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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 REPLY IN SUPPORT OF

ITS MOTION TO DISMISS

(Oral Argument scheduled: July 27, 2006 at 10:00 a.m.)

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") reply in support of their Motion to Dismiss the Application filed by Arizona Water Company ("AWC").

I. Preliminary statement.

As AWC states, a motion to dismiss should be granted if the Applicant is not entitled to relief "under any interpretation of the facts susceptible to proof." (AWC Response at 3). By applying undisputed facts, the Commission can dismiss AWC's unprecedented, overreaching

application. This will spare Staff and other parties the need for a unnecessary and burdensome hearing.

The key facts are not in dispute:

1) AWC's proposed extension area is of an unprecedented size;
2) AWC has requests for service for 0.3% of this vast area;
3) AWC has not submitted plans for reusing reclaimed water or for recharging water back into the acquifer;
4) AWC will finance the entire cost of the area with AIAC;
5) Part of the extension is already certificated to another water company; and
6) AWC did not submit some of the financial projections required by Commission rules.

Under any interpretation of these undisputed facts, AWC has not met – and cannot meet – its burden showing the public interest would be served by granting a CC&N for the gigantic area it requests. Accordingly, the Commission should dismiss AWC's application.

II. <u>The Commission does not lack the power to dismiss AWC's Application.</u>

A. The Commission has discretion to dismiss a fatally flawed application.

AWC argues that Global has inappropriately imported concepts from the Arizona Rules of Civil Procedure ("Civil Rules") into a CC&N case. But there is no dispute that the Commission's procedural rules cover this matter. A.A.C. R14-3-101 et seq. And those rules clearly incorporate the Civil Rules. A.A.C. R14-3-101(A). Moreover, the Commission's rules mandate that motions comply with the Civil Rules. A.A.C. R14-3-106(K). Motions to dismiss are a well-recognized part of the Civil Rules, and there is nothing inappropriate about filing one here.

AWC argues that the Commission's "sufficiency" process somehow precludes motions to dismiss. But sufficiency review and motions to dismiss are different processes that serve different ends, and they are thus not mutually exclusive. The sufficiency review conducted by Staff is limited to checking "for compliance with the information requirements" specifically listed in the CC&N rule. A.A.C. R14-2-402(A)(3). In contrast, the purpose of a motion to dismiss is to

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determine whether "under any interpretation of the facts" the Applicants are entitled to relief.[1] Thus, the sufficiency process involves reviewing the Application for compliance with a checklist of requirements, and requesting additional information if the checklist is not satisfied. In contrast, a motion to dismiss does not seek new facts but assumes the facts asserted by the Application.

More importantly, a motion to dismiss allows the Commission to dispose of applications that are fatally flawed regardless of whether they satisfy the checklist in the CC&N rule. Suppose, for example, the Commission ordered a utility not to file any extensions until it satisfied certain requirements. The order would not affect the CC&N rule, so it would not be reflected in the sufficiency checklist. Thus, if the utility filed an application in violation of the order, it could not be rejected under the sufficiency rule. Yet surely the Commission is not required to process an application that clearly violates an order. A motion to dismiss provides the solution to this problem.

The situation here is equally clear cut. The six key facts listed above are not disputed, and the public interest is clearly not served by granting AWC's Application. Under AWC's theory, as long as a utility satisfies the minimum requirements of the sufficiency rule, the Commission would be powerless to dismiss an application, no matter how glaring its defects. Staff and other parties would be forced to conduct discovery, prepare witnesses and reports, and participate in a hearing, all for a case where the result is a foregone conclusion based on the Applicant's own facts. There is no reason for the Commission to place such extraordinary restrictions on its capability to manage its own docket by dismissing merit-less cases upon motion.

B. Collateral estoppel does not apply.

AWC also argues that Global's motion is barred by "collateral estoppel" (also known as issue preclusion) pointing to a procedural order in another docket that denied a motion to dismiss by Global. AWC lists a four elements of collateral estoppel, citing *Irby Construction Co. v. Arizona Department of Revenue*, 184 Ariz. 105, 107, 907 P.2d 74, 76 (App. 1995). But *Irby* lists

[1] AWC Response at 3.

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five elements (the omitted element is in bold): "(1) the issue actually litigated in the previous proceeding; (2) there was a full and fair opportunity to litigate the issue; (3) resolution of the issue was essential to the decision; (4) **there was a valid and final decision on the merits;** (5) there is common identity of the parties." *Id.* (enumeration and emphasis added). As *Irby* makes clear, a final decision on the merits is necessary before collateral estoppel will apply. Only months ago, the Arizona Supreme Court repeated this requirement. *See In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 212 Ariz. 64, ¶ 14, n. 8, 127 P.3d 882, 888 (2006) *reconsideration denied* 212 Ariz. 470, 134 P.3d 375 (2006). Other cases also note the necessity of a final judgment. *See e.g. Brigstone/Firestone North American Tire, LLC v. Naranjo*, 206 Ariz. 447, 452 ¶ 19, 79 P.3d 1206, 1211 (App. 2003).

The procedural order that AWC relies on was entered in the AWC vs. Global complaint case.[2] There has been no final Commission decision in that case, so collateral estoppel cannot apply. Moreover, it is not clear what, if anything, the procedural order "decided", as the order simply held the complaint case in abeyance pending resolution of the pending financing docket. Further, the issues are different. AWC's complaint had three counts: (1) that various affiliates of Global were acting as public service corporations; (2) that various agreements signed by Global Water Resources, LLC should be banned; and (3) that the Commission should enter an injunction against Global's speech to potential customers. In this docket, Global's motion to dismiss does not address any of the three counts from the complaint docket. Because there is no final decision in the complaint case, and because the issues in the cases are different, collateral estoppel does not apply.

III. <u>AWC's Application is fatally flawed.</u>

There are six key, undisputed facts. Each of these facts shows that AWC's Application is fatally flawed. Because there is no dispute about these facts, a hearing is not necessary, and AWC's Application should be dismissed.

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[2] Docket Nos. W-01445A-06-0200 et al.

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Uncontested Fact # 1: AWC's extension area is of an unprecedented size. Indeed, AWC recently confirmed that it's even bigger than we first thought. AWC states that the extension area is 70,494 acres.[3] That's a **hundred and ten square miles**. AWC estimates a density of four homes per acre.[4] At that density, the extension area will have 281,976 homes.

Granting a permanent property right for such a gigantic area in one case is not wise. There has been no showing of necessity, and it is implausible to assume that this vast area will develop quickly. Indeed, AWC's own master plan assumes that it will still be adding new facilities to serve growth in this area up to the year 2055.[5] Because necessity cannot be shown for such a large area, the Commission does not grant CC&N extensions of this size.

Indeed, this concern has been at the forefront of the Commission's deliberations recently. At Tuesday's open meeting, the Commissioners discussed how prematurely granting a certificate results in irrevocable property rights, which cities or other utilities are then forced to buy years later when development finally comes to pass.

Moreover, the huge size of the area magnifies other concerns. Any decision that applies over such a large area will have large impacts. For example, if effective water conservation measures are not implemented in a small area, the result is merely unfortunate. But if effective water conservation measures are not implemented in a gigantic area, the effects could be disastrous for the entire region. There is simply no "do over" for CC&Ns – once they are granted, they are permanent property rights. And once facilities are built and streets are paved, it becomes difficult to put in new infrastructure later. That's why implementing the critical water conservation measures from the very onset is so important.

Uncontested Fact # 2: AWC has requests for service for only 0.3% of the extension area. The requests cover a 197 out of 70,494 acres. Our motion cited numerous Commission orders requiring requests for service, and explained at length why this practice protects both the

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[3] AWC Response to Staff's Insufficiency Letter, filed July 7, 2006, at Attachment B.
[4] AWC Response to Staff's Insufficiency Letter, filed July 7, 2006, at Attachment A, page 3.
[5] *Id.* at Attachment A, pages 2-3.

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public interest and landowner rights. AWC's Response did not dispute these points. AWC offered no defense on this point because it has none – there is simply no excuse for falling so short of Commission standards.

Uncontested Fact # 3: AWC has submitted no plans for reusing reclaimed water or for recharging water back into the aquifer. Effective water conservation measures involve three critical elements, the "triad of conservation": (1) reusing reclaimed water for non-potable purposes; (2) using renewable surface water where possible; and (3) recharging excess reclaimed and surface water into the aquifer for later use. AWC apparently plans to use surface water to some extent. However, their plans appear to still heavily rely on groundwater.[6]

AWC presents no plan for the other two parts of the triad. AWC has not discussed recharging at all. Regarding reclaimed water, AWC does refer to an agreement it has with a Southwest Water Company. Southwest Water Company does not hold a CC&N in Arizona, and it is not authorized to do business as a foreign corporation in Arizona.[7] In any event, the agreement with Southwest Water does not obligate Southwest to serve any area – AWC simply gives them an "invitation", which they can decline. Moreover, the agreement was signed in 2002, but has apparently never been used, as Southwest has yet to enter the Arizona market.

AWC claims that its agreement with Southwest is "functionally equivalent" to the integrated approach used by Global.[8] A cursory review shows that they are not equivalent at all. The key provision is Paragraph 2(b). This provision forbids Southwest from selling reclaimed water (effluent) in AWC's service area, except for wholesale sales to AWC. Thus, AWC will presumably resell the reclaimed water. But each sale of reclaimed water will only undermine AWC's sales of more expensive potable water, so they have no incentive to sell. Most of the value of the reclaimed water is created by the treatment, which is done by Southwest and will presumably be included in their wholesale charge to AWC. That leaves AWC with adding a retail

[6] AWC Response to Staff's Insufficiency Letter, filed July 7, 2006, at Attachment A, page 2, noting 26 new wells.
[7] According to the Commission's Corporations Division website, visited July 18, 2006.
[8] AWC Response at 8:13.

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markup and charging for distribution – they simply aren't going to make much money from reselling reclaimed water, and each gallon they do sell will likely cut down on their sales of potable water. AWC will likely sell to customers who actively seek out reclaimed water (e.g. golf courses) but they will likely not actively promote such sales. This is in stark contrast to the integrated model, where the common management and ownership of the water and wastewater utilities enables them to work together to aggressively promote the sale of reclaimed water, even if it reduces potable water usage.

Certainly, AWC will not install purple reclaimed water pipes out to people's houses, as Global is doing. Indeed, AWC's master plan includes a plan for distribution mains for potable water, **but there are no plans for reclaimed water distribution mains.**[9]

Moreover, the AWC / Southwest agreement cannot be used in the extension area. This is because AWC is legally prohibited from selling reclaimed water in this area. AWC proposes to add the area to its Casa Grande system. The courts have already established that AWC's Casa Grande CC&N does not include the right to sell reclaimed water.[10] Moreover, AWC has no tariff to sell reclaimed water in this area. AWC's Casa Grande tariff includes only general service (i.e. potable water) rates.[11] AWC also has a separate tariff to sell non-potable water in the area, but it only applies to CAP water, not reclaimed water.[12] Tellingly, AWC does have a tariff to sell reclaimed water, but this tariff is limited to part of its Apache Junction system.[13] The lack of an equivalent tariff in Casa Grande clearly shows that AWC cannot sell reclaimed water in Casa Grande. Thus, both the courts and AWC's own tariffs show that AWC cannot sell reclaimed water in Casa Grande. And under the AWC / Southwest agreement, Southwest is forbidden from selling reclaimed water, except to AWC. Thus, if this agreement is put into effect in the extension area, no utility will be authorized to sell reclaimed water.

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[9] AWC Response to Staff's Insufficiency Letter, filed July 7, 2006, at Attachment A, page 3.
[10] The relevant court cases are listed in Footnote 4 of Global's Motion to Dismiss.
[11] AWC Tariff WG-103, filed November 30, 2005.
[12] AWC Tariff No. NP-274, filed November 30, 2005.
[13] AWC Tariff No. RW-256, filed December 1, 1989.

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AWC claims that while Global "dreams up marketing buzz words" about conservation, AWC actually "walks the walk" of conservation.[14] As shown above, AWC has no plans for recharge wells, and has no plans for distribution mains for reclaimed water. Moreover, AWC is legally prohibited from selling reclaimed water – the very cornerstone of conservation. And if AWC is really attempting to walk the walk, it is not being very successful. The most recent water usage data for the Casa Grande system shows that AWC pumped 724 gallons of groundwater per customer per day.[15] That compares to 476 gallons for Global in Maricopa.

Uncontested Fact No. 4: AWC plans to finance all facilities in the extension area with AIAC.[16] The dangers of over-reliance on AIAC are well known. This is particularly true when large areas are financed entirely with AIAC. For example, excessive reliance on AIAC is the root cause of the massive rate increases that are facing Arizona-American's Anthem system.[17] AWC's requested extension area will have about 28 times as many homes as Anthem. Repeating the mistakes of Anthem on a vastly larger scale does not seem advisable.

Uncontested Fact No. 5: Part of the extension area is already certificated to another water company. AWC is aware that CP Water Company holds a certificate for part of the extension area. Yet AWC refuses to amend its application to delete the CP area from its Application. This approach flies in the face of decades of CC&N law, as explained in CP Water Company's own motion.

Uncontested Fact No. 6: AWC did not submit some of the financial projections required by Commission rules. Specifically, AWC did not submit the "estimated annual operating revenues and expenses that are expected to accrue from the proposed construction" as required by A.A.C. R14-2-402(A)(2).

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[14] AWC Response at 10.
[15] AWC Response to Staff's Insufficiency Letter, filed July 7, 2006, at Attachment C. 455,678,000 gallons pumped divided by 20,294 customers is 22,454.
[16] AWC Application at ¶ 9.
[17] See Direct Testimony of Thomas M. Broderick at 9-12 filed in Docket No. WS-01303A-06-0403.

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IV. Conclusion.

Although AWC argues otherwise, the Commission is not forbidden from dismissing CC&N Applications that are without merit. The six uncontested facts discussed above show that AWC's Application is fatally flawed. Under these facts, it is not in the public interest to grant a CC&N to AWC. Because these facts are not in dispute, no hearing is necessary. Accordingly, the Commission should dismiss AWC's Application.

RESPECTFULLY SUBMITTED this 26th day of July 2006.

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