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AZ CORP COMMISSION Arizona Corporation Commission
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JUL 17 2006

BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE APPLICATION
OF ARIZONA WATER COMPANY, AN
ARIZONA CORPORATION, TO EXTEND
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

**ARIZONA WATER COMPANY'S RESPONSE TO
GLOBAL'S MOTION TO DISMISS**

Arizona Water Company hereby responds in opposition to the motion to dismiss filed by 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").

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

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1 **I. INTRODUCTION.**

2 By its motion, Global seeks inappropriate relief that is unprecedented in Certificate
3 of Convenience and Necessity (“CCN”) extension proceedings. Rather than allowing Staff
4 to determine the sufficiency of an application in the required administrative process, as set
5 forth in Section II below, Global confuses adversary pleading concepts from the Rules of
6 Civil Procedure with the administrative process that is already unfolding in the appropriate
7 manner. Not only are Global’s assertions of fact and law misleading and wrong, they are
8 premature and inappropriately raised. Most troubling, Global argues issues of fact and law
9 on the merits that will be the subject of inquiry during evidentiary hearings in these properly
10 consolidated proceedings as if they are foregone conclusions reached after full due process
11 to Arizona Water Company, then demands a result that forecloses Arizona Water Company
12 from providing water utility service in its requested area on a wholly procedural basis. The
13 motion should be denied out-of-hand so that this matter may proceed to evidentiary hearings
14 in accordance with standard Commission practice.

15 Motions to dismiss are procedurally improper in the context of an application for a
16 CCN, and therefore the Commission’s rules do not provide for motions to dismiss in that
17 process. Even if Global’s motion were procedurally proper, it fails to meet the necessary
18 legal standard for dismissal. On July 7, 2006, Arizona Water Company filed and docketed
19 its response to Staff’s Insufficiency Letter, which is the only appropriate manner to deal
20 with insufficiencies. Finally, Arizona Water Company is the best equipped utility to
21 provide safe and reliable water utility service to the proposed expansion area at the lowest
22 rates, and it stands poised to do so upon the granting of its application by the Commission.

23 **II. GLOBAL’S MOTION TO DISMISS MUST BE DENIED BECAUSE IT IS**
24 **PROCEDURALLY IMPROPER, FAILS TO MEET THE NECESSARY**
25 **STANDARD FOR DISMISSAL, AND IS BARRED BY THE DOCTRINE OF**
COLLATERAL ESTOPPEL.

26 **A. The Commission’s Rules And Procedures Do Not Provide For**
Motions To Dismiss In The CCN Application Context.

27 Motions to dismiss are not appropriate in the context of an application to extend a
28 CCN. A motion to dismiss is a mechanism designed for adversarial proceedings when one

1 party files a complaint against another party; on the other hand, an application for a CCN is
2 an administrative process involving the applicant, Utilities Division Staff, the Commission,
3 and members of the public. Under the Commission's rules, "any person or entity" who
4 desires to operate a water utility may file an application for a CCN with the Commission.
5 ARIZ. ADMIN. CODE § 14-2-402(A)(1). Upon receipt of an application, Staff reviews the
6 application for compliance and works with the applicant to fulfill informational
7 requirements. ARIZ. ADMIN. CODE § 14-2-402(A)(3-4). Once the applicant has satisfied the
8 informational requirements and has provided all documentation requested by Staff, the
9 Commission schedules a hearing to receive evidence and sworn testimony, reviews briefing,
10 and then renders a decision. ARIZ. ADMIN. CODE § 14-2-402A(4).

11 Under Arizona law, the test for whether a motion to dismiss should be granted is
12 whether plaintiffs are entitled to relief under any interpretation of the facts susceptible to
13 proof. *Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, 534, 115 P.3d 124, 128
14 (App. 2005) (citing *Fidelity Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224, 954
15 P.2d 580, 582 (1998)). By submitting its application to extend its CCN, Arizona Water
16 Company has not filed an adversarial pleading; it is simply submitting an application to the
17 Commission which it has a right to do under the Commission's rules. ADMIN. CODE § 14-2-
18 402(A)(1). Arizona Water Company does not have the burden of making its case at the time
19 it submits an application to extend its CCN. Rather, Arizona Water Company is required to
20 submit an application, work with Staff to meet sufficiency requirements, and then, when
21 called upon to do so, present evidence and sworn testimony in support of its application
22 before the Commission.

23 In this case, Global is attempting to subvert the longstanding CCN application
24 process by filing a motion to dismiss, which is not part of the CCN application process,
25 before Arizona Water Company has completed the sufficiency requirements identified by
26 Staff and has had its application presented in a hearing before the Commission. It is Staff's
27 duty, not Global's, to review the application, request additional data from Arizona Water
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1 Company, and then make recommendations to the Commission about the application's
2 conformance with the Commission's sufficiency requirements. This is why the
3 Commission's rules do not provide for motions to dismiss in the CCN application context
4 and why Global's motion should be denied.

5 **B. Even if Global's Motion Were Procedurally Proper, Its Motion Fails To**
6 **Meet The Standards For Dismissal.**

7 Even if motions to dismiss were permissible in the CCN application context, which
8 they are not, such motions are disfavored in Arizona. Under Arizona law, "motions to
9 dismiss for failure to state a claim *are not favored and should not be granted* unless it
10 appears that the plaintiff should be denied relief as a matter of law given the facts alleged."
11 *Logan v. Forever Living Products Int'l, Inc.*, 203 Ariz. 191, 193, 52 P.3d 760, 762
12 (2002)(en banc)(citing *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304,
13 1309 (1983)) (emphasis added). "When a complaint is the target of a rule 12(b)(6) motion,
14 the [Commission] must assume the truth of all of the complaint's material allegations,
15 accord the plaintiffs the benefit of all inferences which the complaint can reasonably
16 support, and deny the motion unless certain that plaintiffs can prove no set of facts which
17 will entitle them to relief upon their stated claims." *Luchanski v. Congrove*, 193 Ariz. 176,
18 179, 971 P.2d 636, 639 (App. 1999)(quoting *Gatecliff v. Great Republic Life Ins. Co.*, 154
19 Ariz. 502, 508, 744 P.2d 29, 35 (App. 1987)).

20 But far from adhering to that rule, which (if the application were instead a complaint)
21 would call for the Commission to assume the truth of Arizona Water Company's material
22 allegations and award the Company the benefit of all inferences, Global makes multiple
23 rash, unsworn factual assertions—virtually all of which are completely wrong—and then
24 insists that its motion be granted before Arizona Water Company is given a full opportunity
25 to complete sufficiency requirements and have its application heard by the Commission in a
26 due process procedure with sworn testimony, exhibits and briefing. The allegations in
27 Global's motion purport to raise questions of fact concerning Arizona Water Company's
28 capacity to provide service, its planning processes, its conservation plans, its water supplies

1 and quality, its abilities to provide wastewater service under an agreement with a wastewater
2 provider, its proposed rate structure, and many other issues that must be addressed in a
3 hearing. But then Global demands a premature “dismissal” of Arizona Water Company’s
4 application so as to preclude another major benefit of the upcoming consolidated hearings:
5 the ability of Staff and the ALJ, and ultimately the Commission, to compare and weigh the
6 components of each competing applicant’s plans for service. Global’s attempts to avoid this
7 necessary scrutiny should be rejected.

8 **C. Global’s Motion Is Barred By The Doctrine Of Collateral Estoppel.**

9 The doctrine of collateral estoppel bars the relitigation of claims which have already
10 been litigated between the parties. *Western Cable v. Industrial Com’n*, 144 Ariz. 514, 518,
11 698 P.2d 759, 763 (App. 1985). The elements of collateral estoppel are: 1) the issue was
12 actually litigated in the previous proceeding; 2) there was a full and fair opportunity to
13 litigate the issue; 3) resolution of the issue was essential to the decision; and 4) there is a
14 common identity of the parties. *Irby Constr. Co. v. Arizona Dep’t. of Revenue*, 184 Ariz.
15 105, 107, 907 P.2d 74, 76 (App. 1995).

16 Arizona Water Company filed a Formal Complaint against regulated and unregulated
17 Global entities on March 29, 2006, and that matter is proceeding in Dockets W-01445A-06-
18 0200, SW-20445A-06-0200, W-20446A-06-0200, SW-03576A-06-0200 and SW-03575A-
19 06-0200 before ALJ Dwight D. Nodes (the “Formal Complaint Proceeding”). Global
20 moved to dismiss the Formal Complaint Proceeding on April 24, 2006. ALJ Nodes denied
21 Global’s motion to dismiss the Formal Complaint Proceeding during a Procedural
22 Conference held on June 15, 2006 (see July 14, 2006 Procedural Order in that matter). The
23 instant motion is a rewarmed version of the same assertions and arguments that Global made
24 in the Formal Complaint Proceeding in an identical effort involving the same parties to
25 obtain an order dismissing claims on wholly procedural grounds. The arguments Global
26 makes for dismissal in this CCN application docket have already been rejected in the Formal
27 Complaint Proceeding as grounds for dismissal. Even if it were procedurally proper for a
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1 competing applicant to move to dismiss a certificate extension proceeding, this motion is
2 barred by collateral estoppel.

3 **III. IT IS GLOBAL – NOT ARIZONA WATER COMPANY – THAT IS**
4 **ENGAGED IN A “LAND GRAB.”**

5 Remarkably, in a classic case of accusing others of its own misdeeds, Global asserts
6 that Arizona Water Company’s application is an “unprecedented land grab” that
7 “contravenes the public interest.” But it is incontrovertible that Arizona Water Company
8 has provided water utility service within its CCN areas adjoining the requested extension
9 area for over 50 years. It is also incontrovertible that Global has never had any presence or
10 capacity to serve in Western Pinal County. In fact it is Global that is engaged in a
11 calculated “land grab” effort right in the heart of Arizona Water Company’s planned
12 expansion area. Awarding the CCN for this area to Global would ignore the fact that it is
13 Arizona Water Company, not Global, that already has the most enduring and consistent
14 track record of working with governing municipalities, Pinal County and appropriate State
15 agencies on developing water supply and assuring safe drinking water, as well as providing
16 safe and reliable water utility service to the immediately adjoining areas for many years.

17 By any measure (as will be shown in the consolidated application proceedings),
18 Arizona Water Company is the better equipped company to serve the proposed expansion
19 area. Arizona Water Company is a long-established Class A water utility that has been
20 providing water utility service for over 50 years. The evidence in this proceeding will
21 establish that Arizona Water Company operates 22 separate water systems in eight Arizona
22 counties and has 120 wells across the state that produce 60,000 gallons of water per minute.
23 Statewide, Arizona Water Company operates 118 water storage tanks, representing about 58
24 million gallons of storage. Arizona Water Company currently produces and delivers 14
25 billion gallons of water per year. Arizona Water Company’s existing CCNs include
26 approximately 425,000 acres. The 69,000 additional acres requested in this proceeding
27 (which Global characterizes as a “larger than many countries,” among other hyperbole) may
28 be well beyond Global’s ability to serve, but are within Arizona Water Company’s present

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

1 ability to serve, and it is in the public interest for Arizona Water Company to do so. When
2 viewed from the appropriate perspective, void of legal rhetoric, if the requested expansion
3 area is added to Arizona Water Company's statewide CCN area, it would represent less than
4 14 percent of the Company's CCN area.

5 During its more than 50 years of providing safe and reliable water utility service,
6 Arizona Water Company has frequently been called upon to take over failing or defunct
7 water systems around the state, including a number of smaller, start-up companies.
8 Numerous other water systems also receive their primary or backup water supplies from
9 Arizona Water Company. Arizona Water Company, not Global, has been the dependable,
10 consistent provider in the adjoining areas.

11 The evidence in this proceeding will also show that Arizona Water Company has a
12 seven-member board of directors with a cumulative 210-plus years of experience in
13 operating water utilities. The average experience of each board member is approximately
14 30 years. Commission Staff has worked with Arizona Water Company's existing
15 management for over 20 years. Arizona Water Company has approximately 180 employees,
16 with each employee having an average of ten years' experience with Arizona Water
17 Company. Over 100 of these employees are ADEQ certified operators and two are certified
18 backflow prevention specialists. Arizona Water Company has its own engineering
19 department, operations staff, drafting department, meter repair and maintenance facilities,
20 accounting department (with C.P.A.s), billing department, in-house legal department and
21 ADEQ compliance specialists. Arizona Water Company has approximately \$250 million of
22 utility plant in service, with another \$25 million of construction work in progress. This
23 includes wells, water treatment facilities, water storage tanks, booster pump stations, water
24 transmission and distribution mains and other utility plant facilities.

25 The evidence will also show that there is no doubt as to the financial viability of
26 Arizona Water Company. Arizona Water Company currently has a \$28 million line of
27 credit. To fund its projects, Arizona Water Company is able to draw upon shareholder
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1 investment, short-term lines of credit and long-term bonds. Arizona Water Company
2 currently serves approximately 80,000 customers, and adds nearly 5,000 customers per year.
3 Arizona Water Company is also experiencing accelerated growth of its customer base in the
4 Casa Grande area, and thus Arizona Water Company achieves economies of scale by
5 spreading costs of service among a much larger group of customers. Rather than “talking
6 the talk” of so-called “triads of conservation” and marketing manipulative and deceptive
7 financing schemes to landowners that have not been approved by the Commission, Arizona
8 Water Company’s utility personnel are providing professional water utility service daily in
9 this area in accordance with the Commission’s long-standing rules and tariff requirements.

10 As the evidence will also show, Arizona Water Company has an agreement with
11 Southwest Water Company (“Southwest”) to provide sewer and wastewater services to
12 customers who desire those services. Arizona Water Company’s arrangement with
13 Southwest is functionally equivalent to Global’s arrangement between Santa Cruz Water
14 Company and Palo Verde Utilities Company. Under Global’s plan, two separate entities,
15 Palo Verde Utilities Company and Santa Cruz Water Company, collaborate to provide
16 services just like Arizona Water Company and Southwest have agreed to do. The only
17 difference between Global’s arrangement and Arizona Water Company’s is that the Global
18 entities are under common ownership. But this distinction is inconsequential to the question
19 of service capacity, and Global has not and cannot show any correlation between the ability
20 to provide efficient utility services and corporate affiliation. Moreover, integration of
21 services is just one of many relevant factors the Commission will weigh in these
22 proceedings. Arizona Water Company has operated throughout the State without owning a
23 wastewater affiliate and has enjoyed a collaborative and beneficial relationship with
24 municipal or private wastewater service providers.

25 The Commission should disregard Global’s comparison of Arizona Water
26 Company’s ability to serve with that of Desert Hills Water Company (“Desert Hills”)
27 because such a comparison is ludicrous, and provides a perfect example of the reckless and
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1 misinformed nature of Global's motion. [Motion at 4.] As noted above, Arizona Water
2 Company will easily demonstrate that it is poised to serve the proposed expansion area and
3 is the best qualified entity to do so. Desert Hills is a much smaller company than Arizona
4 Water Company. In fact, Arizona Water Company adds approximately three times as many
5 new customers each year—5,000—as Desert Hills has in total customers—1,625. Desert
6 Hills does not have the resources that Arizona Water Company possesses, nor does it have
7 Arizona Water Company's well-established reputation and track record. Moreover, Global
8 has no evidence to suggest that Arizona Water Company is unable to serve its proposed
9 expansion area.

10 **IV. GLOBAL'S LITANY OF UNSUPPORTED FACTUAL ASSERTIONS MUST**
11 **AWAIT DETERMINATION IN THESE PROCEEDINGS UNDER NORMAL**
12 **DUE PROCESS GUIDELINES.**

13 As set forth above, a motion to dismiss is not the appropriate vehicle to contest
14 Global's multi-faceted factual misstatements concerning Arizona Water Company's
15 application. That must be done in a manner consistent with the Commission's rules and
16 procedures, in a formally noticed hearing with sworn testimony, exhibits and briefing, with
17 input from Staff and under the control of the Administrative Law Judge. The questions of
18 long-term conservation, landowner's rights, rates, and the effect on other utilities cannot be
19 determined superficially based on unsworn and unsupported allegations in a motion to
20 dismiss. Notwithstanding these fatal deficiencies in Global's motion, it is helpful at this
21 early stage to respond briefly in opposition to Global's primary attacks on Arizona Water
22 Company's application.

23 First, both applicants have asked for sizable CCN extensions. But it is only Arizona
24 Water Company that currently has adjacent and contiguous CCN area, as well as a
25 demonstrated track record of safe and reliable water utility service in the area. Only
26 Arizona Water Company has a legitimate, long-standing master water plan to its infuse its
27 Casa Grande, Tierra Grande, Arizona City and Coolidge water systems and the adjacent and
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1 contiguous areas in Pinal County with transmission and distribution mains, production and
2 storage facilities, and other necessary attributes of water service.

3 In its motion, Global preaches its version of Arizona law concerning conservation
4 and water supply. The record here will demonstrate that Arizona Water Company's officers
5 and employees know significantly more about water supply and conservation issues than
6 Global has learned during its comparatively brief existence in Arizona. As the Commission
7 is already aware, Arizona Water Company already participates as a leading stakeholder in
8 water affairs and public policy determination in Pinal County, and enjoys enduring and
9 substantial relationships with the governing municipalities, Pinal County, the Arizona
10 Department of Water Resources, the Arizona Department of Environmental Quality, the
11 Central Arizona Groundwater Replenishment District, the San Carlos Irrigation and
12 Drainage District, the Maricopa-Stanfield Irrigation and Drainage District, and many other
13 governmental and quasi-governmental agencies. It has been Arizona Water Company's
14 business for 50 years to attend to water conservation, supply and quality issues; unlike
15 Global's proprietary and predatory track record during its brief existence in Arizona,
16 Arizona Water Company will likely be performing the same roles in this area 50 years from
17 now. The record will show that Arizona Water Company is committed to conservation
18 efforts, that it uses renewable surface water where available, that it already provides effluent
19 service and that it cooperates with users and public agencies in providing for the recharge of
20 valuable water resources. Again, Arizona Water Company's legion of qualified operators
21 and engineers are daily "walking the walk" of conservation, rather than dreaming up
22 marketing buzz words like "triads of conservation" and peddling questionable financing
23 schemes in an effort to grab a toe-hold within the existing provider's planned service area.

24 Second, Global predictably seizes upon the decision in *Woodruff Water Company*,
25 No. 68453 (February 3, 2006) to argue that the mere fact that it has affiliated entities that
26 provide water and wastewater service is determinative of the issue before the Commission
27 as to who should provide water service in western Pinal County. However, this decision
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1 cannot be made in a vacuum on mere initial unsworn briefing. *Woodruff Water Company* is
2 on appeal to the Superior Court in any event (*Arizona Water Company v. Arizona*
3 *Corporation Commission*, Maricopa County Superior Court No. LC2006-000283), and
4 involves a completely different area with completely different facts, including that the
5 applicant there proposes to provide service only within the development planned by its own
6 parent company, as opposed to serving members of the public-at-large outside of that
7 development.

8 Third, Arizona Water Company will present a full case on its ability to demonstrate
9 adequate water supplies to serve the area. At pages 8-9 of its motion, Global makes a
10 number of unsupported and incorrect assertions concerning the nature of Arizona Water
11 Company's water supplies. Arizona Water Company has outlined these and many other
12 issues in this response to Staff's Insufficiency Letter docketed in this proceeding on July 7,
13 2006, just as Global has attempted to respond to Staff's repeated notices of insufficiency of
14 its own application. These issues must be addressed by Staff, then in a formal hearing, not
15 by way of a motion to dismiss.

16 Fourth, Arizona Water Company will demonstrate the necessity for water service in
17 its requested CCN extension area. Commission Staff has consistently taken the position that
18 the present landowner's initial choice for service provider is but one factor to be considered.
19 Discovery has not even commenced as to the true motivation and background behind the
20 landowner requests Global attempts to characterize as legitimate and voluntary. The entire
21 fabric of Global's invasion into this area is being questioned by the Commission in a generic
22 proceeding exploring the propriety of the financing scheme that is the primary reason for
23 generating Global's purported "requests for service" referenced in its application. *See In re*
24 *Commission's Generic Evaluation of the Regulatory Impacts from the Use of Non-*
25 *Traditional Financing Arrangements by Water Utilities and Their Affiliates*, Docket No. W-
26 00000C-06-0149 (the "Generic Docket"). Nor is Global's argument valid that Arizona
27 Water Company was deficient in providing notice to landowners of its application [Motion
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1 at 12-13]; Arizona Water Company gave notice to all landowners by publication, and the
2 Staff has not found this method of notice to be insufficient. In any event, insufficient notice
3 would not be an appropriate basis for dismissal of the entire application.

4 Finally, it is absurd for Global, which has a higher-cost rate structure proposed in its
5 application than does Arizona Water Company, to assert in an initial pleading that Arizona
6 Water Company's application should be dismissed because "existing and future rate payers
7 may be harmed." Other than the parties' applications and follow-up responses to Staff, the
8 rate implications of the respective applications have not yet been explored. The questions of
9 rates and financing will be important in these consolidated proceedings as well as the
10 Formal Complaint Proceeding and the Generic Docket investigation concerning Global's
11 conduct. It is especially premature and inappropriate to attempt to preclude any
12 Commission analysis of rates by attempting to have Arizona Water Company's application
13 dismissed out-of-hand at this stage.

14 **V. CONCLUSION.**

15 For the foregoing reasons, Global's motion to dismiss should be denied in its
16 entirety, and Arizona Water Company's application to extend its CCN should be allowed to
17 progress toward a hearing. Oral argument has been set for July 27, 2006 on this and
18 Global's parallel motion to vacate consolidation and alternative motion to sever. In its
19 motion, Global requested that oral argument be set in conjunction with unrelated motions to
20 exclude filed by CHI Construction Company and CP Water Company. The ALJ
21 appropriately did not do so in her July 10, 2006 Procedural Order, since the issues raised in
22 those two motions are entirely separate from those raised in Global's pending motions.

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1 RESPECTFULLY SUBMITTED this 17th day of July, 2006.

2 BRYAN CAVE LLP

3
4 By *St. A. Hirsch*

5 Steven A. Hirsch, #006360
6 Rodney W. Ott, #016686
7 Two N. Central Avenue, Suite 2200
8 Phoenix, AZ 85004-4406
9 Attorneys for Arizona Water Company

10 **ORIGINAL** and 17 **COPIES** of the foregoing
11 filed this 17th day of July, 2006 with:

12 Docket Control Division
13 Arizona Corporation Commission
14 1200 W. Washington
15 Phoenix, AZ 85007

16 **COPY** of the foregoing hand-delivered
17 this 17th day of July, 2006 to:

18 Lyn A. Farmer, Esq.
19 Chief Administrative Law Judge
20 Hearing Division
21 Arizona Corporation Commission
22 1200 W. Washington
23 Phoenix, AZ 85007

24 Yvette B. Kinsey, Esq.
25 Administrative Law Judge
26 Hearing Division
27 Arizona Corporation Commission
28 1200 W. Washington
Phoenix, AZ 85007

Christopher Kempley, Esq.
Chief Counsel, Legal Division
Arizona Corporation Commission
1200 W. Washington
Phoenix, AZ 85007

1 Ernest G. Johnson
2 Director, Utilities Division
3 Arizona Corporation Commission
4 1200 W. Washington
5 Phoenix, AZ 85007

6 **COPY** of the foregoing mailed
7 this 17th day of July, 2006 to:

8 Michael W. Patten, Esq.
9 Roshka DeWulf & Patten, PLC
10 One Arizona Center
11 400 E. Van Buren St., Suite 800
12 Phoenix, AZ 85004
13 Attorneys for Applicants
14 Santa Cruz Water Company, L.L.C.
15 and Palo Verde Utilities Company, L.L.C.

16 Jeffrey W. Crockett, Esq.
17 Marcie Montgomery, Esq.
18 Snell & Wilmer LLP
19 One Arizona Center
20 400 East Van Buren Street
21 Phoenix, Arizona 85004

22 Kenneth H. Loman
23 Manager
24 KEJE Group, LLC
25 7854 West Sahara
26 Las Vegas, Nevada 89117

27 Craig Emmerson, Manager
28 Anderson & Val Vista 6, LLC
8501 North Scottsdale Road, Suite 260
Scottsdale, Arizona 85253

Brad Clough
Anderson & Barnes 580 LLP
Anderson & Miller 694, LLP
8501 North Scottsdale Road, Suite 260
Scottsdale, Arizona 85253

1 Phillip J. Polich
2 Gallup Financial, LLC
3 8501 North Scottsdale, #125
4 Scottsdale, Arizona 85253

5 *Melinda M. Erway*
6

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

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