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 AZ CORP COMMISSION  
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**BEFORE THE ARIZONA CORPORATION COMMISSION**

ASSET TRUST MANAGEMENT, CORP.,

DOCKET NO: W-03512A-06-0613

Complainants,

v.

**PINE WATER COMPANY'S REPLY IN  
SUPPORT OF MOTION TO DISMISS**

PINE WATER COMPANY, an Arizona  
Corporation,

Respondent.

15 Pine Water Company ("PWCo") hereby files this Reply in support of its Motion to  
 16 Dismiss Asset Trust Management, Corp.'s ("ATM") complaint. PWCo asserts that  
 17 because ATM has plead no set of facts that will entitle it to the relief requested, PWCo's  
 18 motion should be granted.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. ATM's Complaint Does Not Present Facts Sufficient to Establish That Its Request for Water Service is Reasonable in Light of the Existing Moratorium.**

22 In *James P. Paul Water Co. v. Arizona Corp. Comm'n*, 137 Ariz. 426, 429, 671  
 23 P.2d 404, 407 (1983), the Arizona Supreme Court held that "Only upon a showing that a  
 24 certificate holder, presented with a demand for service which is reasonable in light of  
 25 projected need, has failed to supply such service at a reasonable cost to customers, can the  
 26 Commission alter its certificate." ATM must plead facts sufficient to establish that: 1) it

1 has presented PWCo with a demand for service which is *reasonable* in light of projected  
2 need; and 2) PWCo has failed to supply such service at *reasonable cost* to customers.  
3 These are two requirements that must be satisfied before the Commission can order the  
4 deletion of any portion of a public service corporation's CC&N.

5 In its Response, ATM argues that the underlying question in its complaint is  
6 whether PWCo has made an adequate investment of capital to secure new water sources.  
7 ATM then asserts that PWCo has not invested adequate capital, and therefore cannot, will  
8 not and does not render competent and adequate service as required by PWCo's CC&N.  
9 See ATM Response at 4. However, even if ATM's assertion is true, which it most  
10 certainly is not, ATM still fails to plead facts sufficient to satisfy both requirements before  
11 the Commission can delete ATM's property from PWCo's CC&N. Specifically, ATM  
12 fails to satisfy the first requirement, which is to establish that its request for water service  
13 is reasonable even with the existing moratorium in place. In *James P. Paul*, the court  
14 recognized that:

15 Once certified to supply water to a parcel of land, a water  
16 company must comply with orders and regulations  
17 promulgated by the Commission in the public interest, see  
18 A.R.S. §§ 40-321 to 322, 331 to 332, 336, 338. Though these  
19 orders and regulations may mandate installation of additional  
20 facilities, A.R.S. § 40-331 or safety devices, A.R.S. § 40-336,  
and reduce expected profits, the certificate holder *is required  
to comply*. [emphasis added].

21 PWCo is required to comply with Decision No. 67823 (May 5, 2005) and the  
22 moratorium imposed therein. ATM does not state why violating this Commission order  
23 would be a reasonable course of action for PWCo to follow. Obviously, because PWCo  
24 is required to comply with all Commission orders, any request to do otherwise must be  
25 seen by the Commission and PWCo as unreasonable. ATM's request is likewise  
26 unreasonable.

1 **II. ATM Does Not Sufficiently Address PWCo's Arguments Concerning ATM's**  
2 **Claim that the Moratorium Represents a Taking.**

3 In its Motion to Dismiss, PWCo argues that: 1) the Commission does not have  
4 jurisdiction to adjudicate whether the moratorium is a taking; 2) ATM does not have a  
5 compensable property interest in an immediate connection to PWCo's system, and 3) the  
6 moratorium does not meet the requirements to be a regulatory taking under the United  
7 States Supreme Court's holding in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S.  
8 104, 98 S. Ct. 2646 (1978). In its Response to PWCo's Motion to Dismiss, ATM  
9 addresses PWCo's first two arguments, asserting that: 1) it must first exhaust its  
10 administrative remedies prior to seeking court action; and 2) the regulatory scheme as a  
11 whole constitutes a deprivation of the use of its property (ATM ignores PWCo's third  
12 argument altogether). These counter-arguments are without merit.

13 First, the exhaustion of administrative remedies applies only to ATM's first claim;  
14 its request for deletion of property from PWCo's existing CC&N based on the allegation  
15 that PWCo is unwilling and unable to provide water service at reasonable costs. The  
16 Commission must first grant or deny ATM's request before judicial review becomes an  
17 option under A.R.S. § 40-254. However, the request for deletion is mutually exclusive of  
18 ATM's second claim that the moratorium represents a taking of its property. ATM  
19 presents no argument or authority in its Response that rebuts PWCo's argument  
20 demonstrating why the Commission is without jurisdiction to address ATM's takings  
21 claim.

22 Second, ATM still fails to identify in its Response what protected property right is  
23 being taken by virtue of the moratorium. ATM argues that the regulatory scheme, when  
24 viewed in a light most favorable to ATM, constitutes a deprivation of the use of its  
25 property. However, this regulatory scheme provides many options for the utilization of  
26 water owned by persons seeking to develop property within a public service corporation's

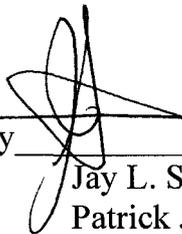
1 CC&N. Even if the Commission retained jurisdiction to address ATM's takings claim,  
2 which it does not, ATM must demonstrate that under no set of circumstances can the  
3 alleged deprivation of use be resolved within the regulatory scheme itself. This is simply  
4 not the case. Although the moratorium presently prohibits PWCo from adding new  
5 service connections based on existing water resources, nothing prevents ATM from  
6 seeking a variance based on the alleged discovery of a new water source. PWCo has  
7 already expressed its support for any customer who wishes to make such an application to  
8 the Commission.

9 **CONCLUSION**

10 Even if the allegations in ATM's complaint are accepted as true, ATM has no  
11 cognizable claim that would justify deletion of its property from PWCo's CC&N.  
12 Furthermore, the moratorium is not a taking of ATM's property as a matter of law. ATM  
13 does not have a property interest in an immediate connection to PWCo's system, as any  
14 such connection is subject to the rules, regulations and orders of the Commission. As a  
15 consequence, PWCo's respectfully requests that the Commission dismiss ATM's  
16 application because ATM has failed to state a claim for relief thereon.

17 RESPECTFULLY SUBMITTED this 9th day of November, 2006.

18 FENNEMORE CRAIG, P.C.

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ORIGINAL and thirteen (13) copies of the foregoing filed this 9th day of November, 2006:

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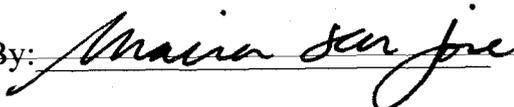
Copy of the foregoing hand delivered this 9th day of November, 2006, to:

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