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BEFORE THE ARIZONA CORPORATION CO.

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Arizona Corporation Commission

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COMMISSIONERS

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

IN THE MATTER OF THE APPLICATION OF
 PERKINS MOUNTAIN UTILITY COMPANY
 FOR A CERTIFICATE OF CONVENIENCE
 AND NECESSITY.

DOCKET NO. SW-20379A-05-0489

IN THE MATTER OF THE APPLICATION OF
 PERKINS MOUNTAIN WATER COMPANY
 FOR A CERTIFICATE OF CONVENIENCE
 AND NECESSITY.

DOCKET NO. W-20380A-05-0490

STAFF'S CLOSING BRIEF

I. INTRODUCTION.

On July 7, 2005 Perkins Mountain Utility Company ("PMUC") and Perkins Mountain Water Company ("PMWC") (collectively "Perkins") filed with the Commission applications for certificates of convenience and necessity to provide potable wastewater and water, respectfully, to two master planned communities in Mohave County, Arizona. One master planned community, known as Golden Valley South, consists of over 5,000 acres and is located approximately five miles southeast of Kingman. Golden Valley South will include an active adult community with an 18-hole golf course, an interconnected community for all ages and an industrial/business park area and community commercial area. At build out it is expected to be comprised of more than 33,000 dwellings.

The Villages at White Hills consists of 2,727 acres and is located along U.S. Highway 93, approximately 29 miles south of Hoover Dam, with a commercial area along U.S. Highway 93 that is expected to serve residents and travelers. The Villages at White Hills is intended to be a self-contained community to provide affordable homes for commuters to the Las Vegas Metropolitan areas. At build out, it is expected to be comprised of more than 20,000 dwelling units. Open spaces, including a golf course will eventually be irrigated with reclaimed water from the wastewater reclamation plant.

1 A hearing was held on these applications on December 5, 2005. A recommended opinion and
2 order was issued on January 31, 2006. Three days before the recommended order and opinion was to
3 be heard in an Open Meeting, Perkins filed in the docket its Analysis of Adequate Water Supply from
4 the Arizona Department of Water Resources ("ADWR") stating that only 9,000 acre feet of water
5 was found to be physically available for Golden Valley South; PMWC had estimated that it would
6 need over 15,000 acre feet to serve the proposed development at Golden Valley. The matter was
7 removed from the Open Meeting Agenda because of the concern of the adequacy of water in the area
8 and returned for a second evidentiary hearing, which was held February 15, 16, 20, 26, March 2, 6, 8,
9 2007.

10 Staff has recommended approval of the applications with conditions. At the commencement
11 of the hearings, there were three contested issues between Perkins and Staff regarding Staff's
12 recommended conditions: (i) the appropriate level of a bond or an irrevocable letter of credit; (ii)
13 Staff's recommended requirement of at least 50% equity for Perkins' capital structure; and (iii)
14 whether the Commission should issue an Order Preliminary or a conditional certificates for Golden
15 Valley South. By the conclusion of the hearings, the parties had reached agreement on the contested
16 issues; Perkins acquiesced to Staff's recommendations.

17 These applications have been the subject of intense scrutiny; during the hearing and at the
18 conclusion, Staff was asked to address in its closing brief: what is the standard for fit and proper;
19 what is the Commission's position on the construction of infrastructure prior to the issuance of a
20 certificate of convenience and necessity; what are the rights of a private landowner, such as a golf
21 course owner to water its course with groundwater from a private well, despite a Commission order
22 prohibiting a water company for selling groundwater to be used to water a golf course; and the parties
23 stance on water conservation measures.

24 **II. THE PUBLIC INTEREST.**

25 It is well established that Arizona's public policy respecting public service corporations, such
26 as water companies, is one of regulated monopoly over free-wheeling competition.¹ Under this
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¹ *Corporation Commission of Arizona v. People's Freight Line, Inc.*, 41 Ariz. 158, 16 P.2d 420 (1932).

1 system, the Commission is statutorily required to investigate all applicants for a certificate of
2 convenience and necessity for a given area, *see* A.R.S. §§ 40-281 to 285, and to issue a certificate
3 only upon a showing that the issuance to a particular applicant would serve the public interest.²

4 Arizona Revised Statutes §§ 40-281 et. seq., governs certificates of convenience and necessity
5 (“CC&N”). Section 40-282(C) grants the Commission the authority to issue or refuse to issue a
6 CC&N. The statute states in part:

7 The commission may after a hearing issue the certificate or refuse to issue
8 it, or issue it for the construction of only a portion...or for the partial
9 exercise only of the right or privilege, and may attach to the exercise of
rights granted by the certificate terms and conditions it deems that the
public convenience and necessity require.

10 Section 40-282 grants the Commission broad discretion in the grant of or the refusal to grant a
11 CC&N. The statute does not articulate the circumstances under which a CC&N is to be granted in
12 whole or in part or denied. Thus, the Commission under its broad authority, decides what is in the
13 public interest (what “the public convenience and necessity require”) when granting or denying a
14 CC&N.

15 The Commission arrives at its decision to grant or deny a CC&N by conducting an
16 investigation of an applicant. AAC R14-2-402 details the application process for a CC&N for water
17 utilities. AAC R14-2-602 details the application process for a CC&N for sewer utilities. The
18 application process is designed to provide Commission Staff with the necessary information to assist
19 in the making of recommendations to the Commission. The Commission’s power to investigate is
20 quite broad; the regulation lists the minimal amount of information needed to submit an application,
21 and Commission Staff can request “additional information”, under AAC R14-402 (4), in order to
22 assess the capabilities of the applicant so as to make the finding that the granting of a CC&N would
23 serve the public interest.

24 Courts have found that the Commission’s authority to investigate CC&N applicants is a
25 necessary part of its duty to act according to the public interest. In *James P. Paul Water Co. v. Ariz.*
26 *Corp. Comm’n*,³ the Court held that the Commission could not simply delete a service area from a
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28 ² *Pacific Greyhound Lines v. Sun Valley Bus Lines*, 70 Ariz. 65, 216 P.2d 404 (1950).

³ 137 Ariz. 426, 671 P.2d 404 (1983).

1 company's existing CC&N without first making an evidentiary showing that the certificate holder is
2 unable or unwilling to provide service at reasonable rates. Paul was the holder of a CC&N and a
3 competing water company petitioned the Commission to delete a certain portion of Paul's service
4 territory. The Commission granted the request and Paul filed suit, seeking to overturn the
5 Commission's decision. The Court interpreted ARS §§ 40-281 to 285 to require the Commission to
6 investigate all applicants for a CC&N for a given area and to issue the CC&N "only upon a showing
7 that the issuance to a particular applicant would serve the public interest."⁴ The Court emphasized
8 that what is in the public interest must be the controlling factor in the Commission's decision to issue
9 a CC&N to a water company⁵ and that investigation of the applicants is necessary to determine the
10 public interest. The court went on to define how the public interest is determined; that where a
11 request for a certificate of convenience and necessity is made, the public interest is determined by
12 comparing the capabilities and qualifications of competitors vying for the exclusive right to provide
13 the relevant service. The amounts of time and money competitors must spend (at the consumers'
14 ultimate expense) to provide service become primary determinants of the public interest.⁶

15 If the public interest is to be determined by an examination of capabilities and qualifications,
16 what does that examination involve? The application for a CC&N requires an applicant to supply
17 information regarding the entity applicant, a description of the facilities proposed, the cost of the
18 construction, the manner and method of capitalization, the financial condition of the applicant, and
19 any additional information requested by Commission Staff. Thus, the Commission investigates the
20 technical and financial capability of an applicant.

21 **III. FIT AND PROPER.**

22 There is no "fit and proper" *standard* applicable to public service corporations required either
23 by statute or by the Arizona Administrative Code. However, at least one prior statute expressly
24 required the Commission to consider whether an applicant is "fit and proper" when issuing a
25 certificate. A.R.S. § 40-607, prior to its repeal in 1979, expressly provided that only "fit and proper"
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27 ⁴ *James P. Paul Water Co.*, 137 Ariz. at 429, 671 P.2d at 407.

28 ⁵ *Id.*, citing Arizona Revised Statutes § 40-282(C).

⁶ *Id.* at 430, 671 P.2d at 408.

1 applicants could be issued a certificate to be a common motor carrier.⁷ Case law interpreted the “fit
2 and proper” standard under A.R.S. § 40-607 to grant the Commission discretion to consider all
3 factors when it decides whether to issue a certificate.⁸ This statute was likely repealed when the
4 Commission ceased to have jurisdiction over common carriers.

5 Other states maintain a “fit and proper” standard for common carriers or hauling garbage
6 carriers.⁹ Arizona has one statute that requires applicants for a certificate of necessity to operate an
7 ambulance service to be “fit and proper”. A.R.S. § 36-2201. Section 36-2233 defines “fit and
8 proper”: “the director determines that an applicant...has the expertise, integrity, fiscal competence,
9 and resources to provide ambulance service in the service area.”

10 If there is not a “fit and proper” standard, how does or should the Commission view fit and
11 proper? The Commission has viewed “fit and proper” as an expression that the granting of a CC&N
12 or taking any other action with respect to a CC&N would or would not serve the public interest.

13 In the Decision No. 66984¹⁰, Staff had filed a complaint against LiveWireNet, a
14 telecommunications company, because of ongoing investigations of the principals of the
15 LiveWireNet in other states along with consumer complaints and failure to pay its wholesale
16 provider. The company and its principals had shown a pattern of conduct of bankruptcies, harm to
17 consumers through disruption of phone service, consent decrees, federal and state investigations, and
18 violations of state rules and orders. The company in that matter had failed to demonstrate that it had
19 the financial resources or the technical capability to provide telephone service in Arizona. Staff
20 petitioned to have the CC&N revoked as the company was not fit to provide telephone service.

21 The Respondent phone company had argued that the “fit and proper” standard does not appear
22 in Arizona law or in the Commission Rules and therefore the Commission has no ability or authority
23 to examine whether an applicant is “fit and proper” to provide service in the state. The Commission
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25 _____
26 ⁷ §§ 40-601– 40-620: Historical and Statutory Notes; *Ariz. Corp. Comm'n v. Construction Trucking Service*, 13 Ariz.
App. 22, 24, 473 P.2d 824, 826 (App.1970).

27 ⁸ *Id.* (holding that it was not unreasonable for the Commission to consider applicant's owner's prior criminal convictions
under the “fit and proper” requirement).

28 ⁹ *Kovack v. Licensing Bd*, 157 Me. 411, 173 A.2d 554 (Me. 1961); *Byham v. Penn. Public Utility Comm'n*, 165 Pa.Super.
253, 67 A.2d 626 (Pa.Super. 1949).

¹⁰ *Utilities Division Staff v. Livewirenet of Arizona*, Docket No. T-03889A-03-0152, Decision No. 66984.

1 flatly rejected this argument, finding that “fit and proper” is a “conclusory statement, made about the
2 ability of a public service corporation to adequately serve the public and the public interest.”
3 (Decision 66984, Conclusion of Law ¶ 45) The Commission found the telephone company and its
4 principal unfit, citing financial and technical incompetence and a pattern of regulatory noncompliance
5 in Arizona and other jurisdictions. (*Id.* Conclusion of Law ¶¶ 42-44).

6 Similarly the Commission in Decision No. 66650¹¹, denied Bensch Ranch a CC&N, finding
7 that it was not a “fit and proper” entity. Bensch Ranch was seeking a CC&N to provide sewer
8 service to two planned residential developments. One of the planned developments, BR Estates, a
9 limited liability company, had as one of its members, Lester O. Smith. Mr. Smith was a principal in
10 American Public Service Company, and had been fined in a previous Commission decision for
11 violation of Commission Orders, rules and regulations in “total disregard for the public health and
12 safety”. Bensch Ranch was found to have demonstrated a pattern of delay in providing required
13 information and additionally, because Bensch Ranch failed to adequately assure that Mr. Smith
14 would not be able to control Bensch Ranch functions, the Commission denied Bensch Ranch a
15 CC&N by finding that the granting of a CC&N would not be in the public interest.¹² The
16 Commission later issued Bensch Ranch a CC&N upon adequate assurances that Smith would not
17 control Bensch Ranch functions.¹³

18 What *LiveWireNet* and *Bensch Ranch* demonstrate is that the expression of “fit and proper” is
19 the predicate for determining if the granting or the denial of a CC&N is in the public interest. In
20 *LiveWireNet*, the respondent telephone company had repeatedly and willfully violated Commission
21 orders, failed to timely provide information, and failed to pay its wholesale provider, which would
22 result in a loss of service to its customers and endangering their health and safety. Other telephone
23 ventures of the principal of *LiveWireNet* were under investigation in several other states for multiple
24 violations of state regulatory rules and had resulted in consent decrees. The principal of *LiveWireNet*
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26
27 ¹¹ *In the Matter of the Application of Bensch Ranch Utilities, LLC Application for a Certificate of Convenience and
Necessity to Provide Sewer Service*, Docket No. SW-04026A-01-0499, Decision No. 66650.

¹² *Id.*, Decision No. 66650, Findings of Fact ¶ 28, Conclusions of Law ¶ 3.

28 ¹³ *Bensch Ranch Utilities, LLC Application for a Certificate of Convenience and Necessity to Provide Sewer Service*, SW-
01-0499, Decision 67180.

1 had filed for bankruptcy and was under investigation by the Federal Securities and Exchange
2 Commission for securities fraud violations.

3 In *Bensch Ranch*, one of the affiliates had as a principal, a person who had previously been
4 involved with certificated entities that had been the subject of protracted environmental and
5 regulatory concerns and had resulted in fines and notice to the Attorney General for the demonstrated
6 total disregard for the public health.¹⁴

7 There is no bright line test for what is “the public interest”. A.R.S. § 40-282(C), grants the
8 Commission broad discretion when issuing certificates to decide what is in the public interest, and the
9 Commission would reasonably conclude that an applicant who has risked public health and safety
10 through numerous regulation violations is not in the public interest and therefore, not “fit and
11 proper.” Further, if an applicant lacks the financial capability or the technical expertise to serve the
12 public, the Commission may reasonably conclude that the granting of a CC&N to an applicant who is
13 not a fit and proper entity would not be in the public interest.

14 Other jurisdictions have upheld public utility commission decisions that rejected applicants
15 due to their criminal history. In *PBI Freight Service v. Public Service Commission*¹⁵, the court
16 emphasized that the public service commission’s duty is to verify that the statutory requirements have
17 been met and determine whether granting a certificate would be in the public interest and in the
18 interest of the involved parties.¹⁶ The court noted that Utah’s statutes do not prohibit granting a
19 permit to an applicant that has violated the law but that participation in illegal operations is an
20 important factor for the Commission to consider when it determines what is in the public interest and
21 the interest of parties.¹⁷

22 Notably, past criminal activity does not automatically disqualify a candidate. A public service
23 commission’s duty to the public interest may require the commission to grant certificates to parties
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26 ¹⁴ See In the Matter of the Formal Complaint Against Litchfield Park Service Company filed by Utilities Division Staff,
Docket No. SW-01428A-02-0720, Decision 66036.

27 ¹⁵ 626 P.2d 408 (Utah, 1981).

28 ¹⁶ *Id.* at 409.

¹⁷ *Id.* at 409. See also *Byham v. Penn. Pub. Serv. Comm’n*, at 253, 67 A.2d 626, 627, 629 (Pa.Super. 1949) (holding that public utility commission did not err by considering appellant’s convictions for drunkenness and disorderly conduct when it evaluated the appellant’s application for a certificate of public convenience to be a common carrier).

1 who have committed prior violations. See *Unitah Freight Lines v. Public Service Commission*¹⁸ and
2 *Cage v. Public Serv. Comm'n.*¹⁹

3 Staff has conducted a thorough investigation of Perkins and its affiliated entities in this
4 matter. In the amended Staff Report, Staff included recommendations to ensure that the public
5 interest would be served. Among its recommendation, Staff recommended a performance bond or an
6 irrevocable letter of credit in the amount of \$2.5 Million for each utility, a capital structure of fifty
7 percent (50%) equity and orders preliminary with the need to supply an Analysis of Adequate Water
8 and conditional CC&Ns with a need to provide a Water Adequacy Report for each subdivision as
9 measures to protect the public interest.

10 Staff concluded that the granting of CC&Ns to Perkins would serve the public interest. Ms.
11 Chukwu, on behalf of Commission Staff, testified that when reviewing an application for a certificate
12 of convenience and necessity, the determining factor is whether the request is in the public interest.
13 (Tr. 1322:13-17) In determining what is in the public interest, Staff reviews the financial capability
14 and the technical expertise of the applicant.

15 For the instant applications, Ms. Chukwu testified that Staff looked at the number of
16 customers to be served, which was much larger than most other applications she has reviewed. She
17 stated that the size of the customer base contributed to the recommendations made by Staff. Staff
18 also reviewed the financial capability of Perkins, reviewing several parent levels above Perkins,
19 which included the affiliates, Rhodes Homes Arizona, LLC, the Rhodes Companies, and Sagebrush
20 Enterprises. Linda Jaress, Staff's witness who reviewed the financial capabilities of the applicants,
21 testified that the two immediate parent companies of Perkins were less secure. However, the Moody's
22 rating for the Rhodes Companies, combined with the Staff recommendation concerning the capital
23 structure, and the Company's agreement to provide either a bond or letter of credit for \$5 million for
24

25
26 ¹⁸ 119 Utah 491, 499-500, 229 P.2d 675, 679 (Utah 1951) ("situations may arise in which the Commission might find it
consistent with its duty to the public to award carriers' rights even where there had been law violations").

27 ¹⁹ 125 Pa.Super. 330, 335-36, 189 A. 896, 899 (Pa.Super. 1937) (finding Commission's refusal of appellant's application
28 for additional rights due to prior violations of their certificate of public convenience unreasonable because of the public's
substantial need for service).

1 both utilities provided sufficient financial and operating security to bolster Staff's recommendation of
2 approval of the applications. (See Exhibit S-4, Attachment D)

3 With respect to the capital structure, Perkins submitted Exhibit A-50, which was the result of
4 negotiation with Staff concerning the proposed recommendation for the capital structure. Ms. Jaress
5 testified that so long as Perkins understands that the phrase "total capital" means "total equity" as
6 found in the Commission's Annual Report submitted annually by utilities, then Staff was in
7 agreement with Perkins proposed CC&N Condition No. 15. (Tr. at 1292-93) Further, Perkins and
8 Staff agreed to revise the proposed rate base to reflect the revised capital structure. (Tr. at 1276)

9 Ms. Chukwu testified regarding the review of the technical expertise of Perkins. She testified
10 that Perkins had hired Aricor Water Solutions ("Aricor"), as its certified operator. Aricor's principal
11 is Ray Jones, who is a certified operator and who also testified on behalf of Perkins.

12 Mr. Jones testified that he was a certified operator in all four classifications,
13 which are wastewater treatment, wastewater collection, water treatment and water distribution. (Tr. at
14 433) He further testified that he is a grade 3 operator. (Tr. at 434) Although Perkins has no
15 experience operating a water company or a wastewater company, Staff saw it as positive that Perkins
16 entered into an operations agreement with Aricor to run its operations. (See Tr. at 1282)

17 Finally Staff reviewed the business practices of the applicants in this case. As in other
18 applications before the Commission, Staff reviews all information it can find, be it newspaper
19 articles, court documents, and information on regulatory compliance that it deems relevant in
20 assisting in making recommendations to the Commission. In addition to financial and technical
21 ability, this is, as the Administrative Law Judge noted in a question to Ms. Chukwu, "...a third
22 category of intangible elements". (Tr. at 1360) It is the obligation of Staff to furnish all necessary
23 and relevant information to assist the Commission in making an informed decision. (Tr. at 1331)
24 Staff concluded, after reviewing the financial capabilities, the technical capabilities, along with other
25 information concerning Perkins and its affiliates ("the intangible elements"), that Perkins is fit and
26 proper and that it would be in the public interest to grant Staff's recommended conditional CC&Ns.
27 (Tr. at 1332)

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2 **IV. BUILDING INFRASTRUCTURE PRIOR TO THE ISSUANCE OF A CC&N.**

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4 It is uncontroverted that Rhodes Homes Arizona has constructed water infrastructure around
5 the proposed CC&N area, has a capped well and has commenced some grading work within the
6 proposed CC&N boundaries. The distinction of whether the building of infrastructure has taken
7 place within or without the proposed CC&N area is not dispositive; A.R.S. § 40-281(A) states that no
8 infrastructure building can take place by a public service corporation without a CC&N. In
9 determining whether Rhodes Homes Arizona has the right to construct infrastructure within the
10 confines of the jurisdiction of the Commission, it must first be determined if Rhodes Homes Arizona
11 is a public service corporation. Staff concluded that Rhodes Homes Arizona is not acting as a public
12 service corporation (Tr. at 31: 2-6).

13 Article 15, § 2 of the Arizona Constitution defines a public service corporation as “all
14 corporations other than municipal engaged in...furnishing water for irrigation, fire protection, or
15 other public purposes...for profit....” If a corporation is acting as a public service corporation, then it
16 may not commence construction of plant or a system unless it has received a CC&N. A.R.S. § 40-
17 281(A).

18 Section 40-281(A) states in part:

19 A public service corporation, other than a railroad, shall not begin
20 construction of a street railroad, a line, plant, service or system, or any
21 extension thereof, without first having obtained from the commission a
22 certificate of public convenience and necessity.

23 In determining whether an entity is action as a public service corporation, the court has held
24 that it must first be determined if the entity is “clothed with public interest” by “making its rates,
25 charges or methods of operations a matter of public concern”.²⁰ It must also be determined by
26 analyzing the entity according to eight factors listed by the Arizona Supreme Court. Those factors
27 are:

- 28 1. What the corporation actually does;
2. A dedication to the public use;

²⁰ *Southwest Gas v Arizona Corp. Comm'n*, 169 Ariz 279, 286, 818 P.2d 714, 721 (1991).

3. Articles of incorporation;
4. Dealing with the service or a commodity in which the public has been generally held to have an interest;
5. Monopolizing or intending to monopolize the territory with a public service commodity;
6. Acceptance of substantially all requests for service;
7. Service under contracts and reserving the right to discriminate is not always controlling;
8. Actual or potential competition with other corporations whose business is clothed with the public interest.

Natural Gas Service v. Serv-Yu Coop, 70 Ariz 235, 237-38, 219 P.2d 324, 325-26 (1950).

A. ADEQ Approval to Construct

Arizona Administrative Code Title 18, Chapter 5, Article 5 specifies minimum design criteria for public water systems. Prior to initiating construction or modification of any facility (pressure system, storage tanks and distribution systems), a public water system must first obtain approval to construct from the Arizona Department of Environmental Quality ("ADEQ"). Approval to construct is also necessary prior to construction of a new source of water for a public water system.

The rule requires that plans, specifications and design reports submitted for ADEQ review be sealed and signed by a professional engineer. There is a general exception to this requirement if construction costs can be documented to not exceed \$12,500.

B. Investigation of Rhodes Homes Arizona

Staff witness Marlin Scott, along with representatives from ADEQ, visited the site to conduct a field inspection on September 21, 2006. At the time of the inspection, Rhodes Homes Arizona had been issued Approvals to Construct for a transmission water line, a 1.0 million gallon storage tank and Well #1 known as GV#1. (Ex S-4, Attachment C) In his testimony and field report, Mr. Scott detailed his observations and noted that the construction activity he observed was outside of the CC&N area. During this field inspection, he observed grading that was taking place within the requested CC&N area. (Tr. at 1219) He also observed a capped well, GV#4, which is located inside the proposed CC&N area and toured the four design homes that lie outside of the proposed CC&N area. He noted that those four homes were being served by hauled water and portable toilets. (Ex S-4, Attachment C; TR at 108)

1 In applying the *Serv-Yu* factors, Staff has concluded that Rhodes Homes Arizona is
2 not acting as a public service corporation. No customers are being provided water. Rhodes Homes
3 Arizona has not sold homes to the public, but is taking reservations with a fully refundable deposit.
4 (Tr. at 111) Rhodes Homes Arizona is in the business of providing homes. There is no distribution
5 system built in the proposed CC&N area for Golden Valley, although Rhodes Homes Arizona has
6 applied for an Approval to Construct from ADEQ. Mr. Brynjulson testified that once an Approval to
7 Construct was received for Golden Valley South, infrastructure would be built at Rhodes Homes'
8 own risk. (TR at 640-641) Mr. Brynjulson testified that once the backbone infrastructure for water
9 and sewer is built in Golden Valley and the Villages at White Hills, it will be conveyed to Perkins.
10 (Tr. at 172) It is Perkins intention to comply with Commissions rules and no work will or service will
11 commence until Perkins is granted a CC&N and declared a public service corporation.

12 **III. WATER ADEQUACY.**

13 **A. Background of Groundwater Management**

14 The Arizona Legislature created the Department of Water Resources ("ADWR") when it
15 enacted the landmark 1980 Groundwater Management Code. (A.R.S. § 45-101 et. seq.) Lawmakers
16 charged ADWR with securing long-term water supplies for communities within the State of Arizona.
17 The duties include among others: (i) Implementing the Groundwater Management Code; (ii)
18 Registering all surface water and groundwater rights.

19 The Legislature enacted the groundwater code to relieve the problem of groundwater
20 overdraft (i.e. taking out more water than was being replaced) in parts of Arizona that were
21 designated Active Management Areas .The State's Active Management Areas ("AMA"s) were
22 established to provide long-term management and conservation of their limited groundwater supplies.
23 In order to accomplish this the AMAs administer state laws, explore ways of augmenting water
24 supplies to meet future needs, and routinely work to develop public policy in order to promote
25 efficient use and an equitable allocation of available water supplies.

26 The Office of Assured and Adequate Water Supply manages applications for both the Assured
27 Water Supply program and the Adequate Water Supply program. The Assured Water Supply
28

1 Program covers subdivisions within AMAs while the Adequate Water Supply Program covers
 2 developments outside of the AMAs. Four types of applications are processed in each of these
 3 roughly parallel programs: Physical Availability Demonstration ("PAD"), Designation of Assured
 4 (or Adequate) Water Supply, Analysis of Assured (or Adequate) Water Supply, and either Certificate
 5 of Assured Water Supply or Water Adequacy Report. Because Perkins is outside of an AMA, it
 6 would be subject to the Adequate Water Supply program.

7
 8 Generally, the term "Adequate Water Supply" means that water is:

9 a. Meeting Current Water Quality Standards;

10 b. Physically Available

11 (i) hydrology report and pump test shows water supplies can meet water demands of
 subdivision at full build-out for 100 years.

12 (ii) ADWR subtracts water that has already been allocated to other water providers,
 developers, and major water users.

13 c. Legally Available

14 (i) Legal right to take the water from the ground or stream.

15 (ii) A water company, municipality, or district has authority to serve the subdivision.

16 d. Continuously Available

17 (i) Water system is, or will be, available to take water from the ground or stream to the
 homes or businesses.

18 An applicant to the Adequate Water Supply program must also show financial capability. If
 19 the water supply is determined to be inadequate, a developer may still sell lots, but the inadequate
 20 determination must be disclosed to potential buyers in the public report approved by Arizona
 21 Department of Real Estate and in all promotional materials.

22 As stated, there are several different applications that may be made under the Adequacy
 23 Program:

24 a. Physical Availability Determination (PAD)

25 (i) Hydrology study showing that water is physically available.

26 (ii) Does not "reserve" water for the person applying for the PAD; simply shows that
 the water is there.

27 (iii) Does not enable developer to get a public report.

28 b. Analysis of Adequate Water Supply

- (i) Shows water is physically available for a subdivision.
- (ii) It “reserves” the water for the subdivision (ADWR takes this amount of water into account when reviewing other applications in the vicinity, see TR at 225).
- (iii) Developers can also try to prove continuous and legal availability, but that is unnecessary to “reserve” the water.
- (iv) Does not enable developer to get a public report.

c. Water Report

- (i) Demonstrates that good quality water is physically, continuously, and legally available for subdivision.
- (ii) Allows a developer to obtain a public report.

d. Designation of Adequate Water Supply

- (i) A water company, municipality, or district demonstrates that there is water available to meet their current, committed, and projected water demands.
- (ii) This “reserve” the water for the water provider based on the current lots and proposed development lots in their service area.
- (iii) If a designated water provider agrees to serve the proposed subdivision, then the developer only has to provide a written commitment of service from the designated provider to ADWR.
- (iv) This will allow a developer to obtain a public report.

B. Well Spacing Rules and Rights of Well Owners Outside an AMA.

In general, every landowner has the right to construct a well and pump groundwater for a beneficial use. (A.R.S. § 45-453) This right is unrestricted outside of Arizona’s five AMAs. Inside of the AMAs, there are some restrictions so that groundwater can be better managed.

Outside the AMAs there are no formal groundwater rights. Every landowner may drill a well and pump as much water as they can put to beneficial use. Impacts on other wells in the vicinity need not be considered. ADWR has no regulatory power to control impact on other wells outside of an AMA.

AAC R12-15-1302 through R12-15-1307 contains well spacing criteria that must be complied with to construct or use certain wells. The rules are designed to prevent unreasonably increasing damage to surrounding land or other water users from the concentration of wells. The well spacing criteria address three types of unreasonably increasing damage: (1) additional drawdown of water levels at neighboring wells of record; (2) additional regional land subsidence; and (3) migration of contaminated groundwater to a well of record.

1 It is important to note that the well spacing rules do not apply to the construction or use of the
2 following types of wells: (1) wells drilled outside of AMAs, except certain recovery wells and certain
3 wells used to withdraw groundwater for transportation away from a groundwater basin; (2) exempt
4 wells within AMAs (generally, non-irrigation wells with a maximum pumping capacity of 35 gallons
5 per minute or less); (3) wells within AMAs drilled pursuant to groundwater withdrawal permits other
6 than general industrial use permits (e.g., mineral extraction and metallurgical processing permits,
7 drainage permits, dewatering permits and poor quality groundwater permits); and (4) wells that
8 withdraw only surface water. (*See generally* A.R.S. §45-453)

9 If a private landowner, such as a golf course, were to drill a well and comply with the
10 applicable regulations from ADEQ and ADWR, and is located outside of an AMA, the landowner
11 would be able to withdraw water for watering

12 **C. Staff's Recommendations Address the Issues of Adequate Water Supply.**

13 Against this background, because of concerns with water adequacy outside of AMAs, Staff
14 recommends Orders Preliminary²¹ and requires applicants to supply a showing that adequate water is
15 available. In the instant case, Perkins submitted its analysis of adequacy notification that ADWR
16 found 9,000 acre feet of water available, short of what was needed at build out of Golden Valley
17 South. (Ex A-15) With respect to the Village at White Hills, ADWR has not issued an adequacy
18 analysis determination. (Tr. at 823)

19 PMWC resubmitted its analysis to ADWR, using effluent. ADWR, on August 14, 2006 then
20 determined that 2,895.69 11 acre feet of treated effluent was physically available, bringing the total
21 of physically available water 11, 566.88 feet per annum. PMWC submission for projected water
22 demand indicated the need for 12,196.11 acre-feet, which is 300.42 acre feet more than what has
23 officially been determined to be legally available.

24 During the hearing, Perkins and Staff reached an agreement that would recommend that a
25 conditional CC&N could be issued for most of Golden Valley South and that an Order Preliminary be
26 issued for a small portion of the project that could be associated with the 300.42 acre-foot demand.
27

28 ²¹ *See generally* A.R.S. §40-282 (D).

1 (Tr. at 155-57) On March 21, 2007, Perkins filed a late filed legal description with its suggestion of
2 the specific piece of land that would be subject to the Order Preliminary. Staff is evaluating the
3 submittal.

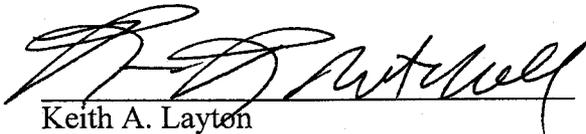
4 **IV. WATER CONSERVATION.**

5 Staff witness Marlin Scott testified that Staff is a stakeholder with ADWR and participates in
6 ADWR meetings and discussions on the development of best management practices with respect to
7 water conservation. (Tr. at 1198) Mr. Scott also testified to date no utilities have tariffs that contain
8 developer deed restrictions relating to conservation measures similar to those contained in the
9 CC&Rs for Golden Valley South. Mr. Brynjulson testified that landscaping restrictions were among
10 the conservation measures included in the CC&Rs. (Tr. at 689-90) Mr. Brynjulson also testified that
11 both Rhodes Homes Arizona and PMWC were committed to water conservation. (Tr. at 689-90)

12 **V. CONCLUSION.**

13 Staff continues to recommend approval of the applications in this matter. PMWC and PMUC
14 are fit and proper entities. The Staff recommendations of the conditional grant of the CC&N for
15 Golden Valley South, with an Order Preliminary for a small portion of that community, an Order
16 Preliminary for the Village at White Hills, coupled with the numerous conditions, all of which
17 PMWC and PMUC, have agreed with, will provide more than adequate assurance of performance,
18 protection for the ratepayers and will serve the public interest.

19
20 RESPECTFULLY SUBMITTED this 30th day of March, 2007.

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22 

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