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Arizona Corporation Commission
DOCKETED

NOV - 1 2006

DOCKETED BY 

IN THE MATTER OF THE APPLICATION OF
WEST END WATER COMPANY FOR AN
EXTENSION OF ITS CERTIFICATE OF
CONVENIENCE AND NECESSITY.

DOCKET NO. W-01157A-05-0706

APPLICANT'S CLOSING BRIEF

On October 5, 2005, the Applicant filed an Application for Extension of Certificate of Convenience and Necessity ("Application") in order to serve approximately thirty percent (30%) of Walden Ranch, a planned subdivision of which the other seventy percent (70%) is situated within the Applicant's current certificated service area. [Exs. A-1, A-3, A-10; *see also* Reporter's Transcript of Proceedings, Volume I ("RT x") at 24:13-25.] The expansion area is depicted on Exhibits A-3 and A-10 ("Expansion Area"). According to the developer's plans, all of the Expansion Area will become part of Walden Ranch. [RT I at 29:5-11.]

On February 3, 2006, the Commission Utilities Division ("Staff") filed a Letter of Sufficiency. [Ex. A-12.]¹

¹ Staff reviewed the application and initially issued an insufficiency letter on November 5, 2005. [Ex. A-9.] The Applicant responded on January 4 and 13, 2006. [Exs. A-11, A-13.]

1 On March 28, 2006, the City of Surprise (“Surprise”) moved to intervene. The
2 Applicant did not object, and on April 18, 2006, the Administrative Law Judge (“ALJ”)
3 granted the motion.

4 A hearing was convened on May 22 and 24, 2006 (the “May Hearing”).
5 Following a July 21, 2006 Staff Request to Suspend the Briefing Schedule and Re-Open
6 Hearing, a supplemental hearing convened on September 13, 2006 (the “September
7 Hearing”).

8 Staff supports granting the Application. [Ex. S-1; RT II at 285:4-7.]

9 LEGAL STANDARD

10 The Applicant’s Request to extend its CC&N to cover the Expansion Area should
11 be granted if the extension serves the public convenience and necessity. [Cf. A.A.C.
12 R14-2-402(C)(1) (requiring that a regulated water utility provide only notice to the ACC
13 where the utility intends, as here, to expand into an area that is contiguous to its existing
14 service area).] The Expansion Area is contiguous to the Applicant’s current service area.
15 [See Exs. A-3, A-10.] The Applicant is the first provider in or near the Expansion Area
16 that is ready, willing and able to serve. As a matter of both law and policy, if the
17 Applicant is ready, willing and able to serve and is the first provider in the Expansion
18 Area, the ALJ should recommend, and the Arizona Corporation Commission
19 (“Commission” or “ACC”) should order that the Application be granted.

20 In *ACC v. Fred Harvey Transportation Co.*, 95 Ariz. 185, 388 P.2d 236 (1964),
21 the Arizona Supreme Court concluded that, where two public service corporations are in
22 competition for a CC&N covering the same area, the Commission should determine
23 whether both entities are ready, willing, and able to serve, and if so, then the CC&N
24 should be granted to the entity that was the first to provide service to the area. Here, the
25 balance tips decisively toward the Applicant for three reasons: (1) there is no true
26 competition for service in the Expansion Area, because the Applicant is the only entity

1 with facilities at or near the Expansion Area that has indicated a desire to serve
2 (neighboring Beardsley Water Company did not intervene, and Surprise's closest existing
3 facilities are approximately two miles from the Expansion Area); (2) Surprise is a
4 municipality, not a public service corporation, and (3) beside making naked statements
5 that it has a policy against expansion of private water companies in its recently-
6 established and remarkably expansive planning area, Surprise did not prove that it is
7 ready or able to serve the Expansion Area, much less that it is more qualified to serve
8 than the Applicant.

9 **PROOF OF THE PUBLIC CONVENIENCE AND NECESSITY**

10 In February 2005, representatives of the developers of two proposed subdivisions—
11 Rancho Maria and Walden Ranch—approached the Applicant regarding water service.
12 [RT I at 24:13-25.] Both developers requested water service for their developments from
13 the Applicant. Marvin Collins, the Applicant's General Manager, explained to the
14 developers that Rancho Maria is entirely within the Applicant's current service area, but
15 Walden Ranch is 70% within and 30% without the current service area. [Id.] Mr. Collins
16 further explained that the Applicant would have to apply to expand its service area in
17 order to serve all of Walden Ranch. [Id.] The developers, understanding the need to
18 request ACC approval of an extension of the Applicant's service area, requested service
19 for all of Walden Ranch (and Rancho Maria) from the Applicant, including the
20 Expansion Area. [RT I, at 25:2-6.] The developers' request for service was
21 memorialized by a letter dated March 3, 2005, from Gary K. Jones on behalf of Wittman
22 510, LLC ("Wittman"), which represented the developers. [Ex. A-2.]

23 In 2001, the voters of Surprise adopted "General Plan 2020," which created a
24 planning area for the City of Surprise of approximately 309 square miles. [RT I at 84:17-
25 23; 189:1-3.] Under Arizona's "Growing Smarter" law, A.R.S. § 9-461 *et seq.*, a
26 municipality must approve a general plan. A general plan, however, has nothing to do

1 with the regulation of public service corporations or the jurisdiction of the ACC.
2 Moreover, the “Growing Smarter” law does not overrule –indeed must be interpreted in
3 harmony with— state law governing municipal utilities, A.R.S. § 9-511 *et seq.*, and
4 specifically, with the laws requiring a municipality, under restricted circumstances and
5 procedures, to condemn and provide just compensation to a public service corporation if
6 the municipality elects to provide unregulated municipal utility services where a
7 regulated utility once served.

8 Twelve water providers currently operate within the Surprise general planning
9 area. [RT at 190:1-3.] Surprise does not directly provide water services to any of its own
10 citizens. Instead, Surprise contracts with Arizona-American Water Company. [RT I at
11 217-218.]

12 Surprise purports to have a policy “to allow the existing legal franchises and water
13 company service areas to continue, but we’re preventing new utilities or expansion of the
14 existing franchises and water company service areas” [RT I at 189:15-17.] Although
15 Surprise articulates such a policy, in this case it is undisputed that Surprise has no
16 existing water distribution or delivery facilities anywhere near the Expansion Area. [RT I
17 at 220-221.]

18 Moreover, the Expansion Area is not poised to become a part of Surprise.
19 Surprise not only conceded that it does not have current legal authority to annex the
20 Expansion Area (because the Expansion Area is not contiguous to the City’s current
21 municipal boundaries) [RT I at 81:2-9; Ex. COS-9], it also conceded that future
22 annexation of the Expansion Area is not even currently “predictable.” [*Id.*; RT I at 84-
23 85.]

24 When the Application was filed, the Expansion Area was owned by Walden
25 Ranch, LLC, which Wittman represented. The Expansion Area came under an option
26 contract with Woodside Homes in approximately July 2005. [RT III at 62-63.] The

1 option contract covered three separate option areas, together comprising the entirety of
2 Walden Ranch. [RT III at 23:10-25.] When Woodside Homes entered into the option
3 agreement, it knew about, and did not object to, the Wittman request for service from the
4 Applicant. [RT III at 63:7-13.]

5 In January 2006, Aricor Water Solution completed a Water System Master Plan
6 (“Master Plan”) that the Applicant commissioned in anticipation of the substantial growth
7 that the Applicant expects will occur in its service area and the Expansion Area. The
8 Master Plan recommended locations and sizing of regional water supply, storage and
9 booster pumping facilities for the Applicant’s current service area and the Expansion
10 Area. [Ex. A-4; RT I at 138-143.]

11 Before the May Hearing, Woodside Homes had exercised two of the three options
12 for the parts of Walden Ranch within the Applicant’s existing CC&N. The Applicant had
13 not yet exercised the option for the Expansion Area. [RT I at 25-26.] Before the May
14 Hearing, the Applicant and representatives of Woodside Homes had engaged in
15 discussions about water service and eventual main extension agreements. [RT I at 26:2-
16 16.] Indeed, before the May Hearing, at the request of the Applicant and consistent with
17 the Master Plan, Woodside Homes was already drilling two wells within the Applicant’s
18 existing service area. The wells will be owned by the Applicant and used by the
19 Applicant to provide water service within its service area. The wells were scheduled for
20 completion in June 2006. [RT I at 26-27.] The Applicant anticipated that the capacity of
21 the two wells would be sufficient to serve the proposed Rancho Maria subdivision, the
22 part of Walden Ranch inside the current service area, *and* the Expansion Area. [RT I at
23 26-27.]

24 Because the Wittman request for service had been confirmed by both the words
25 and actions of Woodside Homes, and because no other provider could serve in the area,
26 the Applicant had no doubt that Woodside Homes intended that the Applicant would

1 serve the Expansion Area as well as the 70% portion of Walden Ranch within the
2 Applicant's existing CC&N. [RT I at 27-28.] At the May Hearing, Ray Jones of Aricor
3 Water Solutions testified that he and Gene Morrison, Regional President of Woodside
4 Homes, had regular discussions about receiving water service from the Applicant. Jones
5 believed, as of the May Hearing, that Woodside Homes desired water service from the
6 Applicant. [RT I at 150:8-25.]

7 As of the May Hearing, the Wittman request for service was the only written
8 request for service for the Expansion Area. That request was made by a representative of
9 the current owner and had also been affirmed by the words and actions of the developer.
10 Moreover, notwithstanding the existence of an option agreement covering the Expansion
11 Area, the option had not yet been exercised by the May Hearing, nor had it been
12 exercised by the September Hearing. [RT II at 286:22-24; RT III at 165:11-14.]

13 At the close of the May Hearing, the ALJ requested that the Applicant provide an
14 update "regarding the status of the request for service." [RT II at 333: 15-18.] On July
15 19, 2006, Surprise filed a letter dated July 14, 2006, from Michael J. Curley, Esq. of Earl,
16 Curley & Lagarde, P.C., on behalf of Woodside Walden, LLC, requesting two "will
17 serve" letters (one for water, one for sewer) for the Expansion Area from Surprise. [Ex.
18 COS-20.] Surprise also filed a "will serve" letter for water service dated July 17, 2006,
19 from Rich Williams, Sr., Water Services Director of the City of Surprise, to Mr. Curley,
20 covering the Expansion Area. [Ex. COS-21.] On August 30, 2006, Gary K. Jones of
21 Wittman 510, LLC wrote a letter to the Applicant, stating that Wittman "would withdraw
22 our request to West End to provide water" for the Expansion Area. [Ex. COS-22.] At the
23 September Hearing, Gary Jones testified that Mr. Curley, the zoning lawyer retained to
24 negotiate with Surprise for development entitlements, prepared on behalf of Woodside
25 Homes all or part of Wittman's August 30, 2006, withdrawal letter. [RT III at 28-29.]

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1 The August 30 letter also stated that “Woodside Homes has entered into an
2 Agreement with the City of Surprise, whereby the City of Surprise has agreed to provide
3 water for the southern one-third of Walden Ranch.” [*Id.*] However, Gene Morrison, the
4 Regional President of Woodside Homes, testified at the September Hearing that he was
5 unaware of any such agreement. [RT III at 67:25-68:1-13.] Moreover, Mr. Morrison
6 testified that he did not recall any reference to water service in a draft agreement between
7 Surprise and Woodside Homes that he had reviewed. [RT III at 68:14-24.] Rich
8 Williams of Surprise confirmed at the September Hearing that there was no agreement
9 between Surprise and Woodside Homes. [RT III at 117-188.]

10 At the September Hearing, Mr. Morrison testified that he is “neutral” on the issue
11 whether the Applicant or Surprise provides water service. [RT III, at 69:4-18.] He later
12 confirmed the same opinion to the ALJ: “I guess you just throw them both up against the
13 wall and whoever wins wins.” [RT III at 75:22-23.] On cross-examination, Mr.
14 Morrison stated: “I am willing to talk to any one or any entity that has water that can
15 provide water however the agreements are made.” Mr. Morrison also stated the request
16 for a “will serve” letter from Surprise was on the advice of his zoning lawyer, Mr.
17 Curley, who was motivated to please the City in his quest to obtain zoning approval from
18 Maricopa County. Mr. Morrison entrusted to Mr. Curley all decisions related to
19 obtaining a favorable result in the zoning case for Walden Ranch, including the request
20 for a “will serve” letter from Surprise. [RT III at 90-91.] Mr. Morrison also testified
21 that, in his experience, a “will serve” letter is “a nonbinding intent by an entity to provide
22 services”, and the purpose of the Surprise “will serve” letter was merely to confirm to
23 the County Planning and Zoning Commission that, if Surprise prevailed in its
24 intervention in the current Application, it would be willing to serve the Expansion Area.
25 [RT III at 91:4-14.] Finally, Mr. Morrison confirmed that the request for a “will serve”

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1 letter did not state that Woodside Homes prefers service from Surprise over the
2 Applicant. [RT III at 91:15-18.]

3 Even Rich Williams of Surprise testified at the September Hearing that he
4 understood that Woodside Homes was “neutral” on the selection of water providers. [RT
5 I at 221-222.]

6 Gary Jones of Wittman 510, LLC testified that the August 30 letter was *not* the
7 result of any doubt or concern about the Applicant’s ability to serve. [RT III at 33-34.]
8 Similarly, both Gene Morrison and Gary Jones testified that the August 30, 2006,
9 Wittman letter, and the earlier July 14, 2006, request by Woodside Homes’ attorney for a
10 “will serve” letter from Surprise, were related to the Maricopa County zoning case (as
11 opposed to the current Application). [RT III at 29-30, 62:4-15, 65:11-14.]

12 Maricopa County Planning & Zoning did not indicate a preference for one
13 provider over another, but rather expressed a desire for clarification that *both* the
14 Applicant and Surprise are willing to serve, such that the outcome of the current
15 Application will not affect whether Walden Ranch ultimately receives water service.
16 [See Exs. A-15, A-16, A-17; RT III at 62:16-20.] At a September 7, 2006, hearing of the
17 County Planning and Zoning Commission, Mr. Curley informed the County Planning and
18 Zoning Commission that his client had no preference between the Applicant and Surprise
19 for water service. [RT III at 137:2-10.]

20 Gary Jones’s testimony also described the pressure he and others had received
21 from Surprise not to request water from any private water company, such as the
22 Applicant:

23 15 [TO MR. JONES] Did Mr. Williams [of Surprise] indicate who he was
24 representing

16 when he called you?

25 17 A. No. He didn't indicate that, no.

26 18 Q. Did he explain anything about the City of

19 Surprise's interest in this letter?

20 A. Not during that conversation, no.

21 Q. Did he imply that there would be any negative or
22 adverse consequences if the letter was not sent?

23 A. Not in that conversation.

24 Q. Did he make such an implication in another
25 conversation?

1 A. No.

2 Q. You testified just a minute ago, you said, "not
3 in that conversation."

4 Has Mr. Williams ever indicated to you in any
5 form that there would be negative consequences if a letter
6 similar to this was not sent?

7 A. Not specifically, no.

8 Q. And could you clarify what you mean by "not
9 specifically"?

10 A. Couple years ago there were numerous, numerous
11 meetings where it was made quite clear that the City of
12 Surprise was interested in having that area, as being the
13 water service provider for that area.

13 [RT III at 30-31.]

14 Similarly, during the May Hearing, Ray Jones of Aricor Water Solutions (no
15 relation to Gary Jones) testified about why Woodside Homes might be reluctant to submit
16 a written request for service from the Applicant:

17
18 It's been my experience that the developers are
19 simultaneously involved in not only negotiations with the
20 water company, West End in this case, but with the City for
21 sewer services. And the developers often feel like they're
22 walking a tightrope between the two entities and that actions
23 with one entity may result in negative consequences with the
24 other entity. So they tend to try to do the minimum possible
25 with either entity to get through the process. ... As this case
26 evidences, you have the City of Surprise by its own admission
and policies trying to control the private water companies in
its planning area. And that's naturally a tension. And the
developers, unfortunately, are the ones caught right in the
middle of it, and they're the ones with all the money at risk.

[RT I at 179-180.]

1 Blessing Chukwu testified at the September Hearing that Staff concludes that the
2 various requests for service indicate that “there is a need there. It clearly shows that
3 somebody needs to serve ... that area.” [RT III at 166:22-24.] All of the evidence, both
4 documentary and oral, demonstrates the developer’s present intent and accompanying
5 action (e.g., pursuing a zoning case and drilling two wells) to proceed with the Walden
6 Ranch subdivision.

7 Indeed, by relying on the option agreement that gives Woodside Homes an
8 inchoate interest in the Expansion Area, and also relying on Woodside Homes’ request
9 for a “will serve” from Surprise, Surprise has conceded the need to serve the Expansion
10 Area.

11 The lack of a single, unambiguous request for service from a single entity that
12 both owns and will develop the Expansion Area does not alter or diminish the fact that
13 there is a need for service in the Expansion Area. Once a need for service has been
14 established, the next question is whether there is a preferred provider that will serve the
15 area in a manner consistent with the public interest. Here, the evidence is also
16 unambiguous that the developer is neutral on the issue and will accept service from either
17 the Applicant or Surprise. The evidence is not neutral, however, on the fact that the
18 Applicant is the only provider that can properly serve the Expansion Area in a manner
19 that is consistent with the public interest.

20 **PROOF THAT THE APPLICANT IS READY, WILLING, AND ABLE TO**
21 **SERVE THE EXPANSION AREA**

22 *Ready and Willing:* Since J D. Campbell acquired the Applicant in 1979 (at the
23 request of the ACC Staff due to problems with the predecessor owner), the Applicant has
24 been in continuing operation as a public service corporation in good standing with the
25 ACC and has had no complaints. [RT I at 19-20.] Since 1979, the Applicant’s service
26 area has experienced slow growth, expanding from 230 customers with two wells and

1 two storage tanks, to 235 customers with three wells and three storage tanks. [RT I at 20:
2 12-16.] Over the past four years, however, the Applicant has planned for growth and is
3 finally poised to receive a return on its decades-long investment in the area. Such
4 preparation started when the Applicant hired Marvin Collins in 2002 to manage both the
5 Applicant and its sister company, Sunrise Water Co. [RT I at 17-18.] Mr. Collins is
6 responsible for the day-to-day operations of the companies, including interactions with
7 customers and developers. [*Id.*] In addition, he represents the Applicant in interactions
8 with Staff, the Arizona Department of Environmental Quality (“ADEQ”), the Arizona
9 Department of Water Services, and Maricopa County Environmental Services
10 Department. [*Id.*] Mr. Collins is a licensed Grade II water treatment operator, a Grade II
11 water distribution operator, a Grade II wastewater treatment operator, and a Grade II
12 wastewater collections systems operator. [*Id.*] He has 40 years of experience in the
13 water utility business. [RT I at 42:4-10.] Before working for the Applicant, he worked
14 for Citizens Water Resources from 1966 to 2002, where from 1992 he held the positions
15 of manager of operations, manager of administration, and manager of customer and
16 community relations. [RT I at 17-18.] Mr. Collins’ resume was admitted into evidence
17 as Exhibit A-7.

18 The Applicant also retained Aricor Water Solutions, and specifically Mr. Ray
19 Jones, to prepare the Master Plan. [RT I at 27:17-20.] The Master Plan specifically
20 anticipated and addressed the two planned subdivisions, Rancho Maria and Walden
21 Ranch. [Ex. A-4.; RT I at 137:1-5.] Mr. Jones is a Registered Professional Engineer in
22 California and Arizona and former President of Arizona-American Water Company. [RT
23 I at 137:6-25.] Mr. Jones’s resume was admitted into evidence as Exhibit A-8.

24 The Applicant provided Staff with a copy of the Master Plan in connection with
25 the Application. [RT I at 140:22-25.] The Master Plan calls for two initial systems,
26 divided by Grand Avenue, with the two systems ultimately becoming integrated into one,

1 interconnected system. [RT I at 141-143:1-16.] Walden Ranch would be part of the
2 Wittmann System, which would be divided into two pressure zones. Walden Ranch will
3 be in the low pressure zone. Mr. Jones even named a planned booster station “Walden
4 Ranch.” [RT I at 142:10-25.]

5 The Master Plan exceeds all ACC and ADEQ standards. [RT I at 149:9-11.]
6 Although not a requirement, the Master Plan also adopts and meets the 2003 International
7 Fire Code for fire flow. [RT I at 149:12-18.]

8 Before the May Hearing, the Applicant had already started work on expanding the
9 Wittmann System. Specifically, the Applicant had worked with Woodside Homes to drill
10 two wells to serve all of the planned Rancho Maria subdivision and all of Walden Ranch,
11 including the Expansion Area. [RT I at 35:13-23.]

12 The Applicant is also ready to respond to the increased demands for customer
13 service that growth will necessarily entail. The Applicant shares staff with its sister
14 company, Sunrise Water Co., has regular and fully-staffed office hours, a 24-hour
15 telephone response line with 24-hour emergency service, and the Applicant’s web-site
16 allows customers to contact the Applicant via e-mail, review account information and pay
17 bills on-line. [RT I, at 37:16-17.] In addition, Mr. Collins was formerly the manager of
18 customer and community relations at Citizens Water Resources. [RT I at 17-18.]

19 The Applicant could provide service to the Expansion Area “immediately”
20 because it has an existing water line near the area. [RT I at 115:9-12; *see also* RT II at
21 257 (Staff’s view that at least one of the two new wells will soon be available.) Thus, the
22 Applicant has current capability, viable and reasonable expansion plans to handle future
23 growth, capability to respond to current and future customer needs, and personnel and
24 consultants who are qualified to manage the company in times of growth. The Applicant
25 is ready and willing to serve the Expansion Area.

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1 Surprise, in stark contrast, is “willing” but not “ready.” Its nearest water
2 distribution and delivery services are at least two miles away. [See COS-14; RT II at
3 257.] Surprise would face significant challenges to serve the area. As Ray Jones
4 testified:

5 To the north is the West End service area, so [Surprise] could not
6 have any facilities there. To the west and south is the Beardsley
7 certificated or service area, so Surprise would not have any facilities
8 there. That really leads us to the east. And if we look at the area to
9 the east, you can see from the aerial photograph [Ex. A-3], it is
10 already dotted with low density residential development And
11 those people in there would have their own wells. There is no water
12 system there today, either private or municipal, serving those houses.
13 So considering all of that, it’s my opinion that Surprise would be
14 looking at a stand-alone system to serve this 160-acre parcel.

15 [RT I at 144-145.]

16 Ray Jones also testified that such a stand-alone system would be more expensive
17 by approximately \$1,000 per dwelling unit than the planned expansion of the Applicant’s
18 system. [RT I at 145-146.]

19 Surprise concedes that it cannot immediately serve the expansion area and does
20 not have nearby facilities. Ironically, Surprise’s proposed solution to its inability to serve
21 provides further proof that the Applicant is ready now. While cross-examining Ray Jones
22 about his opinion that Surprise would need a more expensive, stand-alone system to serve
23 the Expansion Area, Surprise’s counsel asked about a possible Mutual Aid Agreement
24 between Surprise and the Applicant. Under such an agreement, the Applicant would sell
25 water wholesale to Surprise, and Surprise would then sell *the Applicant’s water* to the
26 customers in the Expansion Area. [RT I at 172-174:1-4.] Rich Williams of Surprise also

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1 testified that he hopes to purchase water from the Applicant through a Mutual Aid
2 Agreement. [RT I at 195-196.]²

3 Thus, if Surprise were to prevail in this case, it appears that Surprise's only viable
4 plan to serve the Expansion Area would be to buy water wholesale *from the Applicant*.
5 The result, therefore, would be the unregulated sale of *the same water* that would be
6 delivered if the Applicant were the provider, but the Applicant would have provided *that*
7 *same water* under the Commission's regulation. The net result would be that the
8 Applicant's request to expand its valuable CC&N to provide needed service would be
9 thwarted solely for the financial interests of Surprise, but against the public interest of the
10 utility customers and contrary to Arizona law requiring condemnation and just
11 compensation.

12 Surprise's plan for providing service to the Expansion Area fully demonstrates the
13 lack of logic of its intervention in this case. The Applicant has proved that it is ready and
14 willing to serve. Surprise concedes that it prefers help from the Applicant if Surprise
15 ends up as the provider. Surprise concedes, therefore, that the Applicant is ready to
16 serve, while at the same time admitting that Surprise is nowhere near ready to serve.

17 Exhibit COS-4 shows the paucity of water infrastructure belonging to Surprise
18 even within its current corporate boundaries. Surprise concedes that it does not currently
19 provide any water services, anywhere. It contracts for those services. In relation to water
20 service, therefore, Surprise has little to offer beyond its aggressive policy against
21 expansion of private water companies in its planning area.³

22
23 ² Surprise never explained how the aid provided through such an agreement would be "mutual."

24 ³ The only issue on which Surprise asserted an advantage over the Applicant was the Applicant's legal
25 impediment—an impediment created by Surprise—to providing wastewater service. Surprise argues that
26 such a "dual system" is preferable. A dual system, however, is not a requirement—nor even a factor—in
determining whether to grant the Application. But even if it were a factor, the Applicant is both qualified
and ready to start wastewater service, but it *is prohibited from doing so by Surprise itself*. [RT I at 36-
37.] Surprise created the condition that it claims makes it the preferable water provider. Through the

1 Able: The Applicant is legally able to serve. It is in compliance with all
2 Commission requirements. [Ex. S-1; RT II at 284-285.] The Applicant has also obtained
3 a franchise for the Expansion Area from Maricopa County. [Ex. A-5, A-14; RT I at
4 30:12-18.]

5 On April 21, 2006, Staff issued its report recommending that the Application
6 should be granted with conditions. [Ex. S-1.] The Applicant agrees to all of the
7 conditions. [RT I at 32:5-7.] Moreover, the evidence at the May Hearing established that
8 Conditions 5 and 6 have been satisfied and are no longer necessary. The evidence also
9 showed the work that the Applicant had already done to meet Conditions 7 and 8.

10 Condition 5 required the applicant to file a curtailment tariff. Before the start of
11 the May Hearing, the Applicant had filed a curtailment tariff, which had been approved
12 but had not become effective as of the May Hearing. [RT II at 255-256.]

13 Condition 6 required the Applicant to obtain a County franchise for the Expansion
14 Area. The franchise was obtained before the May Hearing. [RT I at 30:24-25 – 31:1-6;
15 Exs. A-5, A-14.]

16 Conditions 7 and 8 concern water loss. The Applicant is required to present a plan
17 for curtailing water loss within 45 days of a decision on the Application, and also must
18 reduce its water loss to less than 15 percent before it submits any main extension
19 agreement for approval. At the May Hearing, the Applicant presented extensive evidence
20 on its research and plans in regard to water loss. [*E.g.*, RT I at 32-35, 152-153.] Indeed,
21 as of the May Hearing, the Applicant's water loss was less than 15 percent. [RT I at
22 34:4-6.]

24 MAG 208 process, Surprise has a legal monopoly on wastewater services within its planning area. [RT I
25 at 153-159; Ex. A-6.] The Applicant is ready to provide wastewater services, but due to Surprise's
26 domination of the MAG 208 approval process, and through no fault of the Applicant, the Applicant is not
legally able to provide that service. In any event, as the Commission knows, many utilities provide
efficient and adequate water utility service throughout the state without also being a wastewater provider,
especially where there is a municipal or governmental wastewater system in the region.

1 of Surprise's rates, safeguards against arbitrary or capricious rate increases in the future,
2 or other consumer protections. The Commission would, in essence, expose future
3 consumers to an unregulated utility provider that currently serves only through a sub-
4 contractor and that has such ambitious growth plans that, on this record, no one can
5 predict the future of Surprise's rates. In light of the fact that Surprise conceded that its
6 future ability to annex Walden Ranch is not even "predictable," the Commission should
7 consider that future customers in the area will not be Surprise citizens for the foreseeable
8 future, and thus, will have no rights as citizens that will protect them, such as the right to
9 vote in municipal elections.

10 The Arizona Court of Appeals addressed the loss of consumer protection
11 safeguards when a municipality takes over a regulated utility in *City of Casa Grande v.*
12 *Ariz. Water Co.*, 199 Ariz. 547, 551, 20 P.3d 590, 594 (App. 2001). There, the City of
13 Casa Grande attempted to condemn part of Arizona Water Company ("AWC") without
14 first putting the condemnation to a public vote, as required by A.R.S. § 9-514. The Court
15 of Appeals held that the election requirement is mandatory. In so ruling, the Court
16 addressed the impact on customers of moving from a regulated to an unregulated utility:

17 The portion of AWC the City seeks, once acquired, would no
18 longer be subject to the jurisdiction of the Arizona
19 Corporation Commission (ACC), and the customers in the
20 former portion of AWC's service area could thereby lose
21 several statutory protections. Because regulation of
22 municipally owned utilities is not within the purview of the
23 ACC, recourse for their customers is through the municipal
24 electoral process – a very different method of registering
25 concerns with utility rates or service from that of the ACC's
26 administrative procedures to which public service
corporations are subject. The comprehensive statutory
scheme prescribing ACC regulation of public service
corporations plainly indicates the legislature's recognition

1 that the matter is of statewide importance and controlled
2 appropriately by the ACC.

3 199 Ariz. at 551, 20 P.3d at 594 (internal citations omitted).

4 The above-quoted language is particularly powerful in this case, where there is not
5 even a change contemplated from ACC regulation to electoral regulation. Because there
6 is no “predictable” ability for Surprise to annex the Expansion Area, the exchange in this
7 case (should Surprise prevail in its intervention) would be from ACC regulation to no
8 regulation at all.

9 CONCLUSION

10 The Applicant is ready, willing, and able to serve the Expansion Area and is the
11 only provider with infrastructure near the Expansion Area that has demonstrated an
12 interest in service. There is an undisputed need for service in the Expansion Area. The
13 developer of the Expansion Area is neutral on the selection of a provider. The
14 Commission, however, should not be neutral. The Applicant has actual plans that are
15 already under way to construct new infrastructure that will serve substantial, planned
16 growth, of which the Expansion Area represents only 30% of one of two major
17 subdivisions. Surprise, on the other hand, has a policy, but no actual plans, designs,
18 funding, or even demonstrable intent to serve. For the Applicant, the Application is part
19 and parcel of an integrated, system wide expansion. For Surprise, the Application is
20 merely a symbol of territorial competition that it wants to quell without paying just
21 compensation as required by state law.

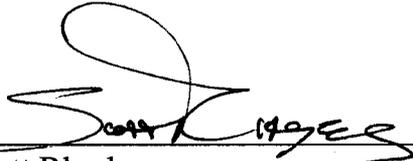
22 The Commission should not be distracted by the ambitious and speculative plans
23 of an unregulated municipality. The Arizona Constitution, and applicable statutes and
24 case law, all direct the Commission’s attention to the Applicant’s ability to serve, as well
25 as the long-term interests of the eventual end-users. Surprise’s ambitious infrastructure
26 growth plans spell uncertainty – uncertain rates, uncertain quality, uncertain reliability,

1 and uncertain customer service. Such uncertainty makes it essential that the Commission
2 act judiciously to protect the eventual customers' interests by keeping the Expansion
3 Area under its jurisdiction. Such a decision would *not* impede Surprise's ultimate goal to
4 become the only provider in its general plan area. It would, however, maintain events on
5 a reasonable timetable, so that the Commission can keep watch over the area until
6 Surprise is ready to assume the role that it desires.

7 The Applicant's qualifications having been established through documentary and
8 oral testimony, and in light of Staff's recommendations, the Application should be
9 granted under the conditions that Staff recommends.

10 DATED this 1st day of November, 2006.

11 JENNINGS, STROUSS & SALMON, P.L.C.

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14 By 

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