

OPEN MEETING ITEM



0000069097

COMMISSIONERS  
MIKE GLEASON - Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE



ORIGIN

22

ARIZONA CORPORATION COMMISSION

DATE: MARCH 23, 2007

DOCKET NO: W-01157A-05-0706

TO ALL PARTIES:

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

WEST END 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:

APRIL 2, 2007

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:

APRIL 11, 2007 and APRIL 12, 2007

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.

RECEIVED

2007 MAR 23 A 10: 01

AZ CORP COMMISSION  
DOCUMENT CONTROL

BRIAN C. McNEIL  
EXECUTIVE DIRECTOR

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**BEFORE THE ARIZONA CORPORATION COMMISSION**

COMMISSIONERS

MIKE GLEASON, Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE

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  
DECISION NO. \_\_\_\_\_

OPINION AND ORDER

DATE OF PROCEDURAL  
CONFERENCE:

August 2, 2006

DATES OF HEARING:

May 22, 24, and September 13, 2006.

PLACE OF HEARING:

Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE:

Amy B. Bjelland<sup>1</sup>

APPEARANCES:

Mr. Scott Rhodes, JENNINGS, STROUSS &  
SALMON, P.L.C., on behalf of Applicant;

Ms. Joan S. Burke and Ms. Danielle D. Janitch,  
OSBORN MALEDON, on behalf of the City of  
Surprise; and

Mr. David M. Ronald, Staff Attorney, Legal Division,  
on behalf of the Utilities Division of the Arizona  
Corporation Commission.

**BY THE COMMISSION:**

On October 5, 2005, West End Water Company (“Company” or “Applicant”) filed with the Arizona Corporation Commission (“Commission”) an Application for an extension of its existing Certificate of Convenience and Necessity (“Certificate”) in a portion of Maricopa County, Arizona.

On November 4, 2005, the Commission’s Utilities Division (“Staff”) issued a notice of insufficiency pursuant to A.A.C. R14-2-411(C).

On February 3, 2006, Staff issued a notice of sufficiency.

On February 6, 2006 by Procedural Order, the above-captioned matter was scheduled for a

<sup>1</sup> This Opinion and Order was drafted by Administrative Law Judge Marc E. Stern.

1 hearing on May 22, 2006, and the Applicant was ordered to publish notice of the application and  
2 hearing thereon.

3 Pursuant to the terms of the Commission's Procedural Order, the Company filed notice that it  
4 had provided public notice.

5 On March 28, 2006, the City of Surprise ("City") filed an Application for Leave to Intervene.

6 On April 18, 2006, by Procedural Order, the City was granted intervention.

7 On April 22, 2006, Staff filed its Staff Report.

8 On May 22 and 24, 2006, the hearing was convened before a duly appointed Administrative  
9 Law Judge of the Commission at its offices in Phoenix, Arizona. The Company, the City and Staff  
10 appeared with counsel. At the conclusion of the hearing, the matter was taken under advisement  
11 pending submission of a Recommended Opinion and Order ("ROO") to the Commission.

12 On July 18, 2006, prior to the issuance of a ROO, the City docketed its Notice of Filing of  
13 Request for Service and Will Serve Letter.

14 On July 21, 2006, Staff filed its Request to Suspend the Briefing Schedule and Re-Open  
15 Hearing ("Request") stating that there were new factual questions relating to the request for service  
16 that should be addressed in a hearing.

17 On July 24, 2006, the Company filed its Joinder in Staff's Request. The City filed its  
18 Response to Staff's Request wherein it objected to re-opening the hearing in this matter, although it  
19 stated it had no objection to suspending the briefing schedule.

20 On August 2, 2006, pursuant to Procedural Order, a procedural conference was held as  
21 scheduled. The parties were ordered to file a proposed date and scope of a supplemental hearing in  
22 this matter by August 14, 2006.

23 On August 11, 2006, the parties filed a Stipulation Regarding Date and Scope of  
24 Supplemental Hearing.

25 On August 16, 2006, by Procedural Order, a hearing was scheduled for September 13, 2006.

26 On September 7, 2006, the City filed a Notice of Filing of Letter of Wittman 510, LLC.

27 On September 11, 2006, each party filed its notice of proposed witnesses and exhibits.

28 On September 13, 2006, the hearing was reconvened before a duly authorized Administrative

1 Law Judge of the Commission in order to address the issues of a request for service to the extension  
2 area. Based on the testimony and exhibits presented at hearing, closing briefs were ordered.

3 On November 13, 2006, the City filed its Notice of Filing of Transcript of September 7, 2006,  
4 Hearing before the Maricopa County Planning and Zoning Commission and Request for Short  
5 Extension for filing Response Briefs, until November 21, 2006. The City stated that Staff had no  
6 opposition to a short extension for filing Response Briefs in this matter, and requested that the  
7 transcript be admitted as a late-filed exhibit.

8 On November 14, 2006, the Company filed its Response to the City's Notice of Filing and  
9 Request for Short Extension, stating its opposition to the extension. The Company stated that it does  
10 not object to admitting the late-filed exhibit offered by the City, but asked that the record reflect that  
11 the transcript was prepared by Surprise from an audio recording of the hearing.

12 Although the Company opposed a short extension, no prejudice to any party would result, and  
13 the extension was allowed for all parties to fully brief all the issues, inclusive of the newly filed  
14 Maricopa County Planning and Zoning transcript, and to file their briefs no later than November 21,  
15 2006.

16 \* \* \* \* \*

17 Having considered the entire record herein and being fully advised in the premises, the  
18 Commission finds, concludes, and orders that:

19 **FINDINGS OF FACT**

20 1. Pursuant to authority granted by the Commission, the Company is an Arizona  
21 corporation which is engaged in the business of providing water service in parts of Maricopa County  
22 northwest of Surprise, Arizona.

23 2. On October 5, 2005, the Company filed an application for an extension of its  
24 Certificate in Maricopa County to provide water service to an area which is marked Exhibit A  
25 attached hereto and incorporated herein by reference.

26 3. Notice of the Application was provided in accordance with the law.

27 4. On April 21, 2006, Staff filed its Staff Report recommending conditional approval of  
28 the application following a hearing.

1           5.       During the hearing, the following witnesses appeared and testified concerning the  
2 application: Marvin Collins, the Company's manager; Ray Jones, President of American Water  
3 Solutions, a Company consultant; Gary L. Jones, an entitlement manager with Peter's Group that  
4 initially requested service from the Company; Gene C. Morrison, the Regional President of Woodside  
5 Homes ("Woodside"); Scott Chesney, the City's Planning and Community Development Director;  
6 Richard Williams, the City's Water Services Director; Dorothy Hains, a Commission engineer; and  
7 Blessing Chukwu, who reviews Certificate applications, and is a member of the Commission's Staff.

8           6.       The Company filed the instant application after receiving a March 3, 2005, letter  
9 requesting service from Mr. Gary Jones, an entitlement manager, with an entity called Peter's Group,  
10 which was acting on behalf of another entity, Wittman 510, L.L.C., which had three options to  
11 purchase the property from the apparent property owner, Walden Farms, L.L.C. (*T. Vol. II, P. 18*)  
12 These options have been or will be subsequently acquired by Woodside or a related entity.

13           7.       The area for which the Company is seeking an extension of its Certificate consists of  
14 140 acres and is contiguous to the Company's existing service area.

15           8.       The requested extension area composes approximately 30 percent of what is to be a  
16 subdivision to be called Walden Ranch which is being developed by Woodside. The remaining 70  
17 percent of the planned subdivision is already contained in a parcel which is located within the  
18 Company's existing certificated service area which lies to the north of the extension area.

19           9.       The extension area lies entirely within a portion of unincorporated Maricopa County  
20 approximately one and one-half miles from the present City limits. (*T. Vol. I, P. 89*)

21           10.      The Company operates two separate systems, the Wheat system, a small system with  
22 one small well which serves only 14 customers, and the Wittman system, a larger system with a 250  
23 gallons of water per minute ("GPM") well with 200,000 gallons of storage and which serves 215  
24 customers.

25           11.      The Company plans to serve Walden Ranch from its Wittman system and is in the  
26 process of developing two new 750 GPM wells, both in its existing certificated area, one of them to  
27 serve Walden Ranch and one to serve another new subdivision, Rancho Maria. In addition, the  
28 Company will add 800,000 gallons of storage to its Wittman system.

1           12.    The Company projects having an additional 443 customers in the extension area in  
2 five years.

3           13.    Based on the record, according to Mr. Gene Morrison, Regional President of  
4 Woodside for Arizona and Nevada, Woodside is in the process of acquiring the options of Wittman  
5 510, L.L.C. in three stages. Woodside has acquired two options on the parcel located within the  
6 Company's certificated service area, and it plans to acquire and exercise the third option on the last  
7 parcel, the extension area described in Exhibit A, to complete the entire Walden Ranch subdivision,  
8 but as of the last date of hearing on September 13, 2006, had not yet completed the acquisition. (*T.*  
9 *Vol. II, P. 59*)

10          14.    Based on the record, all of the planned Walden Ranch subdivision including the  
11 requested extension area described in Exhibit A is included in and surrounded by the City's 309  
12 square mile General Planning Area ("GPA"), which was developed in accordance with Arizona's  
13 "Growing Smarter" Plan.

14          15.    The City is in the process of annexing various county areas in its GPA into the City  
15 limits and towards this end has had its 208 Plan Amendment approved by the Maricopa Association  
16 of Governments ("MAG") to be the regional wastewater treatment provider for its GPA besides  
17 providing wastewater service in the City.

18          16.    According to Mr. Scott Chesney and Mr. Richard Williams, although the Company  
19 and approximately nine other private water companies are providing water service in their existing  
20 certificated service areas within the City's GPA, if they attempt to extend their service areas in the  
21 GPA or in any proposed annexation areas, the City will oppose the expansion, and will not issue a  
22 franchise to a private utility to allow expansion in annexed areas. (*T. Vol. I, P. 76 and 189*)

23          17.    Because of MAG's approval of the City's 208 Plan, the City will be the regional sewer  
24 provider for Walden Ranch and any new developments henceforth in its GPA.

25          18.    On July 14, 2006, Woodside's attorneys wrote a letter to the City requesting water  
26 service for the Company's proposed extension area.

27          19.    Based on testimony by Mr. Williams, while the City has no water production or  
28 distribution facilities in or near the proposed extension area, it is clear that the City has the financial

1 means to meet the needs of the proposed extension area (*T. Vol. I, P. 198 and 199*). Mr. Williams  
2 confirmed the City's intent to serve in the requested extension area by sending on July 17, 2006, a  
3 "will serve letter" in response to Woodside's request for service sent by its attorneys.

4       20. Mr. Morrison indicated that Woodside wants water service from the Company in the  
5 Company's existing certificated service area for the parcel located there, and water service in the  
6 extension area, but he appears to have no preference for whether it is the Company's water or the  
7 City's water. However, during the hearing, Mr. Morrison indicated that he supports a request for  
8 service from his Company's attorney to the City for water service in the extension area. (*T. Vol. III,*  
9 *P. 76*) He further stated that despite a request from the Company that Woodside write a letter to the  
10 Company requesting service for the extension area, he has not done so. (*T. Vol. III, P. 86*)

11       21. In correlation with Woodside not requesting service for the extension area, on August  
12 30, 2006, Mr. Jones wrote a letter at the request of Woodside's attorneys to the Company  
13 withdrawing his earlier request for service in the extension area on behalf of Wittman 510, L.L.C.

14       22. According to the Staff Report, the Company is providing water which meets the  
15 requirements of the Safe Drinking Water Act and the Company's water is below the new maximum  
16 allowable arsenic level of 10 parts per billion.

17       23. Staff further indicates that the Company is in compliance with prior Commission  
18 Orders and is current on its property tax payments.

19       24. The Company has previously filed and received Commission approval of its  
20 Curtailment Tariff and during the hearing had admitted into evidence a copy of the Maricopa County  
21 franchise for the requested extension area described in Exhibit A.

22       25. Staff recommends the Commission approve the Company's application for an  
23 extension of its Certificate to provide water service, subject to the following conditions:

- 24
- 25           1. that the Company charge its authorized rates and charges in the extension  
26           area;
  - 27           2. that the Company file, within 365 days of the effective date of this  
28           Decision, with the Commission's Docket Control, as a compliance item in  
            this docket, a Notice of Filing indicating West End has submitted for Staff

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

review and approval, a copy of the fully executed main extension agreements for water facilities for the extension area;

3. that the Company file, by December 31, 2007, with the Commission's Docket Control, as a compliance item in this docket, a copy of the Maricopa County Environmental Services Department Approval to Construct ("ATC") for the new wells and storage tank;
4. that the Company file, by December 31, 2007, with the Commission's Docket Control, as a compliance item in this docket, a copy of the developer's Certificate of Assured Water Supply, where applicable or when required by statute;
5. that the Company file, within 45 days of the effective date of this Decision, a plan to reduce its water loss to less than 10%. If the Company believes that it is not cost effective to reduce its water loss to less than 10%, it shall file a detailed analysis with the Commission's Docket Control explaining why it is not cost effective to do so; and
6. that the Company reduce its water loss to a level that is 15% or less before filing for approval of any new main extension agreements.

26. Staff further recommends that the Commission's Decision granting the requested Certificate extension to Applicant be considered null and void, after due process, should the Company fail to meet Condition Nos. 2, 3, 4 and 5 listed above within the time specified.

27. Because an allowance for the property tax expense of Applicant is included in the Company's rates and will be collected from its customers, the Commission seeks assurances from the Company that any taxes collected from ratepayers have been remitted to the appropriate taxing authority. It has come to the Commission's attention that a number of water companies have been unwilling or unable to fulfill their obligation to pay the taxes that were collected from ratepayers, some for as many as twenty years. It is reasonable, therefore, that as a preventive measure the 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.

28. Under the circumstances, this is not a case of competing applications by competing private water companies over which the Commission has jurisdiction. While it appears that development may move forward on Walden Ranch, it is equally clear that the Company does not presently have a valid request for service for the extension area and the City, a non-jurisdictional

1 provider, apparently is willing to serve when service is required by the developer. We also note that  
 2 the City will apparently provide wastewater service to the proposed extension area, and that the  
 3 integrated provision of water and wastewater service by a single provider may be preferable to the  
 4 developer and ultimately to end use customers. However, we wish to make clear that the City's  
 5 inclusion of the proposed extension in its GPA is not a controlling factor in denying the Company's  
 6 application. Rather, the critical factor in this case is the lack of a current need for service in the  
 7 extension area, as reflected by the explicit withdrawal of the request for service set forth in Mr.  
 8 Jones' August 30, 2006 letter on behalf of Woodside Homes. If a valid request for service had been  
 9 presented in the record of this proceeding by West End, the City's objection to the application would  
 10 have carried very little weight, based on our view that a municipality should not be able to prevent  
 11 development by a property owner who seeks service from a private utility company, simply because  
 12 the City desires to serve that area at some unknown point in the future.

**CONCLUSIONS OF LAW**

- 14 1. Applicant is a public service corporation within the meaning of Article XV of the  
 15 Arizona Constitution and A.R.S. §§ 40-281 and 40-282.
- 16 2. The Commission has jurisdiction over the Company and the subject matter of the  
 17 application.
- 18 3. Notice of the application was provided in accordance with the law.
- 19 4. Without a valid request for service, the evidence does not establish that there is a  
 20 public need and necessity for water utility service by a private utility in the proposed service area  
 21 described in Exhibit A.
- 22 5. The application by the Company to extend its Certificate for the area described in  
 23 Exhibit A should be denied without prejudice.

24 ...  
 25 ...  
 26 ...  
 27 ...  
 28 ....

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**ORDER**

IT IS THEREFORE ORDERED that application of West End Water Company for an extension of its Certificate of Convenience and Necessity for the operation of a water utility in the area more fully described in Exhibit A is hereby denied.

IT IS FURTHER ORDERED that the West End 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 \_\_\_\_\_, 2007.

\_\_\_\_\_  
BRIAN C. McNEIL  
EXECUTIVE DIRECTOR

DISSENT \_\_\_\_\_

DISSENT \_\_\_\_\_

1 SERVICE LIST FOR: WEST END WATER COMPANY

2 DOCKET NO.: W-01157A-05-0706

3

4 J. Scott Rhodes  
JENNINGS STROUSS & SALMON  
201 East Washington Street, 11<sup>th</sup> Floor  
5 Phoenix, AZ 85004

6 Joan S. Burke  
Danielle D. Janitch  
7 OSBORN MALEDON  
2929 N. Central Avenue, Ste. 2100  
8 Phoenix, AZ 85012  
Attorneys for the City of Surprise

9

10 City Attorney  
City of Surprise  
12425 West Bell, Ste. D100  
11 Surprise, AZ 85374

12 Christopher Kempley, Chief Counsel  
Legal Division  
13 ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
14 Phoenix, AZ 85007

15 Ernest G. Johnson, Director  
Utilities Division  
16 ARIZONA CORPORATION COMMISSION  
1200 West Washington  
17 Phoenix, AZ 85007

18

19

20

21

22

23

24

25

26

27

28

EXHIBIT A  
ATTACHMENT "B"

Maricopa	25	5N	3W
COUNTY	SECTION	TOWNSHIP	RANGE

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

Type or Print Description Here:

NW 1/4 of Section 25 R5N T3W