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JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER



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ARIZONA CORPORATION COMMISSION 2001 DEC -4 P 1:54

AZ CORP COMMISSION
DOCUMENT CONTROL

DATE: December 4, 2001
DOCKET NOS: W-03512A-01-0464
TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Dwight D. Nodes. The recommendation has been filed in the form of an Order on:

PINE WATER COMPANY v. STRAWBERRY HOLLOW DEVELOPMENT, INC. ET AL.
(ORDER TO SHOW CAUSE)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

DECEMBER 13, 2001

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Special Open Meeting to be held on:

DECEMBER 18 AND 19, 2001

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250.

Arizona Corporation Commission

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DEC 04 2001

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BRIAN C. McNEIL
EXECUTIVE SECRETARY

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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

PINE WATER COMPANY, an Arizona corporation,

Complainant,

Vs.

STRAWBERRY HOLLOW DEVELOPMENT,
INC., an Arizona corporation, STRAWBERRY
HOLLOW PROPERTIES, L.L.C., an Arizona
limited liability company, STRAWBERRY
HOLLOW PROPERTY OWNER'S
ASSOCIATION, INC., an Arizona not-for-profit
corporation,

Respondent.

DOCKET NO. W-03512A-01-0464

DECISION NO. _____

ORDER

Open Meeting
December 18 and 19, 2001
Phoenix, Arizona

BY THE COMMISSION:

Having considered the record herein, and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. On June 6, 2001, Pine Water Company ("Complainant" or "Pine Water") filed a Complaint with the Arizona Corporation Commission ("Commission") and an Application for an Order to Show Cause why the Respondents, Strawberry Hollow Development, Inc. ("Strawberry Hollow Development"), Strawberry Hollow Properties, LLC, and Strawberry Hollow Property Owners Association, Inc. ("Strawberry Hollow POA"), should not be adjudicated a public service corporation. Due to historical water shortages, Pine Water has operated under various moratoria since the late 1980s with respect to establishing new connections and/or main connections (See, Decision Nos. 56539, 56654, and 59753). Strawberry Hollow Development approached Pine Water for service but Strawberry Hollow was denied service due to the Commission-imposed moratoria.

1 Pine Water alleged that Strawberry Hollow Development, a real estate developer, intended to act as a
2 "water provider" to 41 residential lots on 38 acres through a central distribution system in an area that
3 is certificated to Pine Water, in order to circumvent the water service moratoria.

4 2. On June 28, 2001, the Respondents filed an Answer and Counter-Claim to the
5 Complaint. The Respondents claimed that under the Declaration of Covenants, Conditions, and
6 Restrictions ("CC&Rs") adopted by the Strawberry Hollow POA, each lot owner, acting as co-
7 tenants, would be responsible for the operation, maintenance, repair and replacement of the water
8 system. According to the Respondents, they would not be public service corporations pursuant to
9 Article XV, Section 2, of the Arizona Constitution and, therefore, they claimed the Commission lacks
10 jurisdiction over the subject matter of the Complaint. The Complainant filed a Reply on July 6, 2001.

11 3. On July 25, 2001, a procedural telephonic conference was conducted in this matter.
12 Pursuant to the agreement of the parties and Staff during that conference, a Procedural Order was
13 issued continuing the hearing until September 13 and 14, 2001.

14 4. On August 14, 2001, the Gila County Board of Supervisors approved the formation of
15 the Strawberry Hollow Domestic Water Improvement District ("Improvement District"), which
16 incorporated the entire area of the Strawberry Hollow subdivision.

17 5. On August 22, 2001, Strawberry Hollow filed a Motion to Dismiss the case without
18 prejudice. According to Strawberry Hollow, it has abandoned its plans to provide water service to
19 the Strawberry Hollow subdivision or to anyone else in Arizona. An affidavit signed by the president
20 of Strawberry Hollow Development states that Strawberry Hollow Development has "completely and
21 irrevocably abandoned the intent to have potable water service provided by any of the Respondents to
22 either the Strawberry Hollow subdivision or any other party in Arizona" (Affidavit of Loren Peterson,
23 Exhibit A to Respondents' Motion to Dismiss). Therefore, the Respondent requested that this
24 proceeding be administratively closed since the issues raised by the Complaint are moot.

25 6. On August 27, 2001, Pine Water filed a Response to the Motion to Dismiss. Pine
26 Water argues that, instead of dismissal, the appropriate remedy should be a stay of the proceedings
27 pending resolution of a civil lawsuit Pine Water has filed against Gila County regarding formation of
28 the Improvement District.

1 7. On August 31, 2001, Strawberry Hollow filed a reply to Pine Water's Response. The
2 Respondent reiterated its claim that the Complaint is moot and that any hearing on the Complaint
3 would be meaningless.

4 8. On September 14, 2001, the Administrative Law Judge heard oral arguments
5 regarding the pending Motion to Dismiss. Strawberry Hollow and Staff both argued that the case
6 should be dismissed without prejudice, while Pine Water continued to advocate that a stay of the
7 proceeding would be more appropriate.

8 9. After reviewing the arguments presented by the parties, we believe that the Complaint
9 should be dismissed. Strawberry Hollow Development's president has stated in a sworn affidavit
10 that, since the formation of the Improvement District, the Respondents have "completely and
11 irrevocably" abandoned their intent to provide water service. Given this clear indication of the
12 Respondents' intent to no longer pursue the action that gave rise to the Complaint, we believe that no
13 purpose would be served by staying this proceeding indefinitely. Indeed, counsel for Pine Water
14 indicated at the oral argument that the inclusion of the above-referenced language in Mr. Peterson's
15 affidavit, in an order dismissing this case, would be sufficient to satisfy Pine Water's concerns
16 (September 14, 2001 Oral Argument Tr. at 18).

17 10. If the Respondents were to resume their original plan to have the Strawberry Hollow
18 POA provision water service by and for the POA's individual members, in direct contravention of
19 Mr. Peterson's sworn affidavit, the Complainant would be entitled to re-file its Complaint. We
20 believe that Pine Water's rights are sufficiently protected by its ability in the future to pursue the
21 same cause of action before the Commission. Accordingly, we will dismiss this Complaint without
22 prejudice.

CONCLUSIONS OF LAW

24 1. The Complainant is a public service corporation within the meaning of Article XV of
25 the Arizona Constitution and A.R.S. §40-249.

26 2. The Commission has jurisdiction over the Complainant and the subject matter of the
27 Complaint.

28 3. Dismissal of this Complaint, without prejudice to the Respondents, is administratively

1 efficient and allows the Respondent to re-file the Complaint and pursue the same cause of action in
2 the future.

3 **ORDER**

4 IT IS THEREFORE ORDERED that Pine Water Company's Complaint shall be dismissed
5 without prejudice.

6 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

7 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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10 CHAIRMAN COMMISSIONER COMMISSIONER

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12 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
13 Secretary of the Arizona Corporation Commission, have
14 hereunto set my hand and caused the official seal of the
Commission to be affixed at the Capitol, in the City of Phoenix,
this ____ day of _____, 2001.

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17 BRIAN C. McNEIL
EXECUTIVE SECRETARY

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18 DISSENT _____

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1 SERVICE LIST FOR:

PINE WATER COMPANY V. STRAWBERRY
HOLLOW DEVELOPMENT, INC. ET AL.

2

3 DOCKET NO.

W-03512A-01-0464

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BEFORE THE ARIZONA CORPORATION COMMISSION

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4 Vs.) W-03512A-01-0464

5 STRAWBERRY HOLLOW DEVELOPMENT, INC., an Arizona corporation,

6 STRAWBERRY HOLLOW PROPERTIES, L.L.C., an Arizona limited liability company,

7 STRAWBERRY HOLLOW PROPERTY OWNERS ASSOCIATION, INC., an Arizona not-for-profit corporation,

8) ORAL ARGUMENTS

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10)

11 At: Phoenix, Arizona

12 Date: September 14, 2001

13 Filed: SEP 25 2001

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

Arizona Corporation Commission
DOCKETED

SEP 25 2001

DOCKETED BY

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ARIZONA REPORTING SERVICE, INC.

Court Reporting

Suite Three

2627 North Third Street

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By: CECELIA BROOKMAN, RPR

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ARIZONA CORP. COMM.

HEARING DIVISION

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