents inquiring  
24 about the possible formation of the District. See Pine Water's Response at Tab  
25 A.
- 26 • August 8, 2001: The parties engage in settlement discussions, which discussions  
involve Commission Staff.

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<sup>1</sup> Notably, counsel for Respondents at that time interposed no objection to this line of questioning on grounds of relevance, or otherwise.

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- August 11, 2001: Mr. Peterson seeks and obtains approval of the Board of Directors of the Pine-Strawberry Domestic Water Improvement District to delete Strawberry Hollow from that district.
- August 14, 2001: Pine Water receives Respondents' response to its data request concerning the formation of the District. Respondents claim the District is irrelevant to the claims in this docket.
- August 14, 2001: Mr. Peterson seeks and obtains approval of the Gila County Board of Supervisors ("Board") to form the Strawberry Hollow Domestic Water Improvement District ("District").
- August 20, 2001: Pine Water files a complaint against Gila County pursuant to A.R.S. § 48-907 challenging formation of the District.
- August 22, 2001: Respondents move to dismiss Pine Water's complaint in these proceedings.

As can be seen, Pine Water initially questioned Mr. Peterson concerning the possible formation of the District on July 10, 2001. Gila County entered this convoluted picture only **after** Mr. Peterson sought and obtained the Board's approval to form the District – on August 14, 2001 – five weeks **after** Pine Water's initial inquiry and two weeks **after** Pine Water sent its first data request concerning this issue. The idea that Pine Water was unethically engaging in a "fishing expedition" is unsupported and preposterous given the timing of the events described above.

Respondents' Misrepresentation No. 2: *Pine Water has "refused to provide the public with water service" and has fought "everyone else who wishes to step up and do Pine's Water Company's job."* (Reply at 3).

Pine Water has never voluntarily refused to provide anyone with water service. Pine Water is in the business of providing water service. The arbitrary denial of service is not only antithetical to this purpose, but is also illegal. Pine Water does, however comply with each and every rule, regulation and order imposed on it by this Commission, including those moratoria that

1 have prevented Pine Water from serving Respondents' subdivision. Pine Water is committed to  
2 responsible water management and will continue to abide by the moratoria, and any other  
3 Commission order, but Pine Water should not be faulted for vigorously defending its rights and  
4 protecting its ability to serve its existing customers.

5 Respondents' Misrepresentation No. 3: *Pine Water has "requested and received a service*  
6 *moratorium from the Commission."* (Reply at 3).

7 As this Commission and counsel for Respondents are well aware, Pine Water did **not**  
8 request the imposition of moratoria in Pine. The initial moratoria were imposed on Pine Water's  
9 predecessors in the early 1980s and have continued, in one form or another, to date. Since  
10 acquiring the assets of E&R Water Company and Williamson Waterworks, Inc., Pine Water has  
11 taken every reasonable step to acquire and secure additional, reliable water supplies for its  
12 customers with the ultimate goal of seeking a sensible modification of the moratoria. As a result  
13 of these steps, including "Project Magnolia,"<sup>2</sup> Pine Water's customers have now experienced 252  
14 consecutive days of Stage 1 conservation status (i.e. no restrictions on water use). In addition,  
15 Pine Water just successfully managed all of the major summer holidays -- Memorial Day, the 4th  
16 of July, and now Labor Day -- all without service interruption due to supply shortages.

17 Respondents' Misrepresentation No. 4: *Respondents have done nothing that would make*  
18 *them a public service corporation.* (Reply at 3).

19 A.R.S. § 40-281 prohibits any public service corporation from beginning construction of  
20 any line, plant, service or system without having first obtained a CC&N from the Commission.  
21 Respondents, in the face of this clear prohibition, conducted hydrology studies, drilled wells,  
22 designed a centralized distribution system, and began to install water pipe, all to serve water to  
23 Strawberry Hollow. Those actions are the very subject of this complaint. Respondents'  
24 unsupported contentions do not dispose of the controversy Pine Water has sought to resolve by

25 \_\_\_\_\_  
26 <sup>2</sup> Project Magnolia has delivered more than 10 million gallons of water into the Pine Water system since early  
February 2001.

1 instituting this action.

2 Respondents' Misrepresentation No. 5: Pine Water desires to "tie Respondents up in  
3 litigation on as many fronts as possible" and is attempting to "bleed Respondents' limited  
4 resources." (Reply at 1, 4).

5 Pine Water filed this action to protect the rights granted it under its CC&N and Arizona  
6 law after Respondents acted in derogation of those rights. Faced with a near certain adverse  
7 ruling in these proceedings, Mr. Peterson, with the Board's blessing, formed a new District to  
8 operate in Pine Water's CC&N. As set forth in Pine Water's complaint against Gila County, the  
9 Board's approval of the District is contrary to public interest. See Pine Water's Response at Tab  
10 C. That suit is not only designed to protect Pine Water's rights, but also the public interest.  
11 Respondents have dictated the forums in which Pine Water must defend itself, and Pine Water  
12 cannot be faulted for protecting its rights.

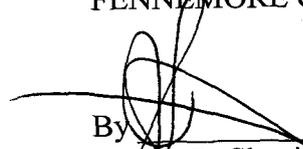
13 In summary, in an apparent effort to delude this Commission, Respondents have distorted  
14 and, in some cases, fabricated facts to argue for dismissal of Pine Water's complaint.  
15 Respondents, however, continue to take inconsistent positions. They say they have no intention  
16 of acting like a public service corporation now, but concede they might return to that scheme if  
17 their parallel plans fail. Pine Water remains willing to dispose of this action on one simple  
18 ground: an irrevocable commitment that neither Respondents, nor their successor and assigns,  
19 will operate as a public service corporation. Respondents still refuse to do so. Therefore, this  
20 action should not be prematurely dismissed. Instead, all proceedings should be stayed pending  
21 the outcome of the litigation in superior court on the validity of the District.

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DATED this 4<sup>th</sup> day of September, 2001.

FENNEMORE CRAIG

By   
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Original and 10 copies  
hand-delivered this 4<sup>th</sup>  
day of September, 2001 to:

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Copy of the foregoing  
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