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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF THE APPLICATION
OF PERKINS MOUNTAIN UTILITY
COMPANY FOR A CERTIFICATE OF
CONVENIENCE AND NECESSITY.

DOCKET NO. SW-20379A-05-0489

IN THE MATTER OF THE APPLICATION
OF PERKINS MOUNTAIN WATER
COMPANY FOR A CERTIFICATE OF
CONVENIENCE AND NECESSITY.

DOCKET NO. W-20380A-05-0490

MOTION TO VACATE ORAL
ARGUMENT SET FOR
AUGUST 30, 2006

On July 7, 2005, Perkins Mountain Water Company and Perkins Mountain Utility Company (collectively, the "Perkins Companies") filed applications for certificates of convenience and necessity ("CC&Ns") to provide water service and wastewater service, respectively, to two master planned developments in Mohave County known as Golden Valley Ranch ("Golden Valley") and the Villages at White Hills. The Perkins Companies are wholly-owned subsidiaries of Rhodes Homes Arizona, LLC, ("Rhodes Homes Arizona"). The purpose of these consolidated cases is to determine whether the Perkins Companies are fit and proper entities to receive the requested CC&Ns.

Pursuant to her procedural order dated July 31, 2006 (the "Procedural Order"), the Administrative Law Judge ("ALJ") ordered the Perkins Companies and Utilities Division Staff ("Staff") to file legal briefs on nine issues listed in the Procedural Order. The ALJ also ordered oral argument on the nine issues to be held August 30, 2006. On August 14, 2006, the Perkins Companies and Staff filed their simultaneous opening briefs on the nine issues, and on August 28, 2006, the Perkins Companies filed its response brief.

Snell & Wilmer

LLP
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

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1 In its opening brief¹, Staff asserts that Rhodes Homes Arizona is acting as a public
2 service corporation and that Rhodes Homes Arizona has violated A.R.S. § 40-281 by
3 constructing certain infrastructure inside and outside the Golden Valley development
4 without a CC&N. Staff further asserts that Rhodes Homes Arizona should either apply
5 for its own CC&N or convey all utility assets to the Perkins Companies. Rhodes Homes
6 Arizona is not a party to these consolidated cases or to any other proceeding before the
7 Commission, and has not consented to the jurisdiction of the Commission.

8 Staff has made no assertions of any wrongdoing against the Perkins Companies,
9 and there is nothing to be addressed by the Perkins Companies with regard to the nine
10 issues. Since there are no issues for oral argument pertaining to the Perkins Companies,
11 and since Rhodes Homes Arizona is not a party to these consolidated cases, the oral
12 argument set for August 30, 2006, is inappropriate and should be vacated.

13 The Perkins Companies note for the record that Rhodes Homes Arizona is not a
14 party to these consolidated cases and has not consented to the jurisdiction of the
15 Commission. Statements contained in this motion pertaining to Rhodes Homes Arizona
16 are the statements of the Perkins Companies only and should not be construed as the
17 statements of Rhodes Homes Arizona.

18 ARGUMENT

19 **A. THERE ARE NO MATERIAL FACTUAL ISSUES OF DISPUTE**
20 **BETWEEN STAFF AND THE PERKINS COMPANIES WITH REGARD**
21 **TO THE NINE ISSUES PERTAINING TO THE PERKINS COMPANIES.**

22 With respect to the Perkins Companies, Staff has not raised any material
23 issues of dispute regarding the issues listed in the Procedural Order. In its opening brief,
24 Staff made each of the following statements with which the Perkins Companies agree:

- 25 1. "The Companies are the Applicant in this case."²
- 26 2. "The Companies both filed applications in this case for CC&Ns."³

27 ¹ Staff has not filed a brief in response to Perkins Companies' Opening Brief.

28 ² *Staff Opening Brief* (August 14, 2006) at 2, line 3. Staff's reference to the "Companies" is to the "Perkins Companies."

³ *Id.* at 2, lines 3-4.

- 1 3. "[T]he Companies still exist as separate legal entities."⁴
2 4. "If the Companies are granted CC&Ns, the Companies, not Rhodes
3 Homes [Arizona], will be responsible for providing water and wastewater services to
4 their certificated areas."⁵
5 5. "The Companies are not acting as public service corporations at this
6 time."⁶
7 6. "At this point, the Companies only actions have been to apply for
8 CC&Ns from the Commission."⁷
9 7. "At this time, the Companies are not supplying water to the design
10 homes discussed at the procedural conference."⁸
11 8. "In this case, it is not necessary to pierce the corporate veil."⁹

12 The statements quoted above constitute virtually all of the discussion regarding the
13 Perkins Companies in the Staff brief.

14 The remainder of the brief is devoted to whether or not Staff believes that Rhodes
15 Homes Arizona is acting as a public service corporation and if so, whether Rhodes Homes
16 Arizona violated A.R.S. § 40-281. This is clearly the crux of the matter, and it pertains to
17 Rhodes Homes Arizona and not the Perkins Companies. Staff acknowledges that the
18 Perkins Companies are separate legal entities from Rhodes Homes Arizona. *Staff*
19 *Opening Brief* at page 2, line 5.

20 Rhodes Homes Arizona is not a party to these consolidated cases, has not
21 consented to the Commission's jurisdiction, and is not subject to the Commission's
22 jurisdiction. It would be improper for the Commission to go ahead with oral argument
23 where the purpose is to adjudicate whether or not Rhodes Homes Arizona is acting as a
24 public service corporation when Rhodes Homes Arizona is not a party to that proceeding!

25 _____
26 ⁴ *Id.* at 2, line 5

27 ⁵ *Id.* at 2, lines 5-7.

28 ⁶ *Id.* at 4, line 16.

⁷ *Id.* at 4, lines 17-18.

⁸ *Id.* at 4, lines 21-22.

⁹ *Id.* at 8, line 14.

1 Clearly, such a course of action violates the due process rights of Rhodes Homes Arizona,
2 and would not result in any order that would be binding upon Rhodes Homes Arizona
3 The Commission's lack of jurisdiction over Rhodes Homes Arizona is discussed below.

4 **B. RHODES HOMES ARIZONA IS NOT A PARTY TO THESE**
5 **CONSOLIDATED CASES AND THE COMMISSION LACKS**
6 **JURISDICTION TO ADJUDICATE WHETHER RHODES HOMES**
7 **ARIZONA IS ACTING AS A PUBLIC SERVICE CORPORATION.**

8 Rhodes Homes Arizona is not a party to these consolidated cases and has
9 not consented to the jurisdiction of the Commission. Absent consent to jurisdiction, the
10 Commission lacks the jurisdiction to make a determination that Rhodes Homes Arizona,
11 or any other entity, is acting as a public service corporation under Article 15, Section 2 of
12 the Arizona Constitution. Rather, the Commission must follow the procedure set down in
13 A.R.S. §40-422(A), which states as follows:

14 *When the commission is of the opinion that a public service corporation is*
15 *failing or about to fail to do anything required of it by law or an order or*
16 *requirement of the commission, or is doing or about to do or permitting or*
17 *about to permit anything to be done contrary to law or any order or*
18 *requirement of the commission, it shall commence a proceeding in the*
19 *name of the state to have such violations or threatened violations*
20 *prevented, either by mandamus or injunction. The commission shall bring*
21 *the action in the superior court in the county in which the claim arose, or in*
22 *which the corporation complained of has its principal place of business or*
23 *an agent for any purpose, or in which the commission has its office.*

24 The Arizona Supreme Court has held that an action under A.R.S. §40-422 is the
25 appropriate way to resolve the question of whether an entity is a public service
26 corporation. In *Visco v. State of Arizona*, 95 Ariz. 154 (1963), the Arizona Attorney
27 General brought an action at the request of the Arizona Corporation Commission against
28 John Visco and Arizona Mill Supply, Inc., (the "Appellants") on the grounds that the
Appellants were operating as common or contract carriers without having first obtained
the necessary CC&N from the Commission. The Arizona Supreme Court reversed the
lower court decision which found that the Appellants were public service corporations and
enjoined them from operating without a CC&N, and directed the lower court to dismiss

1 the complaint. However, the Supreme Court endorsed the procedure followed in *Visco*,
2 stating that "[t]his action under § 40-422 is an appropriate one in which to decide the
3 question of whether the defendant is a public service corporation." *Id.* at 158.

4 In *Williams v Arizona Corporation Commission*, 102 Ariz. 382 (1967), the Arizona
5 Supreme Court quashed an order to show cause issued by the Commission in the case of a
6 contractor engaged in the business of moving houses.¹⁰ The Commission asserted that the
7 contractor, Harold Williams, should cease and desist his operations as a house mover and
8 be fined for the reason that he did not hold a CC&N to operate as a common or contract
9 motor carrier. Williams argued that his "carrying" was only incidental to another lawful
10 business, and that he was not subject to the Commission's jurisdiction.

11 The Arizona Supreme Court agreed with Williams, ruling that the Commission
12 lacked jurisdiction to adjudicate whether an entity was a public service corporation within
13 the meaning of Article 15, Section 2, stating as follows:

14 *In invoking Article XV, § 2, the Commission assumes the truth of what is*
15 *here disputed, that is, that petitioner is engaging in the business of carrying*
16 *property for hire, and fails to recognize petitioner's asserted status that he*
17 *is carrying only as an incident to another lawful business and is not a*
18 *public service corporation. Until there has been determination of this*
19 *question favorable to the Commission in an appropriate proceeding, it is*
20 *without jurisdiction to compel petitioner to appear before it or submit to its*
21 *control.*

22 *It is ordered that the proceeding before the Commission be quashed. Id.*

23 Additionally, the Arizona Attorney General has issued a formal opinion that the
24 Commission lacks the jurisdiction to directly order an entity to appear before it. In
25 Opinion 177-150, the Attorney General considered a leasing arrangement that was
26 allegedly designed to circumvent the Commission's regulation of common or contract
27 motor carriers, and concluded as follows:

28 *Since apparently the entities involved in this type of subterfuge are most*
often companies not already subject to the jurisdiction of the Commission,

¹⁰ Williams' petition stated that "he is a contractor engaged in the business of moving houses, and as such submits bids, undertakes to alter, improve, repair, move, erect, or demolish any building or other structure." *Williams v. Arizona Corp. Comm'n* at 1.

1 it will not be possible for the Commission to directly order the firms to
2 appear before it. See *Williams v. Arizona Corporation Commission*, 102
3 Ariz. 382, 430 P.2d 144 (1967). The Commission may seek to have the firm
4 voluntarily submit to its jurisdiction, direct the Attorney General to bring
5 an action to enjoin the violation pursuant to A.R.S. § 40-422, or may
6 pursue the misdemeanor remedies available in A.R.S. § 40-660.¹¹ *Ariz. Op.*
7 *Atty. Gen. No. 177-150 (1977) (emphasis in original).*

8 Staff recently acknowledged the above-described limitation on the Commission's
9 jurisdiction in a case pending before the Commission. In the case captioned *In the Matter*
10 *of the Formal Complaint of Accipiter Communications, Inc., Against Vistancia*
11 *Communications, L.L.C., Shea Sunbelt Pleasant Point, L.L.C., and Cox Arizona Telcom,*
12 *L.L.C.* (Docket T-03471A-05-0064), Staff investigated an alleged anticompetitive
13 arrangement between Cox Arizona Telcom, Vistancia Communications, and Shea Sunbelt
14 Pleasant Point, the developer of the Vistancia master planned development. In oral
15 argument held June 9, 2005, Staff legal counsel framed the issues in the case to include
16 "whether the developer in this instance is acting as a public service corporation under
17 Arizona law." *Transcript of Oral Argument* held June 13, 2005 (Docket T-03471A-05-
18 0064) at page 10, lines 20-22. Staff counsel stated that a *prima facie* case had been made
19 that the developer was acting as a public service corporation:

20 *Under Counts I and II, Accipiter has presented sufficient evidence to*
21 *establish a prima facie case that both Vistancia and Shea [the developer]*
22 *are acting as public service corporations under Arizona law. In addition,*
23 *Staff believes that there is also evidence to establish the existence of a joint*
24 *venture or enterprise between Cox, Shea, and Vistancia to provide*
25 *telephone service to the public. Id. at page 12, lines 5-12.*

26 However, in a subsequent procedural conference held February 9, 2006, Staff
27 counsel agreed that the Commission lacked jurisdiction over the developer—Shea Sunbelt
28 Pleasant Point—as evidenced by the following exchange between the ALJ and Staff
29 counsel:¹²

¹¹ A.R.S. § 40-660 was repealed since the issuance of Opinion 177-150.

¹² Staff reached its conclusion that the Commission lacked jurisdiction over the developer even though the allegations against the developer were very serious. Staff counsel stated, for example, that:

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Judge Nodes: Well, I understand that. I think there are a lot of people that believe that they [Shea Sunbelt Pleasant Point and the City of Peoria] should voluntarily come forward and participate. But I think it is pretty obvious at this point that there is no intent on their part to do so.

And given that, is there, has Staff done any research on whether the Commission may seek to join those entities and, if so, how that would best be accomplished?

Ms. Scott: Your Honor, we, I guess clarifying on the joinder issue as a necessary party, again we don't feel it is necessary to join either Shea or the city as necessary parties. Explaining a little further on that point, we do not believe that the Commission has the jurisdiction to join these parties as, join these entities as necessary parties at this point in time. And I guess we would refer you to the *Williams* case. And I can give you the cite on that. That is 430 P.2nd, Pacific 2nd, 144. That is a Supreme Court of Arizona case issued in 1967. *Transcript of Procedural Conference* held February 3, 2006 (Docket T-03471A-05-0064) at page 20, lines 13-21, and page 21, lines 13-23.

The question of whether an entity is a public service corporation subject to regulation by the Commission is a question of law, the resolution of which is vested in the courts.¹³ If the Commission truly believes that Rhodes Homes Arizona is acting as a public service corporation, the procedure is clear: the Commission must bring an action in

It is clear to Staff that the arrangements and the complex web agreements between Cox, the developer, and the City were put in place to enrich the various parties to the agreements and were intended to stymie entry by competitive providers into the Vistancia development.

The arrangement, to Staff's knowledge, is one of a kind. If allowed to continue, arrangements of this kind will have an adverse impact on customer choice, the customer's ability to obtain competitive rates, to obtain their preferred provider of choice, and to obtain the benefits of competition which this Commission has worked so hard to put in place. The preclusive arrangement is so anticompetitive on its face that it has drawn the attention of the United States Department of Justice which has now started its own investigation into this matter. *Transcript of Oral Argument* held June 13, 2005 (Docket T-03471A-05-0064) at page 10, line 24 through page 11, line 15.

¹³ *Southwest Gas Corp. v Arizona Corp. Comm'n*, 169 Ariz. 279, 285 (1991).

1 Superior Court under A.R.S. § 40-422. The Commission simply lacks the jurisdiction to
2 resolve this issue on its own.

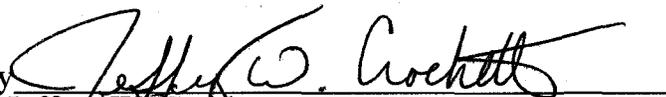
3 A.R.S. § 40-281 applies only to public service corporations. Unless and until the
4 Commission secures an order from a court that Rhodes Homes Arizona is a public service
5 corporation, Rhodes Homes Arizona cannot be in violation of A.R.S. § 40-281. Since the
6 Commission lacks jurisdiction over Rhodes Homes Arizona, oral argument on the issues
7 pertaining to Rhodes Homes Arizona identified in the Procedural Order would be
8 improper and certainly would not result in any order that would be binding upon Rhodes
9 Homes Arizona. As stated above, there are no material issues of dispute between Staff
10 and the Perkins Companies with regard to any issue related to the Perkins Companies, so
11 there is no legitimate reason to proceed with oral argument.

12 **CONCLUSION**

13 Since Staff has not raised any material issues of dispute with regard to the Perkins
14 Companies, and since the Commission lacks jurisdiction to proceed in these consolidated
15 cases with an adjudication of the status of Rhodes Homes Arizona, no purpose would be
16 served by the oral argument currently scheduled for August 30, 2006. Accordingly, the
17 Perkins Companies request that the ALJ vacate the oral argument scheduled for August
18 30, 2006, be vacated.

19 DATED this 28th day of August, 2006.

20 SNELL & WILMER

21
22 By 

23 Jeffrey W. Crockett
24 Kimberly A. Grouse
25 One Arizona Center
26 400 East Van Buren
27 Phoenix AZ 85004-2202
28 Attorneys for Perkins Mountain Water Company and
Perkins Mountain Utility Company

1 ORIGINAL and 15 copies filed this 28th day of August, 2006, with:

2 Docket Control
3 Arizona Corporation Commission
4 1200 West Washington
5 Phoenix, Arizona 85007

6 COPY hand-delivered this 28th day of August, 2006, to:

7 Amy Bjelland, Administrative Law Judge
8 Hearing Division
9 Arizona Corporation Commission
10 1200 West Washington
11 Phoenix, Arizona 85007

12 David Ronald, Staff Attorney
13 Legal Division
14 Arizona Corporation Commission
15 1200 West Washington
16 Phoenix, Arizona 85007

17 Blessing Chukwu
18 Utilities Division Staff
19 Arizona Corporation Commission
20 1200 West Washington
21 Phoenix, Arizona 85007

22 COPY mailed this 28th day of August, 2006, to:

23 Booker T. Evans, Jr.
24 Kimberly A. Warshawski
25 Greenberg Traurig, L.L.P.
26 2375 East Camelback Road, Suite 700
27 Phoenix, AZ 85016

28 Scott Fisher
Sports Entertainment
808 Buchanan Blvd., Suite 115-303
Boulder City, NV 89005

29 