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BEFORE THE ARIZONA CORPORATION COMMISSION

ARIZONA WATER COMPANY, an Arizona corporation,

Complainant,

vs.

GLOBAL WATER RESOURCES, LLC, a foreign limited liability company; GLOBAL WATER RESOURCES, INC., a Delaware corporation; GLOBAL WATER MANAGEMENT, LLC, a foreign limited liability company; SANTA CRUZ WATER COMPANY, LLC, an Arizona limited liability corporation; PALO VERDE UTILITIES COMPANY, LLC, an Arizona limited liability corporation; GLOBAL WATER - SANTA CRUZ WATER COMPANY, an Arizona corporation; GLOBAL WATER - PALO VERDE UTILITIES COMPANY, an Arizona corporation; JOHN AND JANE DOES 1-20; ABC ENTITIES I - XX,

Respondents.

DOCKET NO. W-01445A-06-0200
SW-20445A-06-0200
W-20446A-06-0200
W-03576A-06-0200
SW-03575A-06-0200

ARIZONA WATER COMPANY'S
BRIEF ON INJUNCTIVE RELIEF

Arizona Corporation Commission

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I. INTRODUCTION.

Pursuant to the request of Administrative Law Judge Dwight D. Nodes on June 15, 2006, Arizona Water Company submits the following brief addressing the Commission's

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1 jurisdiction and authority to order injunctive relief in this proceeding. Under its broad
2 authority granted by the Arizona Constitution, the Corporation Commission has the judicial
3 power to issue injunctions prohibiting entities from acting as public service corporations.
4 That power would be illusory if the Commission could not prevent illegal activity and
5 preserve the status quo pending a decision on whether an entity is in fact acting as a public
6 service corporation. Because the Commission has this power and has frequently used it, and
7 based upon the balance of hardships and compelling equities in this matter, the Commission
8 should enjoin the Global Entities as requested below until the relevant issues are decided.¹
9

10 **II. THE COMMISSION SHOULD ENJOIN THE GLOBAL ENTITIES FROM**
11 **ENTERING INTO ILLEGAL FINANCING ARRANGEMENTS AND**
12 **SOLICITING CUSTOMERS UNTIL A DECISION HAS BEEN RENDERED**
13 **ON ARIZONA WATER COMPANY'S FORMAL COMPLAINT.**

14 **A. The Commission's Broad Authority Includes the Judicial Power to**
15 **Enjoin the Unregulated Global Entities.**

16 The Commission's authority derives from the Arizona Constitution and its authority
17 is broad. Arizona Constitution, Art. 15, § 3; *Southwest Gas Corp. v. Arizona Corp.*
18 *Comm'n*, 169 Ariz. 279, 283, 818 P.2d 714, 718 (App. 1991). Indeed, "[n]o other state's
19 constitution has given its commission the extensive power and jurisdiction that the Arizona
20 Corporation Commission possesses." *Arizona Corp. Comm'n v. Superior Court*, 107 Ariz.

21 ¹ This motion addresses Arizona Water Company's Formal Complaint and the relief
22 requested in this docket. However, a Procedural Order has not yet issued from the June 15,
23 2006 procedural conference, at which the interplay between this docket and the generic
24 docket proceeding, *In re Commission's Generic Evaluation of the Regulatory Impacts from*
25 *the Use of Non-Traditional Financing Arrangements by Water Utilities and Their Affiliates*,
26 Docket No. W-00000C-06-0149 (the "Generic Docket"), was discussed. The relief Arizona
27 Water Company seeks in its Formal Complaint and discusses in this memorandum is
28 equally applicable to the Generic Docket, as it is equally important there for the
Commission to maintain the status quo unless and until the unregulated Global Entities can,
in a formal evidentiary proceeding, justify their conduct in acting as unregulated public
service corporations. It would be entirely appropriate for the Commission to enjoin the
Global Entities as requested in this proceeding pending the results of the Generic Docket as
well.

1 24, 26, 480 P.2d 988, 990 (1971) (citing *State v. Tucson Gas, Elec. Light & Power Co.*, 15
2 Ariz. 294, 300, 138 P. 781, 783 (1914)). Article 15, § 3 of the Arizona Constitution gives
3 the Commission broad power to regulate public service corporations. *Southwest Gas*, 169
4 Ariz. at 283, 818 P.2d at 718. The Commission is empowered to exercise legislative,
5 judicial, administrative and executive powers within the sphere of its responsibilities. *Id.* at
6 283.

7 Pursuant to its judicial power, the Commission has adopted the Arizona Rules of
8 Civil Procedure for situations in which procedures are not otherwise set forth in the
9 Commission's Rules of Practice and Procedure. ARIZ. ADMIN. CODE § 14-3-216. Rule 65
10 of the Arizona Rules of Civil Procedure provides for preliminary injunctions, which the
11 Commission may grant when the "balance of hardships" favor the party seeking the
12 injunction and the party seeking the injunction has a "strong likelihood of success on the
13 merits." *The Power P.E.O. v. Employees Ins. of Wausau*, 210 Ariz. 559, 562, 38 P.3d 1224,
14 1227 (App. 2002). Preliminary injunctions are also granted when they advance the public
15 interest. *Phoenix Orthopaedic Surgeons, Ltd. v. Peairs*, 164 Ariz. 54, 58, 790 P.2d 752, 756
16 (App. 1990), overruled on other grounds in *Valley Medical Specialists v. Farber*, 190 Ariz.
17 563, 565, 950 P.2d 1184, 1186 (App. 1997); *Owner-Operator Independent Drivers Assoc.,*
18 *Inc. v. Swift Transportation Co., Inc.*, 367 F.3d 1108, 1111 (D. Ariz. 2004).

19 Because the Commission has judicial power and has adopted the Arizona Rules of
20 Civil Procedure, it follows that it can exercise that power to utilize remedies expressly
21 provided for in the Arizona Rules of Civil Procedure and enjoin activity it deems improper.
22 Otherwise the Commission would be an ineffective regulatory body, devoid of judicial
23 power and unable to make binding judgments and regulate any entity which, like the
24 unregulated Global Entities, performs the functions of public service corporations while
25 contending that it is not subject to the Commission's authority.
26
27
28

1 **B. The Commission has Entered Similar Relief in Similar Circumstances.**

2 It is clear that the Commission is the proper tribunal to determine whether the
3 unregulated Global Entities should be classified as public service corporations. *Southwest*
4 *Gas*, 169 Ariz. at 284, 818 P.2d at 719. Indeed, the Commission’s judicial power “includes
5 the determination of whether a particular business is a public service corporation.” *Id.* It is
6 only appropriate that the Commission can and should prohibit unauthorized entities from
7 performing the functions of public service corporations until that determination can be
8 made.

9 The Commission frequently issues cease and desist orders when entities and
10 individuals violate Commission rules, including in the water utility arena, *see In re Pineview*
11 *Water Company, Inc.*, Docket No. W-01676A-04-0463, Decision No. 67989 (Commission
12 ordered water company to cease and desist commingling its expenses and capital equipment
13 with unaffiliated businesses) and *Graham County Utilities, Inc. v. Ashcreek Water*
14 *Company*, Docket No. W-02494A-01-0671, Decision No. 67951 (Commission ordered non-
15 public service corporation to cease and desist providing water utility service), as well as in
16 other areas of its jurisdiction. *See Polaris Int’l. Metals Corp. v. Arizona Corp. Comm’n*,
17 133 Ariz. 500, 502, 652 P.2d 1023, 1025 (1982) (Commission ordered unregistered
18 securities dealer and its salespeople to cease and desist selling securities); *Arizona Corp.*
19 *Comm’n v. Superior Court*, 105 Ariz. 56, 57, 62-3, 459 P.2d 489, 490, 495-6 (1969)
20 (Supreme Court acknowledged power of Commission to order airline to cease and desist
21 operating until it obtained a Certificate of Convenience and Necessity); *Nutek Info. Sys., Inc.*
22 *v. Arizona Corp. Comm’n*, 194 Ariz. 104, 105, 977 P.2d 826, 827 (App. 1998) (Court of
23 Appeals affirmed Commission’s order to cease and desist selling unregistered securities);
24 *State v. Cook*, 185 Ariz. 358, 360, 916 P.2d 1074, 1076 (App. 1996) (Commission ordered
25 unregistered securities seller to cease and desist selling unregistered securities); *In re Listo,*
26 *Inc.*, Docket No. S-03585A-05-0000, Decision No. 68230 (Commission ordered
27 unregistered securities broker to permanently cease and desist selling securities in Arizona
28 until it and the securities were registered in Arizona); *In re Pfingsten*, Docket No. S-

1 03569A-05-0000, Decision No. 68161 (Commission ordered respondent to cease and desist
2 selling unregistered securities); *In re Deutsche Bank Securities, Inc.*, Docket No. S-03578A-
3 05-0000, Decision No. 67603 (Commission ordered securities brokerage to cease and desist
4 from engaging in dishonest and unethical conduct).

5 In *Graham County Utilities, Inc. v. Ashcreek Water Company*, Graham County
6 Utilities, Inc. (“Graham”) filed a formal complaint with the Commission alleging that
7 Ashcreek Water Company (“Ashcreek”) was providing water service to eighteen customers
8 in Graham’s certificated area. [Decision No. 67951 at 2.] Graham requested that Ashcreek
9 be ordered to cease and desist from providing water to new customers, and that Ashcreek
10 refund to the customers located in Graham’s territory all monies advanced to extend the
11 facilities to their properties. Ashcreek subsequently notified the Commission that an
12 indispensable party, William Clay Smith dba West Central Community Services (“WCCS”),
13 should be made a party to the proceeding. [Decision No. 67951 at 3.] Ashcreek further
14 alleged that WCCS, a non-public service corporation, not Ashcreek, was providing water
15 service to the disputed area. WCCS responded that it was a “coordinator,” not a public
16 service corporation, because it was simply providing customers with water it had purchased
17 from Ashcreek. [Decision No. 67951 at 5.] Ashcreek and WCCS were ordered in a
18 Procedural Order dated October 11, 2002 “not to provide service to, or take deposits from,
19 additional users in the disputed area.” *Id.* On June 21, 2005, after the Commission
20 preliminarily enjoined WCCS and Ashcreek from providing service to new users in the
21 disputed area, the Commission found that WCCS was a public service corporation within
22 the meaning of Article XV of the Arizona Constitution and ordered WCCS permanently to
23 cease and desist from providing water utility service. [Decision No. 67951 at 19-21.]

24 Here, like in *Graham*, the unregulated Global Entities are non-public service
25 corporations essentially performing public service corporation functions for the regulated
26 Global Entities outside of the Commission’s authority, even presenting themselves to the
27 public as “coordinators” of utility services. In *Graham*, the Commission ordered WCCS,
28

1 which contended that it was not a public service corporation, but merely a “coordinator,” to
2 cease providing service to new customers almost three years before it ruled that WCCS was
3 in fact a public service corporation. Furthermore, as noted above, the Commission
4 frequently issues cease and desist orders in a variety of contexts. Thus, the Commission has
5 the authority to enjoin the unregulated Global Entities from entering into additional
6 improper financing arrangements such as the Infrastructure Coordination and Finance
7 Agreements (“ICFAs”) at issue here pending a decision on whether the unregulated Global
8 Entities are public service corporations.

9
10 **C. Based on the Balance of Hardships and the Irreparable Harm Caused by**
11 **the Ongoing Execution and Recording of the ICFAs, the Commission**
12 **Should Forthwith Order the Unregulated Global Entities to Cease and**
13 **Desist Their Illegal Activities Pending Resolution of The Issues.**

14 The balance of hardships heavily favor Arizona Water Company in this case. The
15 Global Entities are acting with unclean hands. At issue, among other practices, is the
16 unregulated Global Entities’ solicitation of customers for the regulated Global public service
17 corporations, inducing the customers to sign and then record ICFAs with the Pinal County
18 Recorder’s Office. First, Arizona Water Company has already stated its cause of action and
19 prevailed on Respondents’ motion to dismiss in this docket alleging, among other claims,
20 that the financing mechanisms implemented in the ICFAs are illegal financing arrangements
21 affecting lands within Arizona Water Company’s present and future certificated areas in
22 western Pinal County, and that the unregulated Global Entities are violating Arizona law by
23 acting as public service corporations through the ICFA scheme and other practices. Second,
24 as the Commission has seen in the Generic Docket, Global’s patterns and practices have
25 been the subject of an industry-wide inquiry by Staff that awaits further scrutiny and action
26 by the Commission based on comments submitted by other public service corporations and
27 individual Commissioners in that docket.

28 If the Commission does not issue a preliminary injunction against the Global Entities
pending the outcome of Arizona Water Company’s Formal Complaint and the Generic

1 Docket, the unregulated Global Entities will continue to profit from their misconduct and
2 cause irreparable harm by soliciting customers in the Company's present and future
3 certificated areas and inducing them to sign and record the ICFAs. Until the Commission
4 holds hearings, receives sworn testimony and documentary exhibits and evidence, and
5 otherwise completes its full investigation into the questions surrounding the Global Entities'
6 ICFAs and related activities, the status quo must be preserved to protect the public interest.
7 Otherwise, the unregulated Global Entities will continue in a race to have signed as many
8 ICFAs as possible before the Commission can act, and will thereby affect future utility
9 service for thousands of customers who are not even yet known, for developments that in
10 some cases have not even been yet conceived. For the reasons set forth in Arizona Water
11 Company's Formal Complaint and its successful Response to Global's motion to dismiss,
12 these are serious matters that justify interim injunctive relief.

13 The public interest will also be advanced by granting a preliminary injunction against
14 the Global Entities in this case. *See Arizona State Bd. Of Dental Examiners v. Hyder*, 114
15 Ariz. 544, 562 P.2d 717 (Ariz. 1977)(approving injunctive relief to halt practice of dentistry
16 without a license, even without full showing of injury or irreparable harm, because of
17 violation of statute); *United States v. Carter*, 339 F.Supp. 1394 (D. Ariz. 1972)(injunctive
18 relief appropriate to prevent non-permitted defendant from continuing to operate boats for
19 hire in national recreation area pending resolution of permit issues). If the Global Entities
20 are allowed to continue soliciting customers and inducing landowners to sign ICFAs, the use
21 of which is currently under investigation by the Commission, the unregulated Global
22 Entities will continue to record their ICFAs with the Pinal County Recorder's office,
23 causing irreparable harm. Because the ICFAs require recording and thereby tie up property
24 titles, more land will become entangled in the Global Entities' illegal financing
25 arrangements, improper restrictions on land will be expanded, and future owners of the land
26 will be bound by entities unregulated by the Commission to future utility service.
27 Moreover, the Commission's authority to regulate public service corporations, including
28

1 determining their certificated areas in the public interest, will be eroded, if not abrogated
2 entirely, as the regulated Global public service corporations will be allowed to thwart the
3 Commission's rules by having the unregulated Global Entities perform acts that the
4 regulated Global public service corporations cannot perform without Commission oversight
5 and approval. This harmful conduct will be halted by the issuance of an injunction until the
6 competing interests pending in dockets before the Commission are resolved. There is *no*
7 hardship to the Global Entities other than to stem the rush to have as many landowners as
8 possible sign ICFAs before the Commission can act.

9 Because the balance of hardships tips sharply in Arizona Water Company's favor, it
10 need only demonstrate the presence of serious questions to prevail on its request for
11 injunctive relief under Arizona law. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792
12 (App. 1990); *See also Newton-Nations v. Rogers*, 316 F.Supp.2d 883 (D. Ariz. 2004);
13 *Wright v. U.S. Army*, 307 F.Supp.2d 1065, 1070 (D. Ariz. 2004)(both applying Ninth Circuit
14 standard applied by *Shoen* court). Because serious questions concerning the Global
15 Entities' conduct have been raised, including but not limited to the propriety of the ICFA
16 financing scheme and whether the unregulated Global Entities are acting as public service
17 corporations, injunctive relief is appropriate.

18
19 **III. THE COMMISSION SHOULD PROHIBIT THE REGULATED GLOBAL**
20 **PUBLIC SERVICE CORPORATIONS FROM PROFITING AS THIRD**
21 **PARTY BENEFICIARIES OF THE UNREGULATED GLOBAL ENTITIES'**
22 **ILLEGAL FINANCING ARRANGEMENTS.**

23 Arizona courts will not enforce illegal contracts as a matter of public policy. *Greene*
24 *v. Reed*, 15 Ariz. App. 110, 112, 486 P.2d 222, 224 (App. 1971). A third party beneficiary
25 "to an illegal contract, cannot, as a general rule, derive any benefit from the contract, even if
26 the contract was entered into in his or her behalf." *Zollinger v. Carrol*, 49 P.3d 402, 405
27 (Idaho 2002).

28 As more fully set forth in Arizona Water Company's Formal Complaint and
Response to Global's Motion to Dismiss, the ICFAs which the unregulated Global Entities

1 impose on landowners include a tie-in arrangement compelling the landowners to enter into
2 main extension agreements with the regulated Global public service corporations. In
3 addition, under the ICFAs, landowners are eventually required to grant the regulated Global
4 public service corporations all water rights and wells on their properties. Thus, the ICFAs
5 amount to a scheme between Global and landowners to decide who will provide water
6 services in an uncertificated area, long before the Commission has determined what is in the
7 public interest. The ICFAs clearly bestow third party benefits upon the regulated Global
8 public service corporations by circumventing the Commission's authority. The Commission
9 should not allow the regulated Global public service corporations to benefit as third party
10 beneficiaries of the illegal ICFA contracts.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the Commission should issue an order prohibiting the
13 Global Entities from continuing to enter into ICFA agreements with landowners and
14 otherwise acting as public service corporations pending a final Commission decision on the
15 status of the unregulated Global entities and the legality of the ICFAs through this Formal
16 Complaint proceeding.

17 DATED this 7th day of July, 2006.

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20
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