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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE APPLICATION OF
ARIZONA WATER COMPANY, AN ARIZONA
CORPORATION, TO EXEND ITS EXISTING
CERTIFICATE OF CONVENIENCE AND
NECESSITY IN THE CITY OF CASA GRANDE
AND IN PINAL COUNTY, ARIZONA

Docket No. W-01445A-06-0199

IN THE MATTER OF THE APPLICATION OF
PALO VERDE UTILITIES COMPANY FOR AN
EXTENSION OF ITS EXISTING CERTIFICATE
OF CONVENIENCE AND NECESSITY.

Docket No. SW-03575A-05-0926

IN THE MATTER OF THE APPLICATION OF
SANTA CRUZ WATER COMPANY FOR AN
EXTENSION OF ITS EXISTING CERTIFICATE
OF CONVENIENCE AND NECESSITY.

Docket No. W-03576A-05-0926

GLOBAL'S MOTION TO VACATE CONSOLIDATION

AND ALTERNATIVE MOTION TO SEVER

Santa Cruz Water Company, LLC; Palo Verde Utilities Company, LLC; Global Water –
Santa Cruz Water Company and Global Water – Palo Verde Utilities Company (collectively,
“Global”) move that the Commission vacate its procedural order consolidating these cases. In the
alternative, Global moves that the Commission sever these cases for hearing. In support of this
motion, Global states:

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1 **I. Preliminary Statement.**

2 Consolidation of separate cases is only appropriate when the cases share common
3 questions of fact or law. The courts and the Commission have used this well-established test for
4 many years. Here, there are numerous factual differences between Global's application and that of
5 Arizona Water Company ("AWC"):

- 6 1) Global's application involves an integrated plan for providing water, wastewater
7 and reclaimed water service, while AWC's application involves only water.
- 8 2) Global's application is supported by 100% requests for service, while AWC's is
9 supported by 0.3%;
- 10 3) A host of parties have intervened to oppose AWC's application, while only AWC
11 opposes Global's application; and
- 12 4) The requested territories are mostly different.

13 Moreover, Global's case has a different procedural posture, because Global is close to obtaining a
14 "sufficiency" finding after Staff six months of working with Staff. Based upon this time frame and
15 if Global's case is tied to AWC's, undue delay will result, and Global and its customers will be
16 prejudiced. These differences suggest that these cases are not suitable for consolidation.

17 In addition, cases should be consolidated only if they are independently viable – that is if
18 each case can stand on its own. Here, AWC's case suffers from a host of flaws, as described
19 below, and it is therefore not independently viable. It should thus not be consolidated with
20 Global's Application.

21 In the alternative, if the cases remain consolidated, they should still be severed for the
22 purposes of hearing. Severance is appropriate when it will avoid delays or prejudice to parties. If
23 these cases are not severed, Global's case will be substantially slowed. Indeed, it is not clear
24 when, if ever, AWC will be able to obtain a sufficiency determination from Staff. Moreover,
25 many parties will be prejudiced by AWC's claim. For example, many landowners will have their
26 plans delayed. In addition, the delay will obstruct the planning being done by local governments.
27 Thus, if these cases remain consolidated they should be severed for the purpose of hearing.

1 **II. Background.**

2 On December 28, 2006, Global filed an Application to extend its water and wastewater
3 CC&Ns. This Application was assigned docket numbers SW-03575A-05-0926 and W-03576A-
4 05-0926 (the "Global Docket"). Global's Application includes approximately 30 sections for
5 water service and approximately 40 sections for wastewater service (the "Global Extension Area").
6 Global's Application was supported by voluminous material, including requests for service
7 directed to Global for each and every acre included in the Global Extension Area. Staff sent
8 Global three insufficiency letters requesting a large amount of technical data, which Global
9 supplied. The third and most recent insufficiency letter contained only two questions, which
10 Global fully answered on June 8, 2006. Global also worked with Staff's Engineering Section to
11 modify and clarify the legal description of the Global Extension Area. Global now believes it has
12 met all requirements for sufficiency, and hopes that it will obtain a sufficiency letter soon.

13 On March 29, 2006, AWC filed an Application to extend its Casa Grande CC&N. The
14 Application was assigned docket number W-01445A-06-0199 (the "AWC Docket"). AWC's
15 application covers a vast area of approximately 108 square miles or more than 69,000 acres (the
16 "AWC Extension Area"). Remarkably, AWC provided requests for service for only 197 acres –
17 less than three tenths of one percent (0.3%) of the AWC Extension Area. AWC's Application was
18 devoid of even the most basic technical information – such as where the water will come from or
19 how it will be treated. The Application contained no estimate of proposed costs. Global filed a
20 letter on April 7 noted many sufficiency issues posed by AWC's Application. On May 9, 2006,
21 Staff filed an Insufficiency Letter noting numerous issues with AWC's Application. AWC has yet
22 to file a response.

23 No party requested consolidation. However, on April 25, 2006, the assigned
24 Administrative Law Judge ordered that these cases be consolidated.

1 **III. These cases lack common issues of law or fact and should not be consolidated.**

2 **A. The “common issues of law or fact” test is widely recognized.**

3 Many authorities agree that consolidation can only be ordered when there are common
4 issues of law or fact. *See e.g.* Wright & Miller, 9 *Federal Practice and Procedure* Civ.2d § 2383;
5 1A C.J.S. Actions § 259. In Arizona, the “common question of law or fact” test is part of Rule
6 42(a) of the Rules of Civil Procedure. These rules, are in turn, incorporated into the Commission’s
7 rules. *See* A.A.C. R14-3-101(A).

8 Arizona courts have therefore have stated that cases must “relate to the same subject-
9 matter” or the “same transaction” before they can be consolidated. *See London, Paris & American*
10 *Bank Ltd. v. Abrams*, 6 Ariz. 87, 90, 53 P. 588, 589 (Ariz. Terr. 1898); *Hershey v. Banta*, 55 Ariz.
11 93, 99-100, 99 P.2d 81, 84 (1940). Thus, cases which are only loosely connected should not be
12 consolidated.

13 Arizona cases allowing consolidation show that consolidation is appropriate only where the
14 common issue dominates the cases. For example, in *Hershey*, the court found consolidation
15 justified where the consolidated cases involved attacks on the same prior judgment. *Id.* The Court
16 explained that both cases were brought by the same plaintiff and “were, in effect, one action.” *Id.*
17 Another example is *Hancock v. McCarroll*, 188 Ariz. 492, 494-95, 937 P.2d 682, 684-85 (App.
18 1996). *Hancock* involved a proposed initiative challenge to the formation of a stadium district.
19 The court found that the “facts were identical” and that the “parties are the same.” *Id.* The only
20 difference was that in one case the defendant was sued in her capacity as clerk of the stadium
21 district, while in the other she was sued as the clerk for the county board of supervisors. *Id.*
22 Although this minor difference meant that different legal theories were in play, the court noted that
23 the central issue – whether the initiative process can be used to challenge the formation of a
24 stadium district – was the same. *Id.* A third example is *Behrens v. O’Melia*, 206 Ariz. 309, 78
25 P.3d 278 (App. 2003). In *Behrens*, two cases were filed that both concerned the same accident on
26 a playground in Casa Grande. The court said that consolidation was appropriate because the
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1 “same injury” was involved. *Id.* In each of these cases, the common issue was at the heart of the
2 consolidated cases.

3 **B. The Commission’s rules and precedent support the “common issues of law or**
4 **fact” test.**

5 The Commission follows the same path. The Commission’s rules provide that the cases
6 can be consolidated when the “issues are substantially the same.” A.A.C. R14-3-109(H). Thus,
7 the Commission has consolidated cases when the cases “rely upon the same law, facts, and
8 witnesses.” *See Utility Source, LLC*, Decision No. 67446 (Jan. 4, 2005) at 2. When cases contain
9 different facts, the Commission has denied consolidation. For example, in *Water Utility of*
10 *Greater Tonopah*, Decision No. 64890 (June 5, 2002), the utility sought to consolidate its
11 financing case with the financing case of an affiliate. Because the proposed financing was to fund
12 different types of facilities, the Commission denied consolidation. *Id.* at n. 1.

13 **C. The numerous differences between these cases outweigh any similarity.**

14 Global understands how at first these cases may have appeared similar. However, upon
15 closer examination, there are many differences between the Global Docket and the AWC Docket.
16 Because the factual issues are not substantially the same, the order for consolidation should be
17 vacated. A tribunal which initially ordered consolidation “unquestionably has the power to vacate
18 or modify a previous order of consolidation where good cause appears.” *Yavapai County v.*
19 *Superior Court*, 13 Ariz. App. 368, 369-70, 476 P.2d 889, 890-91 (1970). This is just what the
20 Commission should do here, due to the many differences between these cases. Some of these
21 differences are described below.

22 **First**, the cases concern different services. As noted above, AWC provides only water
23 service, while Global provides an integrated portfolio of water, wastewater, and reclaimed water
24 services. These cases necessarily raise different issues. The Global Docket will include an
25 assessment of Global’s technical, financial, and managerial capabilities to provide wastewater and
26 reclaimed water services. The AWC Docket does not present this issue. But the AWC Docket
27 raises a host of separate issues:

1 (1) Who will provide wastewater service?

2 (2) Will reclaimed water be used to reduce reliance on groundwater? If so, how will this
3 be done given that AWC's CC&N does not include reclaimed water? If not, what will
4 the environmental effect be? Will AWC use surface water and recharging?

5 (3) Given the absence of a wastewater provider, will septic systems be used? If so, what
6 are the environmental effects of using septic for such a vast area? What are the
7 economic effects from the large lot sizes required for septic systems? And how would
8 this effect the planning being done by Pinal County and nearby cities?

9 **Second**, Global's Application is supported by requests for service directed to Global
10 covering the entire Global Extension area. In contrast, AWC's Application contains requests for
11 service directed to AWC for less than 0.3% of the area in the AWC Extension Area. Thus, the
12 AWC Docket raises an issue – whether an extension should be allowed in the absence of requests
13 – that is not present in the Global Docket.

14 AWC also attached to its Application requests directed to Global for the Global Extension
15 Area. These requests should not be considered for two reasons. First, the landowners selected
16 Global not AWC. Utility companies are not fungible, interchangeable parts like a bolt. It cannot
17 be assumed that a landowner, by submitting a request to one company, is willing to be served by
18 any company. Second, AWC and Global provide different services. AWC only provides water
19 service.¹ In contrast, Global provides an integrated portfolio of water, wastewater and reclaimed
20 water services. This integrated portfolio is part of Global's strategy of providing the "triad of
21 conservation" – maximizing use of reclaimed water; using renewable surface water where
22 available; and recharging the aquifer with any available excess water. The requests for service
23 directed to Global ask for this integrated portfolio of services – not one isolated service on a stand

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25 ¹ AWC declines to provide wastewater service, and the courts have ruled that AWC's CC&N for
26 Casa Grande does not include the right to sell reclaimed water (effluent). *See Arizona Water Co.*
27 *v. City of Casa Grande*, No. CV2000-022448 (Superior Court, Maricopa County), Minute Entry
dated March 27, 2002 *aff'd* by Case No. 1 CA-CV 02-0671 and 1 CA-CV 02-0724 (Arizona Court
of Appeals), Memorandum Opinion filed October 14, 2003.

1 alone basis. In short, the requests for service are directed to a different company and concern
2 different services. Moreover, by presenting these requests, AWC raises yet another issue –
3 whether such requests should apply to AWC – that is not present in the Global Docket.

4 Even if these additional requests are considered, though, AWC still falls far short of the
5 mark. Counting the requests to Global, the total area covered by requests is only 19,570 acres,
6 which is only 28% of the 69,000 acres in the AWC Extension Area.² In contrast, Global has
7 requests for service directed to it for 100% of the Global Extension Area. Thus, there are stark
8 factual differences between Global and AWC with regard to requests for service.

9 **Third**, many parties object to AWC’s attempt to lock up such a vast area. The following
10 parties³ have filed motions to intervene in opposition to AWC:

- 11 1) Robson Utilities⁴ (motion filed May 18, 2006)
- 12 2) Gallup Financial, LLC (motion granted June 13, 2006)
- 13 3) KEJE Group, LLC (motion granted May 18, 2006)
- 14 4) Anderson & Val Vista 6, LLC (motion granted May 18, 2006)
- 15 5) CP Water Co. (motion granted May 15, 2006)
- 16 6) CHI Construction Co. (motion granted May 15, 2006)
- 17 7) Anderson & Miller 694, LLP (motion granted May 15, 2006)
- 18 8) Anderson & Barnes 580, LLP (motion granted May 15, 2006)

19 These eight parties are opposed to AWC’s Application, but do not oppose Global’s
20 Application. Thus, the Global Docket and the AWC Docket concern different parties. Moreover, a
21 large number of persons filed public comment letters objecting to AWC’s Application. There are
22 no public comment letters objecting to Global’s Application. The AWC Docket concerns parties
23 and public comment that are not relevant to the Global Docket. The AWC Docket has generated a

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25 ² The water portion of the Global Extension area is about 30 sections or 19,373 acres. Adding 197
26 acres with requests directed to AWC produces a total of 19,570.

27 ³ In addition, Global and AWC have each been granted intervention in each other’s case.

⁴ Specifically, the “Robson Utilities” that filed the motion are Ridgeview Utility Co., Picacho
Water Co., Lago Del Oro Water Co., and Santa Rosa Water Co.

1 level of opposition that is unprecedented for a CC&N case, while the Global Docket has no
2 opposition other than from AWC itself. These differences suggest that the AWC Docket and the
3 Global Docket are not suitable for consolidation.

4 **Fourth**, the AWC Extension Area is much larger than the Global Extension Area. The
5 AWC Extension Area includes approximately 78 sections that are not included in the Global
6 Extension Area. Further, the wastewater portion of the Global Extension Area includes
7 approximately 10 sections not included in the AWC Extension Area. While there is some overlap,
8 the extension areas are more different than they are the same.

9 These cases are not like previous CC&N cases that have been consolidated. For example,
10 the Commission allowed consolidation when two water companies both filed applications to
11 extend their CC&Ns to precisely the same subdivision, known as Linden Trails. *Mountain Glen*
12 *Water Service, Inc.*, Decision No. 67277 (Oct. 5, 2004) at 2-3. Likewise, when, two companies
13 wanted to serve a development known as Sandia, the Commission consolidated the cases.
14 *Woodruff Water Co.*, Decision No. 68453 (Feb. 2, 2006). AWC was one of the disputing
15 companies. AWC's application included Sandia as well as a separate development known as
16 Martin Ranch. *Id.* at 17. However, the Sandia development at issue was much larger than the
17 undisputed Martin Ranch development. *Id.* at 5-6. Thus, in *Woodruff* there was a substantial
18 overlap between the proposed extension areas.

19 In contrast, there is little overlap here. There is no overlap for about 72% of the AWC
20 Extension Area as compared to the water portion of the Global Extension Area.⁵ In addition, for
21 wastewater, 10 sections of the Global Extension Area do not overlap with the AWC Extension
22 area at all. When this factor is considered, only about a quarter of the aggregate extension areas
23 are in common.⁶

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25 ⁵ 108 sections in the AWC Extension Area less 30 sections in the water portion of the Global
26 Extension Area equals 78 sections with no overlap. $78/108 = 72.2222\%$.

27 ⁶ The 108 sections in the AWC Extension Area include 30 sections in the Global Extension Area.
An additional 10 sections of the Global Extension Area (wastewater only) lies outside the AWC
Extension Area because it is already in AWC's water CC&N. Thus, a total of 118 Sections (water

1 In sum, there are many differences between the Global Docket and the AWC Docket. They
2 concern different services, different parties, different areas, and different issues – such as the lack
3 of requests for service and the lack of wastewater and reclaimed water plans by AWC.
4 Consolidation is not appropriate given the myriad differences between these cases. Accordingly,
5 the order for consolidation should be vacated.

6 **IV. Consolidation will cause undue prejudice, inconvenience, delay and expense.**

7 Even when cases have common issues, consolidation is discretionary, not mandatory. In
8 exercising this discretion, there are many factors to consider. For example, if “consolidation will
9 cause delay in the processing of one or more of the individual cases” consolidation is often not
10 appropriate. See Wright & Miller, 9 Federal Practice and Procedure Civ.2d § 2383. Here,
11 Global’s Application was filed months earlier, is more complete and is nearly finished with the
12 sufficiency process, while AWC has barely begun. Indeed, AWC may face insurmountable
13 obstacles to achieving sufficiency. As a result, Global and the landowners in the Global Extension
14 Area will face undue delay if the Global Docket remains consolidated with the AWC Docket,
15 especially if the hearing is delayed for an AWC sufficiency letter that may never come. Thus,
16 consolidation should be vacated. Likewise, consolidation may be denied if one of the cases “has
17 proceeded further in the discover process than the other.” *Id.* Because the cases are at different
18 points in the sufficiency process, consolidation should be vacated.

19 Further, the Commission’s rules provide that cases should be consolidated only when “the
20 rights of parties will not be prejudiced by such procedure.” A.A.C. R14-3-109(H). The delay
21 caused by AWC will hold up the construction and deployment of infrastructure, thwart Global’s
22 planning, delay the start of construction of developments, and cause problems with financing for
23 the developers. Accordingly, Global and developers (including some who are intervenors) will be
24 prejudiced if consolidation is not vacated.

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27 or wastewater) are at issue in the consolidated cases. 30 Sections of overlap divided by 118 total
sections equals 25.42%.

1 Moreover, procedural rules should be interpreted to “obviate delay and to administer
2 speedy justice.” *Jobe v. King*, 129 Ariz. 195, 198, 629 P.2d 1031, 1034 (App. 1981). Likewise,
3 the Commission’s rules provide that they should be construed “to secure just and speedy
4 determination of all matters presented to the Commission.” A.A.C. R14-3-101(A). AWC should
5 not be able to delay proceedings and derail the plans of others by filing an application that is
6 unprecedented both its vast area and its many flaws.

7 In considering consolidation, the Commission has also considered “the public interest to
8 conserve time and resources of the parties.” *Cave Creek Water Co.*, Decision No. 68190 (Sept. 30,
9 2005) at 2. Here, consolidation will lengthen, not shorten, proceedings, and will cause parties to
10 expend resources that would not be necessary if the Global Docket was considered in isolation.
11 Likewise, the Commission has considered whether parties have objected, and whether the
12 applicant has “agreed to waive any time-clock requirements or deadlines.” *Id.* Here, Global
13 objects to consolidation, and Global respectfully declines to waive applicable time-clock
14 requirements or other deadlines. Thus, these factors weigh against consolidation.

15 **V. Consolidation is not appropriate because awc’s application is not independently**
16 **viable.**

17 Under Arizona law, cases can be consolidated only if they are “independently viable.”
18 *Federal Deposit Insurance Corp. v. Maricopa County*, 175 Ariz. 128, 131, 854 P.2d 161, 164 (Tax
19 1993); *Berge Ford v. Maricopa County*, 172 Ariz. 483, 486, 838 P.2d 822, 825 (Tax 1992). Here,
20 AWC’s Application has a legion of flaws, and it is therefore not independently viable. These
21 flaws include:

- 22 1) The almost complete lack of requests for service;
- 23 2) The vast area requested by AWC, which amounts to an unprecedented land grab;
- 24 3) The lack of an assured water supply;
- 25 4) No provision for wastewater service;
- 26 5) No provision for use of reclaimed water;
- 27 6) No provision for the use of surface water;

- 1 7) No provision for recharging groundwater;
- 2 8) No description of proposed facilities or cost; and
- 3 9) AWC's Application includes an area certificated to another company.

4 These flaws are explored more fully in a Motion to Dismiss that Global is filing concurrently.
5 Because AWC's Application is not independently viable, consolidation should be vacated.

6 **VI. In the alternative, the cases should be severed for hearing to avoid delay and**
7 **prejudice.**

8 If consolidation is not vacated, then in the alternative, Global requests that these cases be
9 severed for the purposes of hearing. Separate trials can be ordered to "in furtherance of
10 convenience or to avoid prejudice." Rule 42(b), Ariz.R.Civ.Pro. This rule provides a "very
11 flexible and useful instrument for... avoiding prejudice.... and [for] disposing of litigation as fairly
12 and quickly as possible." Write & Miller, 9 *Federal Practice and Procedure* Civ.2d § 2387
13 (citation omitted). Under this option, while the cases would remain linked, the Global Docket
14 would proceed to hearing. The hearing would focus on the Global Extension Area, while the vast
15 remaining area requested by AWC would be the subject of a second hearing, should AWC ever
16 obtain sufficiency.

17 **VII. Conclusion.**

18 Consolidation is not appropriate here because the Global Docket and the AWC Docket
19 have numerous differences, because consolidation will cause undue delay and prejudice, and
20 because the AWC Docket is not independently viable. Accordingly, the consolidation of these
21 cases should be vacated. In the alternative, a separate hearing should be ordered for the Global
22 Docket. To the extent oral argument is held regarding this motion, Global suggests that the
23 argument be held at the same time as the oral argument for the Motions to Exclude filed by CP
24 Water Co. and CHI Construction Company.

1 RESPECTFULLY SUBMITTED this 23rd day of June 2006.

2 ROSHKA DEWULF & PATTEN, PLC

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