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AZ CORP COMMISSION  
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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

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.

**ARIZONA WATER COMPANY'S  
APPLICATION FOR REHEARING  
PURSUANT TO A.R.S. § 40-253**

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

Arizona Water Company hereby submits its Application for Rehearing Pursuant to A.R.S. § 40-253 concerning Decision No. 68453 dated February 2, 2006 (as supplemented by subsequent Procedural Order). The Commission should grant Arizona Water Company's

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1 Application for a Rehearing, approve Arizona Water Company's application for the  
2 Certificate of Convenience and Necessity ("CCN") for the disputed Sandia Development  
3 area (the "Disputed CCN Area"), and deny Woodruff Water Company's ("WWC")  
4 Application for three reasons:

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

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

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

16 This is an extremely important policy crossroads for the Commission, with far-  
17 reaching implications for future CCN applications and the provision of water utility service  
18 in this State. By rejecting the well-considered Recommended Opinion and Order of  
19 Administrative Law Judge Marc E. Stern, who presided over eight days of testimony, two  
20 separate public hearings and reviewed over 100 exhibits, the Commission could be  
21 embarking on a course of encouraging the proliferation of a patchwork of start-up,  
22 developer-controlled utilities serving comparatively small areas despite the presence of  
23 existing, well-established utilities that already have master plans to serve the area in the  
24 overall public interest. In its February 2 Decision, the Commission chose this course in the  
25 name of the supposed benefits of integrated water and wastewater service. However, those  
26 supposed benefits pale in comparison to the detriment inflicted on the actual water customer  
27 who will reside in the Disputed CCN Area by denying to the existing utility with a proven  
28 track record of providing reliable water service in the area for more than 50 years the right

1 to provide service to those residents at far lower rates. The Commission should take this  
2 opportunity to rehear this matter and enter the Recommended Opinion and Order prepared  
3 by Judge Stern.

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

8 **A. The “First In The Field” Doctrine Provides That Arizona Water**  
9 **Company Should Be Awarded the CCN.**

10 As a matter of Arizona law and appropriate public policy, the decision in this case  
11 should begin and end with a simple inquiry: Is Arizona Water Company, as the longtime  
12 existing water utility already providing service west, south and east of the Disputed CCN  
13 Area, ready, willing and able to serve that area? Since the undisputed answer to this  
14 question in this record is “yes,” under Arizona law, Arizona Water Company should be  
15 granted the water CCN for the Disputed CCN Area.

16 The Arizona Supreme Court has recognized and applied this proposition for many  
17 decades, and it is dispositive of this case. The proposition was directly applied in *Arizona*  
18 *Corporation Commission v. Fred Harvey Transportation Co.*, 95 Ariz. 185, 388 P.2d 236  
19 (1964), a case involving competing applications for a CCN to provide bus service in  
20 northern Arizona. In that case, Nava-Hopi Tours was certificated to provide daily trips to  
21 the Grand Canyon from Flagstaff over a western route through Williams via State Highway  
22 64, over a distance of 91 miles. 95 Ariz. at 187, 388 P.2d at 237. Nava-Hopi scheduled at  
23 least one trip a day over that route, and some days provided as many three or four buses a  
24 day. *Id.* at 188-89, 388 P.2d at 238. Fred Harvey, on the other hand, was certificated to  
25 provide trips to the Grand Canyon over an eastern route via Cameron north on U.S.  
26 Highway 89, over a longer route of 109 miles. 95 Ariz. at 187, 388 P.2d at 237. Fred  
27 Harvey did not maintain any offices or facilities in Flagstaff and provided much more  
28 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

1 the Grand Canyon, both carriers sought the CCN to operate on the shorter route. The  
2 Commission granted the certificate to the more established provider, Nava-Hopi, but the  
3 superior court vacated that decision, effectively allowing both carriers to compete on the  
4 same route. 95 Ariz. at 187-88, 388 P.2d at 237.

5 The Arizona Supreme Court reversed and applied the rule that is dispositive here: the  
6 existing certificated utility should be awarded the new territory if it is ready, willing and  
7 able to serve. Noting that “Arizona is a regulated monopoly state,” and that the superior  
8 court had clearly erred when it allowed “free wheeling competition between two carriers,”  
9 95 Ariz. at 188, 388 P.2d at 237, the Supreme Court affirmed the Commission’s decision to  
10 grant the CCN to the far more established, existing carrier over a much less established  
11 competitor. In fact, after noting that the Arizona rule is that the “existing” utility always has  
12 first rights to the new territory, the Supreme Court went on to note that it did not even have  
13 to apply that rule to award the route to Nava-Hopi, because Nava-Hopi prevailed (as  
14 Arizona Water Company must here) in a balancing test between the two utilities in any  
15 event:

16 *We need not, however, turn this decision on the obvious fact that Nava-Hopi is in*  
17 *reality the existing carrier between the two termini, Flagstaff and Grand Canyon,*  
18 *and that therefore it had the right to the first opportunity to provide any extended or*  
19 *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.*

20 95 Ariz. at 188-89, 388 P.2d at 238 (citations omitted; emphasis added). The Supreme  
21 Court went on to discuss the factors favoring Nava-Hopi over Fred Harvey, and held that  
22 based on the evidence before the Commission Nava-Hopi should prevail. “The Commission  
23 in selecting Nava-Hopi over Harvey was not unreasonable . . . .” 95 Ariz. at 190, 388 P.2d  
24 at 238.

25 The *Fred Harvey* case is important to the determination of this matter because the  
26 Arizona Supreme Court recognized that an existing CCN holder (here, Arizona Water  
27 Company) has the priority and “first opportunity to provide any extended or additional  
28 service” over the less established company (here, WWC). 95 Ariz. at 189, 388 P.2d at 238.

1 In this case, Arizona Water Company has an even greater right and priority to extend service  
2 than did Nava-Hopi because WWC has provided no utility service at all (aside from  
3 overseeing farmer Wuertz' operation of his own private well), as compared to the infrequent  
4 service of Fred Harvey that was still found to be insufficient in *Fred Harvey*.

5 Nor is the fact that the *Fred Harvey* opinion dealt with bus service a material  
6 distinguishing point; the public policy arguments that the Arizona Supreme Court found  
7 dispositive there are equally applicable to any regulated utility provider, including water  
8 providers. Further, as set forth below, the Supreme Court has subsequently carried forward  
9 the *Fred Harvey* principles in the context of regulated water utility service in Arizona.

10 In another case involving Arizona Water Company, the Arizona Supreme Court  
11 reversed a Commission decision denying Arizona Water Company a CCN expansion in  
12 favor of a smaller, start-up water company (as WWC is here). In *Arizona Corporation*  
13 *Commission v. Arizona Water Company*, 111 Ariz. 74, 523 P.2d 505 (1974), as in this case,  
14 the contested area was surrounded on three sides by Arizona Water Company's established  
15 CCN and water utility distribution system facilities. *Id.* at 75, 523 P.2d at 506. Arizona  
16 Water Company and R.J. Fernandez filed competing applications for a CCN to deliver water  
17 to the area, and following a rehearing, the Commission granted the certificate to Fernandez.  
18 *Id.* Arizona Water Company sought judicial review by the superior court pursuant to A.R.S.  
19 § 40-254, and the superior court vacated the decision of the Commission, instead granting  
20 the CCN to Arizona Water Company. *Id.*

21 The Arizona Supreme Court then affirmed the decision of the superior court, noting  
22 that, in the area of public utilities, "Arizona is a regulated monopoly state." *Id.* at 76, 523  
23 P.2d 507. The Supreme Court summarized three key findings of fact by the superior court  
24 that were dispositive of the issue:

- 25 ● Arizona Water Company proposed to serve the area through a system of  
26 "three inter-connected wells," while Fernandez had just one well;
- 27 ● Arizona Water Company already had a CCN to serve water on three sides of  
28 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 utility 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 Co.*, 3 Ariz. App. 458, 462, 415 P.2d 472, 476 (App. 1966)(“regulated monopoly rather than free-wheeling competition”); *Fred Harvey*, 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.

Arizona Water Company is mindful that at least one Commissioner felt the fact that the underlying property owner had requested service from WWC as opposed to Arizona Water Company was an important factor in this analysis. However, that property owner was the seller of the development property to WWC’s parent, the Pivotal Group (“Pivotal”), and as such was not exercising an objective and disinterested choice as to which provider to select. More importantly, the Arizona Supreme Court has noted that “[a] property owner’s

1 interests and desires must yield to the public convenience.” *Arizona Corporation*  
2 *Commission v. Tucson Insurance & Bonding Co.*, 3 Ariz. App. 458, 463, 415 P.2d 472, 477  
3 (App. 1966)(denying petition by property owners who sought to set up their own water  
4 company rather than receive water service from the certificated water company in the area).  
5 The Arizona Supreme Court has also noted the benefit of granting certificates to a single  
6 water company in a large area, rather than carving the area up among numerous smaller  
7 companies: “Allowing the area to remain gerrymandered in small non-integrated tracts  
8 served by different companies must inevitably injure both the consumer and the  
9 companies.” *Davis v. Corporation Commission*, 96 Ariz. 215, 217, 393 P.2d 909, 910  
10 (1964)(quoting the Commission).

11 Applying these principles to the record facts in this case, the result is clear. WWC is  
12 a start-up operation with questionable capitalization and no track record whatsoever of  
13 providing actual water utility service. Tr. 55-58, 60-61, 70-72, 1386. In contrast, Arizona  
14 Water Company established in this proceeding that it has served the area for over 50 years  
15 and that it is ready, willing and able to provide service to the contested area from a well-  
16 coordinated and engineered water utility system that includes a grid of water production  
17 facilities and reservoirs, transmission and distribution mains that are part of a master plan to  
18 serve the entire region. Arizona Water Company will also do so with water rates much  
19 lower than WWC’s proposed rates. “Free wheeling competition” that serves the interests of  
20 only a comparatively small development is neither in the public interest nor consistent with  
21 the greater good of the citizens of Coolidge and Casa Grande, and it is that interest, as  
22 opposed to the varied development interests of the principals of WWC, that should control  
23 here. The Commission should reconsider its Decision in light of the “first in the field”  
24 doctrine and how that doctrine has been applied by the Arizona courts to similar facts.

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27  
28

1           **B.     The “First In The Field” Doctrine Is Recognized In Other Jurisdictions**  
2           **As Well.**

3           Case law from other jurisdictions also supports the proposition that, when two  
4 competing utilities seek to serve in the same area, the more established utility should be  
5 granted the right to serve, assuming that it is ready, willing and able to serve, a fact that is  
6 not contested here. A decision by the Illinois Supreme Court, *Citizens Valley View Co. v.*  
7 *Illinois Commerce Commission*, 192 N.E.2d 392 (Ill. 1963), involved facts nearly identical  
8 to those presented here. In that case, an existing water company and developer-owned start-  
9 up company both sought to serve the same subdivision southeast of an intersection. The  
10 existing water company, Citizens Valley, possessed a certificate to serve subdivisions on the  
11 other three corners of the intersection and operated an existing water utility system with 12  
12 employees, besides other operations throughout the state. *Id.* at 394-95. Citizens Valley  
13 estimated that it could serve the area at a cost of \$455,000. *Id.* at 395. In contrast, the  
14 developer-owned start-up company, Sunny Acres, had minimal resources and no operating  
15 history:

16           Sunny Acres at the time of the hearing was a new utility and had not yet commenced  
17 business. It was not serving any area nor was it authorized to serve any. It had no  
18 substantial assets, no utility management personnel, no engineers and no equipment.  
19 One existing water well located on the property . . . was, according to the an  
20 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.

21 *Id.* at 394. However, the developer requested that his newly-organized water company  
22 provide service, disputed the water main extension policy of Citizens Valley, and even  
23 asserted that he would not develop the property if Citizens Valley were certified as the  
24 provider. *Id.* at 395.

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

27           It is the policy of this State, established by legislation for the regulation of all public  
28 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

1 service and at the same time protect it from ruinous competition, . . . and, where  
2 *additional or extended service is required in the interest of the public and a utility in*  
3 *the field makes known its willingness and ability to furnish the required service, the*  
4 *Commerce Commission is not justified in granting a certificate of convenience and*  
5 *necessity to a competing utility until the utility in the field has had an opportunity to*  
6 *demonstrate its ability to give the required service.*

7 *Id.* at 396 (emphasis added). The fact that the contested area lay outside the existing  
8 utility's certificated area "did not prevent the existing utility from making application for a  
9 certificate to serve other territory adjacent to one of its lines and that the principle of  
10 favoring the prior utility in the field was equally applicable to such other territory." *Id.*

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

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

24 *Id.* at 397-98 (emphasis added). The Illinois Supreme Court also held that the developer-  
25 funded start-up company failed to present adequate evidence of its financial capability:  
26 "The only evidence submitted in this regard was [the developer's] testimony that he and his  
27 brother were financially able to build these facilities and if necessary would furnish the  
28 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. Importantly, these capabilities often have a direct  
bearing on rates to the consumers, a compelling factor in weighing the public interest, and a  
factor on which Arizona Water Company convincingly prevails over WWC. (*See* Argument

1 II(B) below, discussing the amount of time and money a utility must spend to provide  
2 service as a “primary determinant” of the public interest under controlling Arizona Supreme  
3 Court law).

4 Other courts and jurisdictions have followed a similar “first in the field” rule. *See,*  
5 *e.g., Illini State Telephone Company v. Illinois Commerce Commission*, 234 N.E.2d 769,  
6 771 (Ill. 1968)(telephone company which was first in the field and contiguous to disputed  
7 area had right to serve); *Public Service Company v. Public Utilities Commission*, 350 P.2d  
8 543, 550-51 (Colo. 1960)(electrical utility which was first in the field had right to serve);  
9 *Burton v. Matanuska Valley Lines, Inc.*, 244 F.2d 647,652 (9<sup>th</sup> Cir. [Alaska] 1957)(bus  
10 company which was first in the field had the right to serve); *Chicago & West Towns*  
11 *Railways v. Illinois Commerce Commission*, 48 N.E.2d 320, 323-24 (Ill. 1943)(in contest  
12 between competing utilities, public policy favors the established company over newcomers;  
13 “If the company now occupying the field is incapable of providing adequate service, then,  
14 and not until then, will a situation arise when the convenience and necessity may require the  
15 establishment of another utility”). *Chicago & West Towns Railways* should be particularly  
16 instructive to the Commission because this case was cited by the Arizona Supreme Court as  
17 the basis for its comment in *Fred Harvey* that the existing utility in the field has the first  
18 priority (see discussion *infra*). Arizona has thereby established its willingness to follow the  
19 Illinois rule applied in *Citizens Valley View Co.*

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

22 Although the final Decision in this case did not address directly the point, the record  
23 is clear that the public benefits from consolidating water service CCNs in a small number of  
24 stable, established public utilities, rather than gerrymandering an area among numerous  
25 smaller and separate utilities. Thus, in Decision No. 62993, dated November 3, 2000, the  
26 Commission approved recommendations of its Water Task Force intended to “Reduce the  
27 number of small, non-viable water systems.” AWC Exhibit 13 at ¶ 4. The Commission  
28

1 further approved a specific proposal by the Commission's Staff ("Staff") concerning the  
2 establishment of new water companies:

3 *The application for a new CC&N must show that an existing water company cannot*  
4 *or will not serve the area being applied for.* This showing must be made by  
5 submitting service rejection letters from all of the "A" size water companies in the  
6 state (there are 3) and at least five of the "B" size companies (there are 20). The five  
7 B size companies contacted should include the B size companies that are  
8 geographically closest to the applicant. The application must also be accompanied  
9 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.

10 *Id.* at ¶ 8 (emphasis added).

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

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

- 23 a. A copy of the Applicant's request for service from all Class A water utilities  
24 in the State as well as the refusal to serve from all those Class A water  
25 utilities; and  
26 b. A copy of the Applicant's request for service from all or at least five (5),  
27 whichever is less, of the Class B water utilities serving within fifty (50) miles  
28 of the Applicant's requested area as well as the refusal to serve from all those  
Class B water utilities, and

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

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

5 Irrespective of whether the Commission has taken final action to formally adopt these  
6 standards, the relevant point for rehearing of the final Decision in this case is that the  
7 standards are good public policy promulgated by Staff based on recommendations of a blue-  
8 ribbon task force of experts in the area. WWC presented no evidence that the public policy  
9 behind these principles was unsound, but instead made only technical arguments that the  
10 principles had not yet been officially adopted by the Commission. But WWC's position is a  
11 smokescreen to obscure the fact that WWC cannot prevail when these sound regulatory  
12 principles are applied to the facts of this case.

13 **II. To the Extent Any Balancing Test Is Appropriate, Arizona Water Company  
14 Prevails.**

15 Under Arizona law and existing Commission policies, no need exists to engage in a  
16 balancing test between a nearby existing established utility that is ready, willing and able to  
17 serve the contested area, like Arizona Water Company, and an untested developer-  
18 controlled start-up utility that plans to serve only its owner's own isolated development,  
19 such as WWC. However, if the Commission were to engage in a balancing test, Arizona  
20 Water Company would prevail on every factor save for one. This "checklist" was discussed  
21 in the Open Meeting on this matter held on January 27, 2006, and is set forth here to assist  
22 the Commission in considering a rehearing of its Decision:

23 **BALANCING TEST FACTORS**

24 **Arizona Water Company (AWC) vs. Woodruff Water Company (WWC)**

<b><u>Factor</u></b>	<b><u>AWC</u></b>	<b><u>WWC</u></b>
Overall Size and Resources-- Economies of Scale	✓	
Lower Rates	✓	
Water Quality	✓	
Operational History and	✓	

	<u>Factor</u>	<u>AWC</u>	<u>WWC</u>
1	Reliability		
2	Corporate Focus	✓	
3	Depth of Managerial	✓	
4	Expertise		
5	Number and Expertise of Employees	✓	
6	Investment in Utility Plant and Facilities	✓	
7			
8	Depth of Financial Resources	✓	
9	Number of Customers	✓	
10	Resources Available to Serve Contested Area	✓	
11			
12	Provision of Wastewater Service Through Separate, but Affiliated Start-up Entity		✓
13			

14 Each of these factors is explored in more detail below, with citations to the record.

15 **A. Overall Size and Resources – Economies of Scale.**

16 Arizona Water Company is a long-established Class A water utility, Tr. 581, which

17 operates 22 different water systems in eight Arizona counties. Tr. 539. The Company

18 operates 115 wells across the state, producing 55,000 gallons of water per minute, or 80

19 million gallons per day. Tr. 541. Statewide, Arizona Water Company operates 115 water

20 storage tanks, representing about 55 million gallons of storage. Tr. 541-42. Arizona Water

21 Company currently produces and delivers 14 billion gallons of water per year. Tr. 546. In

22 contrast, WWC plans to provide water service to a relatively small area (3,200 acres),

23 consisting of one development, Sandia. Ex. WWC-1, Attachment B-1; Tr. 44. WWC has

24 no resources to draw on outside of that area, Tr. 339-40, 349-50, and no plans to serve any

25 customers outside of that area. Tr. 160-61, 1387. While Arizona Water Company can

26 deliver 14 billion gallons of water per year, WWC has a current production capacity of zero.

27 Tr. 1390-91. In short, Arizona Water Company has a much larger area with which to

28

1 engage in regional interconnection and regional planning. Tr. 1385. WWC's area of  
2 service, though larger than many smaller start-up companies, still does not provide the  
3 economies of scale, rate savings and efficiencies of operation that Arizona Water  
4 Company's provision of water service offers to future water customers in the Disputed CCN  
5 Area. The relevant comparison is the relative size and experience of Arizona Water  
6 Company versus WWC, not the fact that the developer predicts that WWC will eventually  
7 serve approximately 9,500 customers.

8 **B. Rates and Cost to Customers.**

9 In the hearing of this matter, Arizona Water Company proposed to charge customers  
10 in the Disputed CCN Area the same rates that it charges customers in its Coolidge system,  
11 which could be as low as \$26 a month for the average bill. Tr. 1221-28. Because of its size,  
12 expertise and efficiency, Arizona Water Company is in a better position to provide lower  
13 cost service to customers in the contested area. Tr. 589-92. A small, start-up, stand-alone  
14 developer-owned company, like WWC, cannot offer such lower rates or rate stability to its  
15 customers. Tr. 593-94. In fact, WWC's proposed rates constitute nothing more than mere  
16 projections for a company without an operating history. Tr. 502. Even so, WWC's  
17 proposed rates (approximately \$47 per month for the average bill) were, in fact,  
18 approximately 80% higher than Arizona Water Company's then-existing Coolidge system  
19 rates. Tr. 1228-30. The average customer at Sandia would pay WWC at least \$20 per  
20 month more than the \$26 per month Arizona Water Company proposed to charge to provide  
21 water service at the time of the hearing, and still some \$18 per month more than the recently  
22 authorized rates in Arizona Water Company's Western Group rate case (Decision No.  
23 68302, 11/14/05). Tr. 1230, 1243-44, 1386-87; Recommended Opinion and Order at ¶¶ 51,  
24 52 and footnote 4. The customers in the Disputed CCN Area will be suffering tremendous  
25 rate shock should WWC become the water provider, especially when added to the new  
26 sewer rates.

27 As noted by the Supreme Court in *James P. Paul*, when two competing utilities both  
28 seek to serve in the same area, "the public interest is determined by comparing the

1 capabilities and qualifications of competitors vying for the exclusive right to provide the  
2 relevant service. *The amounts of time and money competitors must spend (at the*  
3 *consumers' ultimate expense) to provide service become primary determinants of the public*  
4 *interest.*” 137 Ariz. at 430, 671 P.2d at 408 (emphasis added). Again, Arizona Water  
5 Company contends that this balancing test applies only where there is not an existing utility  
6 like Arizona Water Company that is ready, willing and able to provide service.  
7 Nonetheless, considering every factor in a balancing test, Arizona Water Company  
8 overwhelmingly prevails over WWC and should be awarded the water CCN for the  
9 Disputed CCN Area. The significant difference in water rates has been a consistent focus of  
10 this Commission, was a primary determinant in Judge Stern’s weighing of the evidence, and  
11 is a predominant reason why Arizona Water Company should prevail on rehearing.

12 **C. Water Quality.**

13 Arizona Water Company has made substantial investments to comply with the new  
14 arsenic standards. Tr. 545. Arizona Water Company is the only water company in Arizona  
15 to have been awarded two EPA demonstration plants for arsenic treatment. Tr. 565. Even  
16 so, Arizona Water Company does not anticipate any need to treat for arsenic in the Coolidge  
17 system that will serve the Sandia development. Tr. 923-25, 931. In contrast, the existing  
18 agricultural wells on the Sandia property have high levels of arsenic, fluoride, nitrates and  
19 total dissolved solids. Tr. 164, 374-75, 943-49, 952-59. Because of its confined area to drill  
20 wells, WWC has a very difficult (and costly) tightrope to walk to comply with water quality  
21 standards. Tr. 832-33. Although WWC says it plans to drill new wells, there is no certainty  
22 about the water quality in those wells until after they are drilled. Tr. 329, 348, 378-80, 454,  
23 473. WWC guesses that it will need to invest \$1 million to treat arsenic and fluoride in the  
24 first five years, rising to \$2 million in capital costs at full build out. Tr. 325-27, 363, 455-  
25 57, 1277-78. WWC’s plans for water treatment methodology have changed since it filed its  
26 CCN application, and WWC cannot finally decide exactly what treatment methodology it  
27 will use until new wells are drilled. Tr. 328-29. Moreover, WWC’s testifying expert on  
28 design of its water treatment facilities, Troy Bontrager (who received his civil engineering

1 license the day before the date of the Wood Patel report) testified that neither he nor anyone  
2 else at his firm, Wood Patel, had ever before designed a fluoride or arsenic treatment plant.  
3 Tr. 329-334.

4 **D. Operational History and Reliability.**

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

20 **E. Corporate Focus.**

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

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

3 **F. Depth of Managerial Experience.**

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

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

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

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

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

11           **I. Depth of Financial Resources.**

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

20           **J. Number of Customers.**

21           Arizona Water Company currently serves approximately 75,000 customers, and adds  
22 approximately 4,000 customers per year. Tr. 539, 542, 1387-88. Arizona Water Company  
23 is also experiencing rapid growth of its customer base in the Coolidge and Casa Grande  
24 areas, and thus Arizona Water Company's costs of service are shared by a much larger  
25 group of customers. Tr. 550-51. WWC is currently serving only Howard Wuertz, who  
26 turns on and maintains his own pump. Tr. 115, 153-54, 162, 1387-88. Even at full build out  
27 of the Sandia project, WWC would have only 9,500 customers. Ex. WWC-1, Cover Letter  
28 dated June 15, 2004.

1           **K. Resources Immediately Available to Serve the Disputed CCN Area.**

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

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

21           The sole balancing factor arguably tipping in WWC's favor is its claim (despite the  
22 overwhelming advantages of Arizona Water Company service in the Disputed CCN Area  
23 and its economies of scale) that somehow the public will benefit from the alleged  
24 "integrated" water and sewer services from WWC and a sewer company controlled by the  
25 same developer. Staff recommended that WWC receive the CCN solely because of Staff's  
26 belief that it would be better for the sewer company to be associated with WWC rather than  
27 standing alone. Tr. 1365-68. However, Staff could not name a single factor other than the  
28 alleged corporate tie to a sewer company on which Staff based its opinion that WWC should

1 prevail over Arizona Water Company. Tr. 1392. In fact, the only arguable benefits from  
2 the supposed “integrated” arrangement flow to the developer-owner of the integrated  
3 utilities – not to the actual water customers who will be forced to pay significantly higher  
4 water rates to WWC than they would pay to Arizona Water Company. In addition, Staff  
5 has little or no support for its assumption that financial and other ties actually exist between  
6 WWC and the sewer company. Tr. 1393-96.

7 In essence, the Commission’s Decision defers to perceived “benefits” of an  
8 integrated utility at the expense of the ultimate customers and ratepayers who will pay far  
9 higher rates to those utilities, when on closer analysis the main “benefits” accrue solely to  
10 the developer-owner’s bottom line. In contrast to WWC’s claims, Arizona Water Company  
11 already operates with the Commission’s knowledge and approval, numerous water systems  
12 in areas where other entities (municipal or private) provide sewer service. Tr. 610. Arizona  
13 Water Company has entered into operating agreements in these areas to achieve efficiencies  
14 in billing and other areas, such as providing information on new customers receiving water  
15 service. Tr. 610-12. Arizona Water Company also works with sewer service entities to  
16 provide an integrated solution for meeting an area’s water needs, such as the use of effluent  
17 or reclaimed water for turf and recharge recovery wells. Tr. 611-12. The goal of using  
18 renewable water sources to meet demands can be effectively achieved with two separate  
19 entities providing water and sewer service. Tr. 616-17. The alleged benefits of the  
20 “integrated” services of WWC and the sewer company are, in this situation, insubstantial,  
21 and do not justify granting a CCN to WWC to the detriment of the water customers who  
22 would be forced to pay WWC’s much higher rates.

23 Woodruff Utility Company and WWC are in fact two separate companies with no  
24 connection other than their common ownership by the developer, Pivotal. Neither company  
25 has any independent resources or financial strength other than what Pivotal decides to  
26 provide, and the very fact that the two companies are incorporated separately suggests that  
27 Pivotal desires convenience in selling them off separately. Moreover, the claim of alleged  
28 efficiencies from “integrated” water and sewer services collapses before the fact of the

1 higher bills for *both* water and sewer service that Pivotal's customers will pay over what  
2 they would pay if Arizona Water Company and the City of Coolidge provided those  
3 services. Tr. 1230, 1243-44, 1386-87. The record supports the conclusion that the public  
4 interest and convenience, as opposed to the developer-owner's profit-seeking interests,  
5 favors the award of the Disputed CCN Area to Arizona Water Company.

6 **CONCLUSION**

7 For the foregoing reasons and those stated in the findings and conclusions in the  
8 Recommended Opinion and Order, the Commission should grant a rehearing and should  
9 award Arizona Water Company the water service CCN for the Disputed CCN Area.

10 DATED this 22nd day of February, 2006.

11 BRYAN CAVE LLP

12  
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