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AZ CORP COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

ASSET TRUST MANAGEMENT, CORP.

Complainants,

v.

PINE WATER COMPANY, an Arizona
Corporation

Respondent.

DOCKET NO. W-03512A-06 -613

RESPONSE TO PINE WATER COMPANY'S
MOTION TO DISMISS

(Oral Argument Requested)

COMES NOW ASSET TRUST MANAGEMENT, CORP., by and through its attorney undersigned and hereby files this Response to Pine Water Company's Motion to Dismiss the Complaint of Asset Trust Management Corporation. Asset Trust Management Corp. asserts that the Motion of Pine Water Company is without merit and the Hearing Officer should deny the Motion to Dismiss. This Response is supported by the following Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 26th day of October, 2006.

GLIEGE LAW OFFICES P.L.L.C.

Arizona Corporation Commission
DOCKETED

OCT 27 2006

DOCKETED BY nr

John G. Gliege

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MEMORANDUM OF POINTS AND AUTHORITIES

PINE WATER COMPANY IS UNABLE AND UNWILLING TO SERVE THE COMPLAINANT'S PROPERTY.

As the exhibits attached to the Complaint of Asset Trust Management Corp. clearly indicate, Pine Water Company is unwilling and unable to provide water service to the property owned by Asset Trust Management Corp. {hereinafter "ATM"} which is located within the geographic area covered by the Certificate of Convenience and Necessity held by Pine Water Company which gives it the right to serve domestic water in that geographic region. Pine Water Company, rather than investing in the necessary capital facilities to provide water within its Certificate of Convenience and Necessity {hereinafter "CC&N"} has chosen instead to blame the Arizona Corporation Commission {hereinafter "ACC"} for its inability to serve by citing several decisions of the ACC which limited Pine Water Company's ability to provide for new service connections.

Because Pine Water Company is unable and unwilling to serve this property the Complainants, although they requested service from Pine Water Company have been denied that service, thereby denying them the use and enjoyment and benefit of their property. Sadly the Complainants have another source of water which would accommodate the use of their property, but they cannot access that source of water because of the CC&N held by Pine Water Company.

THE TEST TO BE APPLIED BY THE HEARING OFFICER

A Motion to Dismiss is not favored by the Courts. The Courts only grant such relief when it is:

. . . certain that the plaintiff can prove no set of facts which will entitle them to relief upon their stated claim. *Tucson Airport Authority v. Certain Underwriters at Lloyd's London, 186 Ariz. 45,46,918 P.2d 1063, 1064 (Ct. App. 1996)*

The Hearing Officer must determine that ATM is not entitled to relief:

under any set of facts susceptible to proof under the claims stated. *Id, see also Carrillo v. State, 169 Ariz. 126, 817 P.2d 493 (Ct. App. 1991)*

1 The Hearing Officer must not dismiss this Complaint unless ATM is not entitled to relief under any facts
2 susceptible of proof under the claims stated. *Donnelly Construction Company v.*
3 *Oberg/Hunt/Gilleland, 139 Ariz. 184, 677 P.2d 1292 (S. Ct. 1984).*

4 In evaluating the Motion to Dismiss, the Hearing officer must take the alleged facts in the
5 Complaint as being true. *Petolicchio v. Santa Cruz County Fair and Rodeo Association, Inc., 177*
6 *Ariz. 256, 866 P.2d 1342 (S.Ct. 1994); Long v. Arizona Portland Cement Company, 89 Ariz. 366, 362*
7 *P.2d 741 (1961)* In this light the Motion to Dismiss must be tested, and as the following will show, the
8 Motion fails to meet the test and should in fact be denied.

9
10 **THE ARIZONA CORPORATION COMMISSION CAN AMEND THE**
11 **CERTIFICATE OF CONVENIENCE AND NECESSITY GRANTED TO PINE**
12 **WATER COMPANY**

13 Pine Water argues that the ACC may not delete territory from its CC&N because the only reason
14 that Pine Water Company is unable or unwilling to serve is that the Orders of the ACC prohibit them
15 from serving at this time. The problem with this argument is that it fails to address the underlying
16 reasons for the ACC's Orders; that Pine Water Company has insufficient water resources to provide the
17 services. The pleadings allege the existence of other available water resources to provide this water
18 service. Assuming that to be true, that the Property can obtain water because it is available, then the
19 question comes down to why Pine Water Company is not sufficiently capitalizing its operation to obtain
20 the available sources of water. Contrary to the position of Pine Water Company, water is available to
21 service the property of ATM, it is just not water that at this time can be delivered by Pine Water
22 Company. To not amend the Certificate of Convenience and Necessity to delete properties which cannot
23 be served because Pine Water Company is complying with ACC orders is to reward Pine Water
24 Company for its inaction in developing adequate water resources at the expenses of ATM and the public
25 generally.

26 Pine Water Company has breached its agreement with the State which granted it the CC&N
27 because of its failure to make adequate investment and provide for water service to ATM. Our Courts
28 have clearly stated:
29

1 In the performance of its duties with respect to public service
2 corporations the Commission acts as an agency of the State. By the
3 issuance of a certificate of convenience and necessity to a public service
4 corporation the state in effect contracts that if the certificate holder will
5 make adequate investment and render competent and adequate service, he
6 may have the privilege of a monopoly as against any other private utility.
Application of Trico Electric Cooperative, Inc. v Senner et al, 92 Ariz.
373, 377 P.2d 309 (1962)

7 ATM has applied for the amendment of the Certificate of Convenience and Necessity of Pine Water
8 Company because it cannot, will not and does not render competent and adequate service, nor has it
9 made an adequate investment into the necessary facilities to provide such service.

10 The Complaint of ATM is a complaint requesting that the ACC delete the property owned by
11 ATM from the Certificate of Convenience and Necessity of Pine Water Company. This is in harmony
12 with the theory of regulated monopoly which has been adopted in Arizona.

13 . . . The monopoly is tolerated only because it is to be subject to vigilant
14 and continuous regulation by the Corporation Commission, and is subject
15 to rescission, alteration or amendment at any time upon proper notice
16 when the public interest would be served by such action. *Davis v.*
Corporation Commission of the State of Arizona, 96 Ariz. 215, 218, 393
P.2d 909, 911 (1964).

17 This is clearly echoed by *Arizona Revised Statutes § 40-252* which provides the power to the ACC to
18 amend its previous order granting the CC&N and delete this territory. An application to amend a
19 previous order is not a collateral attack upon that order, but is in fact the appropriate manner in which to
20 proceed. *Id at 219*

21 While, as Pine Water asserts, the ACC may have duty to protect Pine Water from competing
22 service, that duty ceases and in fact the CC&N is limited by the ability to serve. As noted in *James P.*
23 *Paul Water Co., v. Arizona Corporation Commission 137 Ariz. 432, 671 P.2d 404 (S.Ct. 1983)*, a case
24 heavily relied upon by Pine Water Company:

25 . . . Where a public service corporation holds a certificate for a
26 given area, the public interest requires that the corporation be allowed to
27 retain its certificate until it is unable or unwilling to provide needed
28 service at a reasonable rate.

1 Clearly that is the circumstance here. Pine Water Company cannot and will not provide needed service
2 at a reasonable rate to ATM. Thus the remedy for ATM is to request that its property be deleted from
3 the CC&N of Pine. Pine is trying to make the ACC the proverbial "fall guy" for its inability to provide
4 water service. That is not the case. Water is there, Pine is unable and unwilling to locate and provide
5 that water in a nondiscriminatory manner to all persons within its CC&N.

6
7 **DELETION OF TERRITORY FROM THE PINE WATER COMPANY IS**
8 **CLEARLY WITHIN THE PUBLIC INTEREST.**

9 Pine Water Company argues that to allow property to be removed from its CC&N is contrary to
10 the public interest in Pine. Since Pine Water Company can no longer provide water service connections
11 in Pine, what is the public interest which being protected? One can only assume that the interest being
12 protected is that of Pine Water Company which in its undercapitalized state is attempting to retain
13 control over the area without providing any additional water service. To require that ATM first apply for
14 a variance of the moratorium places a burden on ATM to do Pine Water Company's work. Why should
15 ATM expend the funds to apply for the variance when the restriction is not one of their doing. Second,
16 why should it be incumbent upon ATM to provide the water to Pine Water so that Pine Water Company
17 can sell that same water back to ATM? Second, what guarantee is there to ATM that the variance would
18 be granted? Third, Pine Water Company has given no indication that it would be willing to purchase the
19 water necessary to provide water service to ATM, and even if it did, would that be in the public interest
20 to provide ATM with water while the rest of the Pine Water Company CC&N is subject to the
21 moratorium? It is contrary to the public policy of the State of Arizona that utility service be provided in
22 a discriminatory manner, which is what would occur if ATM were to apply for and obtain a variance.

23 The key in determining the public interest as it relates to regulated monopolies in Arizona has
24 always been the public policy will demand it so long as those being served are being provided proper
25 service at a reasonable price. *Corporation Commission of the State of Arizona v. Peoples Freight*
26 *Line, Inc., 41 Ariz. 158, 16 P.2d 420 (1932)* Here in this case before this hearing officer, ATM is not
27 being provided proper service at reasonable prices. It is being provided no service. And given the
28 present state of affairs it has no reasonable expectation of being provided service in the near future.

29 **///**

1 **THE MORATORIUM CONSTITUTES A TAKING OF ATM'S PROPERTY.**

2 If the ACC does not amend the CC&N of Pine Water Company and allow the deletion of the
3 property owned by ATM from the CC&N of Pine Water Company, the effect on ATM will be that it will
4 be a property owner with no reasonable use of its property because of the lack of water service. Absent
5 water the probability of using the property for any purpose other than wildlife foraging is minimal.
6 ATM can get water, but it is prohibited from doing so by the CC&N of Pine Water Company. ATM
7 intends to acquire this water from a third party who has a sustainable source and supply of water within a
8 reasonable distance from ATM's property. However, so long as ATM is within the CC&N of Pine
9 Water Company that water is not available to ATM. The cause of the moratorium is Pine Water
10 Company's inability to provide water and to serve. The imposition of the moratorium by the ACC
11 creates a situation where the ACC by virtue of imposing the moratorium and Pine Water Company by
12 virtue of not taking appropriate action to develop additional supplies of water which causes the
13 moratorium to continue cause ATM to be without water. The deletion of the property from the CC&N
14 relieves this problem because ATM can proceed to acquire water for the property. Otherwise ATM is in
15 a catch 22 position where it cannot obtain water because of the moratorium and therefore it cannot use
16 its property, and it cannot bring water to the property without violating the CC&N. Clearly this renders
17 the property devoid of reasonable use, not through the actions of ATM, but rather through the actions of
18 Pine Water Company using and abusing the ACC's regulatory process. The answer should be simple. If
19 you cannot or will not serve, then you should not have the CC&N. For this reason ATM requests that its
20 property be removed from the CC&N.

21 Before ATM can seek any legal remedy regarding its claim that its property is being taken
22 without adequate compensation first being paid to it, it is incumbent upon ATM to exhaust its
23 administrative remedies. *Arizona Department of Revenue v. Dougherty*, 200 Ariz. 515, 29 P.3d 862
24 (S.Ct. 2001)¹. Failure to take that step will preclude a court from ever hearing the claim of ATM. So, to

25
26 ¹ The law setting forth this tenant is exhaustive, it was well cited by Justice McGregor in her dissent in *Southwestern Paint*
27 *and Varnish Co. v. Arizona Department of Environmental Quality*, 194 Ariz. 22, 976 P.2d 872 (S. Ct. 1999) where in
28 footnote 3 she stated:
29 Although the majority expressly disapproves those five decisions, many other decisions include statements inconsistent with
today's holding. *See, e.g., Hamilton v. State*, 186 Ariz. 590, 593, 925 P.2d 731, 734 (App. 1996) ("failure to **exhaust**
administrative remedies deprives the superior court of authority to hear the party's claim"); *Estate of Bohn v. Waddell*, 174
Ariz. 239, 245-46, 848 P.2d 324, 330-31 (App. 1992) (even when the word "may" in the administrative appeal statute is used,

1 comply, ATM has presented this issue to the ACC for it to consider in the process of amending the
2 CC&N of Pine Water Company pursuant to *Arizona Revised Statutes § 40-252*.

3
4
5 judicial relief is not available until a party has "fully utilized" and exhausted all administrative remedies); *Gilbert v. Board of*
6 *Med. Examiners*, 155 Ariz. 169, 174, 745 P.2d 617, 622 (App. 1987) ("failure to appeal a final administrative decision makes
7 that decision final and *res judicata*"); *Minor v. Cochise County*, 125 Ariz. 170, 172, 608 P.2d 309, 311 (1980) (where agency
8 considers claim in the first instance, exhaustion of administrative remedies applies); *Campbell v. Mountain States Tel. & Tel.*
9 *Co.*, 120 Ariz. 426, 429, 586 P.2d 987, 990 (App. 1978) (once an agency is given original jurisdiction over a claim,
10 exhaustion of remedies applies and rehearing before that agency must be sought before judicial review occurs); *Univar Corp.*
11 *v. City of Phoenix*, 122 Ariz. 220, 223, 594 P.2d 86, 89 (1979) (recognizing that exhaustion of administrative remedies is a
12 "firmly entrenched" doctrine in Arizona); *State ex rel. Dandoy v. City of Phoenix*, 133 Ariz. 334, 337, 651 P.2d 862, 865
13 (App. 1982) (judicial review of legal or factual challenges to an agency decision are precluded unless timely review is sought
14 in the manner provided by the ARA); *City of Tucson v. Superior Court*, 127 Ariz. 205, 209, 619 P.2d 33, 37 (App. 1980)
15 ("failure to **exhaust administrative remedies** bars" filing of judicial lawsuit); *Medina v. Arizona Dep't of Transp.*, 185 Ariz.
16 414, 418, 916 P.2d 1130, 1134 (App. 1995) ("exhaustion of remedies is generally a prerequisite to judicial relief"); *Kerr v.*
17 *Waddell*, 185 Ariz. 457, 916 P.2d 1173 (App. 1996) (administrative remedies must be exhausted before a claim may be
18 judicially reviewed); *Estate of Bohn v. Scott*, 185 Ariz. 284, 915 P.2d 1239, 1246 (App. 1996) (matters properly the subject
19 of an administrative process are barred from judicial relief for failure to "**exhaust administrative remedies**"); *Southwest*
20 *Ambulance v. Superior Court*, 187 Ariz. 290, 293-94, 928 P.2d 714, 717-18 (App. 1996) (a trial court may not exercise
21 jurisdiction over a claim that is subject to administrative proceedings unless the party has first exhausted its administrative
22 remedies); *United Association of Journeymen v. Marchese*, 81 Ariz. 162, 302 P.2d 930 (1956) (recognizing the general
23 principle that where the agency has primary jurisdiction judicial relief is unavailable until administrative remedies have been
24 exhausted); *Zeigler v. Kirschner*, 162 Ariz. 77, 85, 781 P.2d 54, 62 (App. 1989) (generally, failure to exhaust an
25 administrative agency's hearing and review process prevents later judicial review); *Sanchez-O'Brien Minerals Corp. v. State*,
26 149 Ariz. 258, 261, 717 P.2d 937, 940 (App. 1986) (recognizing that judicial review is precluded by a failure to utilize and
27 exhaust administrative review procedures); *Owens v. City of Phoenix*, 180 Ariz. 402, 409, 884 P.2d 1100, 1107 (App. 1994)
28 (claimants usually must **exhaust administrative remedies** "before seeking judicial relief"); *Wammack v. Industrial Comm'n*
29 *of Arizona*, 83 Ariz. 321, 327, 320 P.2d 950, 954 (1958) (an agency must be given an opportunity to correct errors through a
rehearing procedure before judicial review is permitted); *Ross v. Industrial Comm'n of Arizona*, 82 Ariz. 9, 307 P.2d 612
(1957) (claimants must first seek and procure the agency's decision on rehearing before review by the court is permitted);
Cochise County v. Kirschner, 171 Ariz. 258, 830 P.2d 470 (App. 1992) (when claims properly arise under the jurisdiction of
an agency, exhaustion of remedies must occur before a lawsuit will be entertained); *Third & Catalina v. City of Phoenix*, 182
Ariz. 203, 207, 895 P.2d 115, 119 (App. 1994) (failure to **exhaust administrative remedies** bars judicial review); *Brown v.*
Industrial Comm'n of Arizona, 168 Ariz. 287, 812 P.2d 1105 (App. 1991) (unless a party satisfies the doctrine of exhaustion
of administrative remedies by filing a motion for review, a court will not consider the issue); *St. Mary's Hosp. and Health*
Center v. State, 150 Ariz. 8, 721 P.2d 666 (App. 1986) (judicial review is unavailable until claimants **exhaust their**
administrative remedies, which includes review of their claims); *Schmitz v. Arizona State Bd. of Dental Exam.*, 141 Ariz.
37, 684 P.2d 918 (App. 1984) (exhaustion of remedies is required prior to judicial review in order to permit the agency to
correct its errors); *Flannery v. Industrial Comm'n of Arizona*, 3 Ariz. App. 122, 412 P.2d 297 (1966) (seeking a rehearing of
an agency's decision is a condition precedent to obtaining judicial review and satisfying the exhaustion of remedies doctrine);
Pima Mining Co. v. Industrial Comm'n of Arizona, 11 Ariz. App. 480, 466 P.2d 31 (1970) (exhaustion of remedies requires a
party to permit an agency to reconsider its decision by seeking a rehearing before pursuing judicial review); *Stevens v.*
Industrial Comm'n of Arizona, 104 Ariz. 293, 451 P.2d 874 (1969) (a party must **exhaust its administrative remedies** by
petitioning for a rehearing from an agency's initial decision prior to seeking judicial review); *State v. Arizona Corp. Comm'n*,
94 Ariz. 107, 382 P.2d 222 (1963) (a party may seek judicial review only after it has petitioned the agency for a rehearing of
the administrative decision); *Ross v. Industrial Comm'n of Arizona*, 20 Ariz. App. 353, 513 P.2d 143 (1973) (a party must
request a rehearing by the agency before petitioning for judicial review); *Fernandez v. Industrial Comm'n of Arizona*, 4 Ariz.
App. 445, 421 P.2d 341 (1966), *vacated on other grounds*, 102 Ariz. 50, 424 P.2d 451 (1967) (petitions for rehearing are
necessary predicates to seeking judicial review of administrative decisions).

1 **THE ESSENCE OF ATM'S COMPLAINT IS THAT THE REGULATION SO**
2 **RESTRICTS THE USE OF ITS PROPERTY THAT IT CONSTITUTES A**
3 **TAKING OF THE PROPERTY.**

4 Pine Water creates a specious argument by stating that because no one in Arizona has a property
5 interest in water that ATM cannot claim that its property interests are being damaged because of the
6 prohibition presently in place precluding providing water to ATM's property. ATM is not arguing that
7 its water is being taken, what it is arguing is that the regulatory scheme, coupled with Pine Water
8 Company's unwillingness and inability to provide water service, plus the fact that ATM has a suitable
9 supply of water available for it to use constitutes a deprivation of the use of its property. This *de facto*
10 prohibition of the use of its property is the injury which ATM complains of which demonstrates why the
11 CC&N must be amended by the ACC pursuant to applicable law. This injury to ATM, and to the rest of
12 the public located within the certificated area is contrary to the public interest. As admitted by Pine
13 Water Company, this inability and unwillingness to serve has continued since at least 1989, so for
14 seventeen years the public has not been adequately served by a public service corporation which was
15 willing and able to provide domestic water service. Now ATM has the ability to obtain water, but is
16 barred by the present CC&N.

17 When a regulatory process so restricts the use and enjoyment of property as to render it virtually
18 unusable and not no longer of any viability to the owner, there are two prongs to potential remedies:
19 One is to require that compensation be paid to the owner, the second is to remove the restrictive
20 regulation so that the property owner can fully use and enjoy the property. In this proceeding before the
21 ACC ATM is requesting that the ACC review its previous decisions granting the CC&N to Pine Water
22 Company and amend it, deleting the property of ATM from the CC&N so that ATM can move forward
23 and use its property. This is a remedy which the ACC can provide and in fact must provide in light of
24 the facts pled in this case.

25 The regulation prohibiting the provision of water and the regulation prohibiting ATM from
26 obtaining it from sources other than the owner of the CC&N clearly constitute a regulation which in fact
27 is more than a police power regulation of the state, but rather constitutes an appropriation of the property
28 interest of ATM. To benefit the public as a whole the regulatory scheme was put into place, burdening
29

1 this property by precluding any viable economic use. Further, the injury to the property owner was far in
2 excess of what would be a reasonable regulation. Essentially, the property of ATM is being pressed into
3 a public use, remaining vacant because of the inability and unwillingness of Pine Water Company to
4 provide water service to this property as is required as a quid pro quo for the receipt of the monopoly
5 status on providing such service. *See Lucas v. South Carolina Coastal Council, 505 U.S.1003, 112*
6 *S.Ct. 2886, 120 L.Ed.2d 798 (1992)*

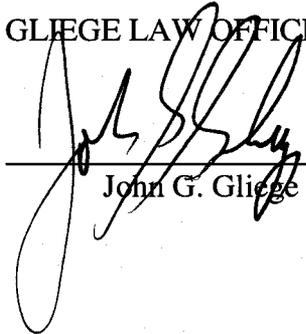
7 **CONCLUSION: THE MOTION TO DISMISS MUST BE DENIED!**

8 The Complaint of ATM in many instances clearly shows that the complainant is entitled to relief
9 in based upon the facts presented. The Complaint asks for an amendment to the Certificate of
10 Convenience and Necessity of Pine Water Company, relief which the Arizona Corporation Commission
11 may grant, to exclude the complainants property from the CC&N because it is not in the public interest
12 to retain it there and further, that such a regulator scheme constitutes an inappropriate regulation of the
13 Complainant's property under the Constitutions of the United States and the State of Arizona. The
14 concept of regulated monopolies is a tolerated concept, not a very acceptable one, which so long as the
15 public benefits, should be allowed, but where the public interest is not served and where private property
16 owners are injured, then it is incumbent upon the regulatory agency, in this case the Arizona Corporation
17 Commission to take such steps as may be necessary to relieve the property owner, ATM, from the
18 burden of this situation.

19 Cognizable facts were pled under which relief can be afforded. Therefore it is respectfully
20 requested that the Motion to Dismiss of Pine Water Company be denied.

21 RESPECTFULLY SUBMITTED this 26th day of October, 2006.

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23 GLEGE LAW OFFICES, PLLC

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26 _____
27 John G. Gliege
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1 Original and thirteen copies of the foregoing
Mailed this 26th day of October 2006 to:

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4 Arizona Corporation Commission
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6 Phoenix, AZ 85007

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