

OPEN MEETING ITEM



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COMMISSIONERS
JEFF HATCH-MILLER - Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG

ORIGINAL



ARIZONA CORPORATION COMMISSION

22

DATE: DECEMBER 5, 2006

DOCKET NO: W-02309A-05-0501

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Jane Rodda. The recommendation has been filed in the form of an Opinion and Order on:

DIABLO VILLAGE WATER COMPANY
(CC&N EXTENSION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

DECEMBER 15, 2006

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

DECEMBER 19, 2006 and DECEMBER 20, 2006

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

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BRIAN C. McNEIL
EXECUTIVE DIRECTOR

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG

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

DOCKET NO. W-02309A-05-0501

DECISION NO. _____

OPINION AND ORDER

DATES OF HEARING:

May 11, 2006 and October 4, 2006

PLACE OF HEARING:

Tucson, Arizona

ADMINISTRATIVE LAW JUDGE:

Jane L. Rodda

APPEARANCES:

Mr. Lawrence V. Robertson Jr., Munger
& Chadwick, Attorneys at Law, on behalf
of Diablo Village Water Company;

Mr. Christopher Avery, Sr. Assistant City
Attorney, on behalf of the Intervenor,
City of Tucson; and

Mr. Christopher Kempley, Chief
Counsel, Legal Division, and Ms. Linda
Fisher and Mr. David Ronald, Staff
Attorneys, Legal Division, on behalf of
the Utilities Division of the Arizona
Corporation Commission.

BY THE COMMISSION:

* * * * *

Having considered the entire record herein and being fully advised in the premises, the
Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. On July 14, 2005, Diablo Village Water Company ("Diablo Village" or "Company")
filed an Application for an Extension of its Certificate of Convenience and Necessity ("CCN" or
"Certificate") with the Commission.

1 2. On August 16, 2005, Commission Utilities Division Staff ("Staff") notified the
2 Company that the application did not meet the sufficiency requirements of the Arizona
3 Administrative Code ("A.A.C").

4 3. On August 23, 2005, Diablo Village filed an amendment to its Application.

5 4. On October 17, 2005, Staff notified Diablo Village that the application was sufficient
6 pursuant to the requirements of the A.A.C.

7 5. By Procedural Order dated November 9, 2005, the matter was set for hearing on
8 January 4, 2006, at the Commission's Tucson offices.

9 6. On November 23, 2005, Diablo Village filed its affidavit of mailing and publication
10 indicating that it had complied with the notice requirements of the November 9, 2005, Procedural
11 Order.

12 7. On December 16, 2005, Staff docketed its Staff Report which recommended denial of
13 the application.

14 8. On December 23, 2005, Diablo Village filed a Response to the Staff Report.

15 9. On December 29, 2005, Staff filed a Request to Reschedule the Hearing. Staff
16 requested a 30 day continuance to allow it to evaluate the new circumstances and facts contained in
17 the Company's Response to the Staff Report.

18 10. By Procedural Order dated January 4, 2006, the hearing in this matter was set to
19 continue on February 13, 2006.

20 11. On January 26, 2006, Staff filed a Motion for Procedural Order to Extend Time. Staff
21 sought another 30 day continuance to allow the Company time to file additional information which
22 the Company believed would be important to Staff's analysis in this case.

23 12. By Procedural Order dated January 30, 2006, the above-captioned matter was set for
24 hearing on March 13, 2006.

25 13. On February 10, 2006, the City of Tucson (the "City") filed a Motion to Intervene.

26 14. The Administrative Law Judge granted intervention to the City of Tucson on February
27 23, 2006.

28 15. On February 24, 2006, counsel for Diablo Village filed a Notice of Appearance and

1 Motion for Rescheduling of Hearing Date.

2 16. On February 24, 2006, Staff filed an Amended Staff Report. The Amended Staff
3 Report recommended approval of the requested extension.

4 17. By Procedural Orders dated February 28, 2006, and April 14, 2006, the matter was set
5 for hearing on May 11, 2006.

6 18. On April 19, 2006, Diablo Village filed a Curtailment Tariff.

7 19. The hearing convened before a duly authorized Administrative Law Judge on May,
8 11, 2006. Margaret Phillips, a principal of the master developer of the property within the proposed
9 extension area, and Sheila Bowen, a professional civil engineer, testified for the Company.
10 Following testimony by two of the Company's witnesses, the hearing was continued indefinitely to
11 allow for additional discovery on issues raised by the City of Tucson and Staff's request for
12 additional water usage data.

13 20. On June 28, 2006, Diablo Village filed with the Commission a Request for Procedural
14 Conference Relating to Discovery. Diablo Village asserted that the City of Tucson had not responded
15 to Diablo Village's data requests. A Procedural Conference to address the discovery dispute
16 commenced on July 7, 2006. By Procedural Order dated July 10, 2006, the City of Tucson was
17 ordered to respond to data requests by July 21, 2006.

18 21. On July 3, 2006, Diablo Village filed the testimony of Sheila Bowen concerning
19 updated projected water use data and production and storage capacity of Diablo Village.

20 22. By Procedural Order dated August 2, 2006, a Procedural Conference convened on
21 August 10, 2006, to determine the status of discovery and whether the matter was ready to be re-set
22 for hearing.

23 23. By Procedural Order dated August 11, 2006, new deadlines for filing testimony were
24 established and the hearing was rescheduled to commence on October 4, 2006

25 24. On September 1, 2006, Staff filed a Second Amended Staff Report. The Second
26 Amended Staff Report recommends approval of the Application.

27 25. On September 27, 2006, Diablo Village filed the supplemental direct and rebuttal
28 testimony of Sheila Bowen and the direct and rebuttal testimony of Robin Thim, owner and president

1 of the Company.

2 26. The hearing re-convened before a duly authorized Administrative Law Judge on
3 October 4, 2006, at the Commission's Tucson offices. Robin Thim and Sheila Bowen testified on
4 behalf of the Company. William Lohmeier testified on behalf of the City of Tucson. Linda Jaress
5 and Dorothy Haines testified for Staff.

6 27. Diablo Village provides water utility service to approximately 734 customers near the
7 Tucson airport in Pima County, Arizona.

8 28. The Company has applied to extend its CC&N area to serve one additional section of
9 land, approximately one square mile in area. The legal description of the proposed extension area is
10 attached hereto as Exhibit A. The owners of the property in the proposed extension area are two
11 related companies: Pomegranate Farms I, LLC ("Pomegranate Farms") and Arboreal Agriculture
12 Resources, LLC ("Arboreal"). Both entities are owned by Pomegranate Development. The extension
13 area would comprise a new subdivision of approximately 1,500 lots and a park.¹ The subdivision
14 would also include two schools, a fire station and some light commercial properties.

15 29. The same master developer has developed two other subdivisions within the Diablo
16 Village service area: Sonoran Ranch Estates I (324 lots) and Sonoran Ranch Estates II (572 lots).
17 Sonoran Ranch Estates I is immediately east of Pomegranate Farms. The developer has requested
18 that Diablo Village serve the newly planned Pomegranate Farms development.

19 30. Diablo Village's current system includes a 210,000 gallon storage tank and one well
20 that is capable of producing 425 gallons per minute ("GPM").² This well is not owned by Diablo
21 Village, and public records indicate that the owner is Thim Utility Co./Nordic Water Corp. The
22 Company has informed Staff that it receives the bulk of its water from a sister corporation called
23 Water Supply Corp. There is no contract memorializing the agreements between Diablo Village and
24 Water Supply Corp.

25 31. Diablo Village also has a contract with the City of Tucson in which the City agrees to

26 ¹ The developer originally planned a pomegranate orchard, but later rejected the pomegranate farm idea in favor of a
27 bosque-like park with pomegranate trees and meandering walkways in order to comply with Arizona Department of
Water Resources ("ADWR") requirements

28 ² Testimony was that the existing well is equipped for a capacity of 425 GPM, but that it could be re-equipped to produce
1,275 GPM. May 11, 2006 TR at 62.

1 sell 44,000 ccf per year of potable water. According to Diablo Village's 2005 annual report to the
2 Commission, it purchased approximately 37,000 gallons of water from the City of Tucson in 2005.
3 Section 2.A of the contract with the City of Tucson provides:

4 If Company acquires new customers after the effective date of this
5 agreement, the designated capacity shall expand by 190 ccf per residential
6 connection. Company shall not be entitled to expand its designated
7 capacity for customers acquired through the development of subdivisions
8 under the Assured Water Supply requirements of the Arizona Department
9 of Water Resources.

10 32. Diablo Village believes there may be a disagreement between it and the City of
11 Tucson interpreting section 2.A, and whether water may be purchased from the City of Tucson to
12 service the newly planned subdivision in the proposed extension area. In its analysis of water use and
13 production capacity, Diablo Village assumed that there would be no purchase of water from the City
14 of Tucson. Diablo Village also provided testimony that any water purchased in the future from the
15 City of Tucson could be limited to use by existing customers in its current service area.

16 33. A new well that will serve the Sonoran Ranch Estates subdivisions is also planned to
17 serve the new Pomegranate Farms subdivision. That well, which had been drilled and was being
18 equipped at the time of the May 2006 hearing, will have a capacity of 550 GPM. In addition, two
19 5,000 gallon pressure tanks and a 300,000 gallons storage tank are planned. Eventually, Diablo
20 Village will need a third well to serve the Pomegranate Farms area. May 11, 2006 TR at 87. Diablo
21 Village calculates that at build-out of the Pomegranate Farms subdivision, with a fire station, school
22 and commercial development, the Company would need additional storage of 363,629 gallons and
23 additional well capacity of 941 GPM.³

24 34. Staff's Engineering Report indicates that the additional well and proposed storage
25 should be sufficient to serve the extension area and to serve the expected growth in the existing
26 service area.

27 35. Diablo Village has obtained an Approval to Construct from the Pima County
28 Department of Environmental Quality for the new 550 GPM well and the two 5,000 gallon pressure

³ The Company testified that existing wells could be re-equipped such that a new well would only need to provide additional capacity of 343 GPM. Oct. 4, 2006 TR. at 18.

1 tanks.

2 36. The developer is contributing to the expansion of a nearby Pima County wastewater
3 treatment plant, and Pima County will provide wastewater service in the development.

4 37. The proposed extension area is not within the city limits of the City of Tucson. The
5 City owns and operates a 42 inch water main adjacent to the proposed subdivision. The City
6 produced a map that shows that Diablo Village and the proposed extension area are located within the
7 City's "50-year Service Area" as proposed by the Citizens Water Advisory Council in November
8 2004. There is no evidence that the mayor and council of the City of Tucson has adopted the
9 proposed 50-year Service Area. The City of Tucson believes that it can serve the proposed extension
10 area.

11 38. The evidence at the hearing indicates that the costs to the developer of connecting to
12 Tucson Water would be greater than the costs of connecting to Diablo Village. The City charges the
13 developer a System Equity Fee of \$1,416 per 5.8 inch meter and a meter connection charge of \$1,170
14 per residence. Diablo Village does not have a hook-up fee tariff, and charges \$350 per connection as
15 a service line and meter installation charge. It is typical for developers to pass along hook-up fees in
16 the cost of lots sold to home purchasers.

17 39. Diablo Village's current rates were set in Decision No. 65044 (July 24, 2002). The
18 Company's 2005 Annual Report shows a loss of \$39,837 for the year.

19 40. Diablo Village's rates are higher than the City of Tucson's water rates.

20 41. Diablo Village is in compliance with Arizona Department of Environmental Quality
21 ("ADEQ") regulations and is providing water that meets water quality standards. Diablo Village's
22 water meets the new federal standards for arsenic.

23 42. Staff concludes that based on the City's conservation program, its planning program
24 and the development's location close to the City's transmission line, over the long run, it is in the
25 public interest for the City to provide water to the extension area. However, based on the developer's
26 request for service by Diablo Village, Diablo Village's ability to provide service at a lower capital
27 cost than the City, and the possible benefits to Diablo Village from economies of scale from the
28 addition of 1,500 a customers, Staff recommends approving the extension request.

1 43. Staff further recommends that:

2 (a) Diablo Village submit a copy of Pima County's Approval to Construct for the
3 proposed 300,000 gallon storage tank as a compliance item within one year of the effective date of an
4 Order approving the requested extension;

5 (b) Although the Company has filed a curtailment tariff, it has since changed its plans
6 in a manner that impacts the form of a proper curtailment tariff. Therefore, Staff recommends the
7 Company file a curtailment tariff in Docket Control as a compliance item within 45 days of the
8 Decision in this case;

9 (c) Diablo Village shall have the wells transferred into its name and file as a
10 compliance item with Docket Control within six months of the effective date of an order approving
11 the requested extension, a copy of ADWR documents showing that the wells are owned by Diablo
12 Village Water Company.

13 (d) The Company file a copy of the developer's Certificate of Assured Water Supply
14 from ADWR for Section 18 with Docket Control as a compliance item within one year of the
15 effective date of a Decision approving the extension.⁴

16 (e) Diablo Village keep its accounts according to the NARUC system of accounts as
17 required by R14-2-411.D; and that Diablo Village should file in Docket Control as a compliance
18 item, a statement from a Certified Public Accountant indicating that the Company's books and
19 records are being kept in compliance with the NARUC system of accounts within six months of the
20 date of the Decision in this case;

21 (f) Due to the poor financial health of Diablo Village as indicated by its most recent
22 annual report, and due to its rate structure that does not encourage conservation, Diablo Village
23 should file a rate case by June 30, 2007, using a calendar year 2006 test year;

24 (g) If Diablo Village does not comply with the conditions listed above within the time
25 specified, the approval of the extension should be null and void after due process.

26 44. Because the proposed extension area is outside City limits where rate payers have no

27 _____
28 ⁴ During the hearing Staff agreed that 18 months to obtain and file proof of the developer's Certificate of Assured Water Supply would be reasonable.

1 influence over decisions affecting water service, Staff believes there is a benefit to potential
2 ratepayers receiving the protections inherent with Commission regulation over Diablo Village.

3 45. The City of Tucson has argued that the Commission should not grant the proposed
4 extension because the City's willingness and ability to serve the new development indicates there is
5 no "need" to grant a CC&N.

6 46. The developer testified that they attempted to contact the City of Tucson to determine
7 if the City could provide water service when the developer was planning the Sonoran Ranch Estates
8 development, but that the City did not express an interest at that time. The developer subsequently
9 arranged for Diablo Village to provide service to those developments. When the developer began to
10 plan the Pomegranate Farms subdivision, it did not contact the City of Tucson to provide service
11 because it was happy with the service provided by Diablo Village. The developer has designed some
12 of the facilities that will serve the Sonoran Ranch Estates subdivisions to be able to also serve the
13 Pomegranate Farms subdivision.

14 47. The proximity of a municipal provider is a factor in our analysis of whether it is in the
15 public interest to grant a CC&N. In this case no private or public water provider is serving in the
16 proposed extension area, and both the City and Diablo Village have facilities nearby. The developer
17 has a relationship with the applicant, a small water company, and has designed its existing facilities
18 to accommodate growth in the extension area. With the acceptance of Staff's recommendations that
19 the Company file a rate case, which we anticipate will lead to tiered rates that will promote
20 conservation, and the expected benefit to the small Company through economies of scale, we concur
21 with Staff's conclusions and approve the application. Although it appears that no golf course or farm
22 is planned for this development, given the recent drought conditions in the state, we believe it is
23 reasonable to include a prohibition on Diablo Village from providing ground water for the irrigation
24 of golf courses, artificial lakes or other water features.

25 48. With respect to Staff's recommendation in Findings of Fact No. 43, subparagraph (a)
26 above, during the hearing Diablo Village submitted a copy of the Pima County Approval to Construct
27 the 300,000 gallon storage tank. Exhibit A-16. Staff acknowledged that the Company has fulfilled
28 this recommendation. October 4, 2006 TR at 144.

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IT IS FURTHER ORDERED that in light of the on-going drought conditions in central Arizona and the need to conserve groundwater, Diablo Village Water Company is prohibited from selling groundwater for the purpose of irrigating any golf courses within the certificated expansion areas or any ornamental lakes or water features located in the common areas of the proposed new developments within the certificated expansion areas.

IT IS FURTHER ORDERED that Diablo Village Water Company shall annually file as part of its annual report, an affidavit with the Utilities Division attesting that the Company is current in paying its property taxes in Arizona.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this ____ day of _____, 2006.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

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SERVICE LIST FOR:

DIABLO VILLAGE WATER COMPANY

DOCKET NO.:

W-02309A-05-0501

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EXHIBIT A

Legal Description of Extension Area

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Section 18 Township 15S, Range 12E, Gila and Salt River Base and Meridian, Pima County, Arizona.