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BEFORE THE ARIZONA CORPORATION COMMISSION

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2007 MAR 30 P 4: 47

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

DOCKET NO. W-20380A-05-0490

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

DOCKET NO. SW-20379A-05-0489

**CLOSING BRIEF OF PERKINS
MOUNTAIN WATER COMPANY
AND PERKINS MOUNTAIN
UTILITY COMPANY**

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I. INTRODUCTION.

Perkins Mountain Water Company ("PMWC") and Perkins Mountain Utility Company ("PMUC") (collectively the "Applicants"), through counsel undersigned, hereby submit their closing brief for the hearing held on February 15, 2007, and continuing on various days through March 8, 2007. Subject to the conditions set forth in the December 15, 2006 Addendum ("Staff Report Addendum") to Staff Report filed November 10, 2005 ("Staff Report"), Staff found the Applicants fit and proper and recommended approval of their respective applications (collectively, the "Applications") for water and wastewater Certificates of Convenience and Necessity ("CC&Ns"). All matters of disagreement between the Utilities Division Staff ("Staff") and the Applicants have been resolved. Therefore, the Applications should be approved consistent with Staff's recommendations and the evidence in this case.

II. PROCEDURAL HISTORY.

On July 7, 2005, the Applicants filed their respective Applications to provide

1 water and wastewater services to proposed master planned developments in Mohave
2 County known as Golden Valley South and Villages at White Hills. On November 10,
3 2005, Staff filed its Staff Report recommending approval of the Applications with
4 conditions. A hearing was held in this matter on December 5, 2005, and the Applicants
5 filed their closing brief on January 6, 2006.

6 A Recommended Opinion and Order (“ROO”) was issued by the Administrative
7 Law Judge (“ALJ”) on January 31, 2006, finding that PMWC and PMUC “are fit and
8 proper entities to receive water and wastewater CC&Ns” and recommending that the
9 Applications for CC&Ns be approved subject to the conditions listed in the ROO. (ROO
10 at 16). The ROO was scheduled for consideration by the Commission at the February
11 14, 2006 Open Meeting.

12 One of the conditions in the ROO required PMWC “to file with Docket Control
13 as a compliance item, copies of the developer’s Letter of Adequate Water Supply
14 demonstrating the availability of adequate water for the requested areas within 24
15 months after the effective date of the order granting this application.” (ROO at 13,
16 Finding of Fact 24(m)). Rather than waiting until after the effective date of the order—
17 and believing it would be supportive of its Application and helpful to the Commission—
18 PMWC filed on February 10, 2006, a copy of an Analysis of Adequate Water Supply
19 issued by the Arizona Department of Water Resources (“ADWR”) dated October 19,
20 2005, stating that “9,000 acre-feet per year of groundwater will be physically available”
21 for Golden Valley South. However, as a result of this filing, the ROO was withdrawn
22 from the February 14, 2006, Open Meeting agenda because questions were raised
23 regarding the significance of the letter in the context of the adequacy of water for the two
24 master planned developments.

25 On February 17, 2006, Commissioner Mayes filed a letter with Docket Control
26 raising questions about the Analysis of Adequate Water Supply because the 9,000 acre-
27 feet of groundwater physically available was less than the estimated demand for Golden
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1 Valley South at the time of the initial filing with ADWR. The Applicants responded
2 with a letter to Commissioner Mayes dated March 6, 2006. The Applicants also filed a
3 Motion for an Expedited Procedural Conference (“Motion”) on March 6, 2006. The
4 Motion was filed because the ROO was scheduled to be heard at the March 15, 2006,
5 Open Meeting of the Commission, and the Applicants were seeking “direction from the
6 Administrative Law Judge how best to supplement the record” to answer
7 Commissioners’ questions regarding steps taken by the developer to secure an adequate
8 water supply. A procedural order was issued on March 13, 2006, ordering a procedural
9 conference on March 17, 2006. At the procedural conference, several Commissioners
10 had questions regarding the adequacy of the water supply for the developments, and the
11 ALJ ordered an additional evidentiary hearing to address the matter. A second
12 evidentiary hearing was scheduled for July 31, 2006.

13 On March 13, 2006, the Applicants filed copies of their respective water and
14 wastewater franchise agreements issued by the Mohave County Board of Supervisors.
15 (Ex. A-7 and A-8). At the request of the Commissioners, public comment sessions were
16 held in Lake Havasu City and Kingman on April 10, 2006. On June 26, 2006, Staff filed
17 a request to modify the procedural schedule to provide Staff with additional time to
18 review the Applicants’ responses to Staff data responses.

19 On July 20, 2006, Commissioner Mayes filed a letter requesting oral argument on
20 issues outlined in her June 19, 2006, letter and, specifically, whether the Applicants or
21 Rhodes Homes Arizona, LLC, (“Rhodes Homes Arizona”) were acting as public service
22 corporations in violation of A.R.S. §40-281 by commencing with the construction and
23 installation of utility infrastructure prior to the issuance of CC&Ns by the Commission.¹
24 A procedural order was issued on July 26, 2006, postponing the July 31, 2006,
25

26 ¹ In response to a question from Commissioner Mayes at the February 8, 2007 prehearing conference
27 regarding whether Staff had resolved the issue of whether Rhodes Homes Arizona is acting as a public
28 service corporation, Staff Attorney Layton stated: “Staff has evaluated that, and we’ve made a
preliminary determination, based on the evidence that we’ve seen so far, that we don’t believe that it is
acting as a public service corporation at this time....” (Prehearing Tr. at 30-31).

1 evidentiary hearing and replacing it with oral argument on the issues raised by
2 Commissioner Mayes in her July 20, 2006, letter. On July 27, 2006, the Applicants filed
3 an Emergency Request for Continuance of Oral Argument so that the parties would have
4 an opportunity to brief the issues. Opening briefs were filed by the Applicants and Staff
5 on August 14, 2006, and a response brief was filed by the Applicants on August 28,
6 2006. Oral argument on the issues raised by Commissioner Mayes was held on August
7 30, 2006.

8 On October 4, 2007, PMUC filed a signed copy of Mohave County Resolution
9 2006-574 and the accompanying October 2, 2006 Mohave County Board of Supervisors
10 Meeting Agenda evidencing the adoption of an amendment to the Mohave County
11 Areawide Water Quality Management Plan (*i.e.*, 208 Plan Amendment) by adding the
12 Golden Valley South Area Plan as a service area to be served by interim and permanent
13 wastewater treatment plants. (Ex. A-9).

14 Staff and the Applicants filed a joint proposed procedural schedule on December
15 5, 2006, requesting an evidentiary hearing on February 15-16, 2007. Consistent with the
16 Staff Report filed November 10, 2005, Staff filed its Staff Report Addendum on
17 December 15, 2006, recommending approval of the Applications for CC&Ns with
18 conditions for a majority of Golden Valley South and approval of an order preliminary
19 for the remainder of Golden Valley South and all of Villages at White Hills.

20 The additional evidentiary hearing in this case was held February 15, 16, 20, and
21 26, 2007, and March 2, 6 and 8, 2007, bringing the total number of hearing days to eight.

22 **III. THE APPLICANTS HAVE MET THE LEGAL REQUIREMENTS TO BE**
23 **ISSUED CC&NS.**

24 There are two questions the Commission must answer in the affirmative before
25 granting a new CC&N. First, is there a demonstrated “need and necessity” for the
26 proposed utility service. Second, is the applicant “fit and proper” to hold a CC&N.

27 **A. Need and Necessity.**

28 Golden Valley South is a proposed master planned community comprising

1 approximately nine square miles (approximately 5,800 acres) and located approximately
2 five miles southwest of Kingman. Golden Valley South will contain more than 33,000
3 residential dwelling units at build-out and will include schools, recreational amenities,
4 industrial parks, business parks and other commercial areas. The Villages at White Hills
5 is planned as a self-contained community to provide affordable homes for commuters to
6 the Las Vegas metropolitan area. The Villages at White Hills comprises approximately
7 four and one-half square miles (approximately 2,700 acres) and is located approximately
8 40 miles northwest of Kingman. The Villages at White Hills will serve both residents
9 and travelers, and will include more than 20,000 dwelling units at build-out. Rhodes
10 Homes Arizona is the developer of both of these communities.

11 The record in this case is uncontroverted with respect to the need and necessity
12 for the water and wastewater services outlined in the Applications. Golden Valley South
13 and the Villages at White Hills are both located in uncertificated and unincorporated
14 areas of Mohave County where there is no water or wastewater service presently
15 available. With regard to Golden Valley South, witness Brynjulson testified that as of
16 February 14, 2007, Rhodes Homes Arizona had 1,167 lot reservations. (Tr. Vol. I at
17 111). In its recommendation for approval of the CC&Ns, Staff has implicitly found
18 there to be a need and necessity for utility service. Moreover, in the January 31, 2006
19 ROO, Conclusion of Law No. 4 stated that “[t]here is a public need and necessity for
20 water and wastewater utility service in the proposed service area.” (ROO at 16).
21 Therefore, the “need and necessity” requirement is satisfied in this case.

22 **B. Fit and Proper.**

23 There are various factors that the Commission considers in determining whether
24 an applicant for a CC&N is “fit and proper.”² These factors include whether the

25 _____
26 ² "In any CC&N proceeding, Staff is charged with reviewing the evidence submitted by an applicant to
27 make a recommendation to the Commission as to whether the applicant is a fit and proper entity with the
28 financial and technical capabilities to serve the public." Staff Report for Woodruff Water Company,
Inc., and Woodruff Utility Company, Inc., for a Certificate of Convenience and Necessity to Provide
Water and Wastewater Service to a Portion of Pinal County dated March 3, 2005 (Docket Nos. W-
04264A-04-0438, SW-04265A-04-0439 and W-01445A-04-0755 (consolidated)).

1 applicant possesses: (1) the technical expertise and experience to run a public utility; and
2 (2) the financial wherewithal to capitalize, construct and operate a public utility. There
3 are also intangible factors the Commission may consider in assessing whether an
4 applicant is fit and proper to provide utility service. Additionally, in order to ensure that
5 an applicant is—and will continue to be—fit and proper, the Commission often attaches
6 conditions to its order approving CC&Ns. For example, in the previously issued ROO,
7 Conclusion of Law No. 5 states: “Perkins Mountain Water Company and Perkins
8 Mountain Utility Company are fit and proper entities to receive water and wastewater
9 CC&Ns to include the service area more fully described in Exhibit A attached hereto,
10 *subject to compliance with the conditions set forth above.*” (ROO at 16, emphasis
11 added). This type of language is standard in Commission orders. As more fully
12 discussed below, the evidence presented in this case demonstrates that the Applicants are
13 each fit and proper to receive and hold CC&Ns.

14 **1. Technical Expertise and Experience.**

15 Despite the many communities, developments and thousands of homes that the
16 Developer³ has built through various related entities, the Applicants are admittedly
17 newly formed entities that have no prior history of operating water or wastewater
18 utilities. Therefore, to ensure that that these utilities are operated properly to serve the
19 public interest, and consistent with approved Commission practices, the Applicants have
20 contracted with Ray Jones of Aricor Water Solutions to be the certified operator for the
21 Applicants. (See Ex. A-13 and A-14). Mr. Jones is well known to this Commission.
22 (Tr. Vol. VI at 1,238). Mr. Jones, an engineer with water and wastewater experience,
23 testified that he started with Citizens Utilities Company’s Arizona water operations as a
24 staff engineer, holding progressively more responsible positions in engineering and
25 management of the company. (Tr. Vol. III at 437-438). Citizens Utilities Company was
26 the largest water and wastewater operation in Arizona at that time. (Tr. Vol. III at 439).

27 _____
28 ³ Mr. Jim Rhodes and entities controlled by Mr. Rhodes.

1 Mr. Jones was promoted to President after Arizona-American Water Company
2 purchased Citizens Utilities Company, a position he held until he left the company in
3 2004. (Tr. Vol. III at 438).

4 Additionally, the President of PMWC and PMUC is Kirk Brynjulson. (Tr. Vol. I
5 at 75-76). Mr. Brynjulson is also Vice President of Operations for Rhodes Homes
6 Arizona. (*Id.*). He has expertise in utility system planning design and the engineering
7 associated with constructing utility infrastructure. (Tr. Vol. III at 422). In addition, he
8 has over 17 years of experience in the development of master planned communities in
9 Las Vegas, including Green Valley Ranch, a 3,500-acre master planned community, and
10 Seven Hills, a 3,000-acre master planned community. (Tr. Vol. I at 76-77).
11 Specifically, Mr. Brynjulson testified as follows:

12 We have always had to, in all of the developments, had to plan for the
13 utilities, whether it is for water, sewer, or electric, cable television,
14 telephone. They all have to be planned for up front. There is a lot of
15 upfront development that has to happen, whether it is within a municipality
16 that is already providing utilities or not. We still have to bring the utilities
17 to the site.

18 (Tr. Vol. I at 78).

19 Witness Fred Chin testified that since joining Sagebrush Enterprises, Inc., (which
20 controls the Applicants) in 2004 as Chief Operating Officer, his objective has been to
21 improve the operations of the business across all lines and recruit talent that he believed
22 is necessary to upgrade the overall quality of the operation. (Tr. Vol. VI at 1112-13).
23 Mr. Chin has over 20 years' experience in the areas of real estate and finance, having
24 worked as a partner with both Kenneth Leventhal & Company and "big four" accounting
25 firm Ernst & Young. (Tr. Vol. VI at 1108). Because the Applicants are part of a
26 vertically integrated corporate structure, this business model enables them to draw upon
27 the experience of Mr. Chin and others with specialized expertise to ensure an efficient
28 operation.⁴

⁴ Mr. Chin testified about other top "talent" which is affiliated with the Rhodes family of companies, including Keith Mosley (formerly associated with the prominent law firm Morrison & Forrester); Chris

1 On the issue of technical experience in running a utility, Staff witness Blessing
2 Chukwu testified that "although they don't have any experience [operating a water
3 company], Staff also looked at the technical experience, in which case the company has
4 now hired Mr. Ray Jones, who is a gentleman that is familiar with Staff and familiar
5 with the Commission." (Tr. Vol. VII at 1329-30). Staff has not raised any concerns
6 regarding Mr. Jones' ability to operate the water and wastewater utilities.

7 Staff does not require that utilities possess "in-house" technical expertise so long
8 as the utilities have access to the technical expertise necessary to provide reasonable
9 utility service at reasonable rates. In a current case before the Commission, Arizona
10 Water Company ("AWC") sought to extend its CC&N to include the already certificated
11 territory of CP Water Company ("CP Water"). For many years, AWC has operated the
12 water system for CP Water Company (even supplying the water for the system) pursuant
13 to an Agreement for Operation of Water System dated October 22, 1985, and a letter
14 amending the agreement dated December 15, 1988. In recommending denial of AWC's
15 request to extend its CC&N to include CP Water's territory, Staff stated as follows:

16 Providing services to a utility does not imply or signify ownership of that
17 utility *nor does it mean that the utility receiving the services is not fit and*
18 *proper*. If Arizona Water ended the CP Water contract, CP Water would
19 remain fit and proper if it found its own water source and/or another entity
20 to provide the necessary services without a reduction in customer service.

21 Staff concludes that Arizona Water has not shown that it is in the public
22 interest to cancel CP's CC&N and award it to Arizona Water. If the
23 Commission were to do so, it would set a precedent whereby any utility
24 operated by a management company which blocks expansion of another
25 utility would be at risk for losing its CC&N even though the rates and
26 service being provided are reasonable.⁵ (Emphasis added.)

27 Mr. Jones' recognized expertise, coupled with the combined \$5,000,000 in
28 performance bonds and/or letters of credit recommended by Staff, clearly support a

Stephens (formerly associated with another prominent law firm, O'Melveny & Myers); and Paul Huygens (formerly a manager with Deloitte & Touche). (Tr. Vol. VI at 1114).

⁵ Staff Report dated October 26, 2006, at 4-5 (Consolidated Docket Nos. W-01445A-06-0199, SW-03575A-05-0926 and W-03576-05-0926 (consolidated)).

1 finding that the Applicants have met the requisite showing of technical expertise under
2 the "fit and proper" analysis.

3 **2. Financial Wherewithal.**

4 The record is clear that the Applicants will have the financial wherewithal to
5 operate water and wastewater utilities in Arizona. Although nominally capitalized at the
6 present time, upon issuance of CC&Ns, Mr. Chin testified that PMWC and PMUC will
7 be capitalized at levels appropriate to operate the utilities. (Tr. Vol. VI at 1146-47). As
8 a further demonstration of their financial wherewithal, the Applicants have access to
9 funds from a \$500 million credit facility secured by \$1.6 billion in assets. (Tr. Vol. VI at
10 1123-27). The credit facility is rated by credit rating agencies Moody's and Standard &
11 Poor's.⁶ (Tr. Vol. VI at 1123, 1179-80). This led Staff witness Jaress to conclude as
12 follows in her December 15, 2006, Memorandum in this case:

13 [T]he fact that Perkins Mountain and Perkins Wastewater will be affiliated
14 with entities which are large enough to receive bond ratings is somewhat
15 reassuring. *Most new water and wastewater utilities are affiliated with*
16 *developers who have far less financial backing.* (Memorandum of Linda
17 A. Jaress dated December 15, 2006, at 2, attached as Attachment "D" to
18 Staff Report Addendum) (emphasis added).

19 Addressing the Moody's and Standard & Poor's ratings, Mr. Chin testified that
20 publicly rated debt provides for a very favorable cost of debt. (Tr. Vol. VI at 1183). He
21 continued, "one of the big factors that is important to the investors is liquidity and
22 having cash on the balance sheet ... and we do have quite a bit of cash on the balance
23 sheet." (Tr. Vol. VI at 1183-84).

24 There is additional financial security built into this case. Staff has recommended
25 that a 50% equity contribution be made (to which the Applicants have agreed) to help
26 ensure that the Applicants' parent has significant investment risk and to motivate the

26 ⁶ The Applicants were asked at the hearing to provide updates of their Moody's and Standard & Poor's
27 ratings. The Applicants filed these updates on March 7 and 15, 2007. On March 14, 2007, Staff filed a
28 memorandum stating that Staff had reviewed the updated reports and that "Staff continues to recommend
approval of the Certificate of Convenience and Necessity and Order Preliminary with conditions as
described at the hearing." (Staff Memorandum dated March 14, 2007, at 2.)

1 parent to protect its investment by applying proper maintenance and installing quality
2 plant. (Tr. Vol. VI at 1289). This minimum equity requirement provides substantial
3 financial security.

4 As yet additional financial security, Staff proposed that the Applicants each
5 provide an unprecedented performance bond or letter of credit in the amount of
6 \$2,500,000, for a combined total of \$5,000,000. Staff arrived at these figures using a
7 methodology which aggregated the first four years' of estimated operating expenses.
8 (Staff Report Addendum at 7-8). However, Staff's figures included depreciation
9 expense which is an accounting entry under operating expenses but which has no cash
10 impact on the Applicants. (Tr. Vol. III at 472). Therefore, the Applicants initially
11 opposed Staff's methodology of including depreciation expense, and proposed
12 alternative performance bond amounts which excluded non-cash depreciation expense.
13 This resulted in performance bond amounts of approximately \$1,000,000 for PMWC and
14 approximately \$1,500,000 for PMUC, for a total of \$2,500,000. (Tr. Vol. III at 473-
15 474).

16 In the spirit of cooperation, the Applicants have since agreed to Staff's
17 recommendation regarding the amount of the performance bonds or letters of credit.
18 Moreover, when agreeing to the Staff recommendation, Mr. Rhodes testified it was, in
19 part, "[b]ecause I'm quite confident that we'll run it [the utilities] correctly." (Tr. Vol. V
20 at 978). In a humorous way, Staff witness Chukwu acknowledged the unprecedented
21 size of the performance bonds, stating "\$2.5 million is not chicken change and neither is
22 \$5 million." (Tr. Vol. VII at 1367). However, she testified that the amount is
23 "reasonable and it is adequate." (*Id.*) Notwithstanding, the Applicants must note that the
24 bond amount is five times higher than the highest bond amount previously recommended
25 by Staff. (Tr. Vol. VI at 1296).

26 Staff's recommended performance bond addresses all of the unique circumstances
27 identified by Staff and the Commissioners in this case, as evidenced by the following Q
28

1 and A between ALJ Nodes and Ms. Jaress:

2 **Q.** And does that bond amount recommendation, is that due to the
3 entirety of circumstances surrounding this application, including the
4 size of the proposed development, the fact that there is no prior
5 operating experience of the developer in operating a utility company,
6 plus the various litigation matters that have been reported of record
7 with respect to Mr. Rhodes and/or his various companies? Is it kind
8 of all of those put together that caused you to make this fairly high
9 bond recommendation?

10 **A.** Yes. Those are all factors.

11 (Tr. Vol. VI at 1296-1297).

12 Perhaps most significant with regard to the Commission's evaluation of the
13 financial wherewithal of the Applicants are the following conclusions of Staff:

- 14 1. Sagebrush [which has control of the Applicants] has substantial
15 assets and received an unqualified opinion from its external auditors
16 for the year ended December 31, 2005. Sagebrush had substantial
17 net income for the years 2004 and 2005.
- 18 2. Rhodes Companies has received Corporate Family rating of B1 by
19 Moody's Investors Service ("Moody's"). See Exhibit A of
20 Attachment D. The Rhodes Companies also received debt ratings
21 from Moody's of Ba3 (investment grade) for \$450 million five-year
22 senior secured first lien term loan, and B1 (below investment grade)
23 \$150 million six-year senior secured second lien term loan.
- 24 3. As of June 30, 2006, Rhodes Homes was generating profits and had
25 assets equal to approximately 4.4 percent of total assets of
26 Sagebrush.

27 (Staff Report Addendum at 6).

28 In light of all of the above, the evidence is clear that the Applicants have met the
requisite showing of financial wherewithal under the "fit and proper" analysis.

3. **Non-Tangible Factors.**

a. **Litigation.**

 There was evidence introduced into the docket relating to litigation matters
involving Mr. Rhodes and his various companies, and Mr. Rhodes answered questions at
the hearing regarding those matters. Certainly, any developer/homebuilder conducting
business on the scale that Mr. Rhodes does will encounter business disputes.
Notwithstanding this reality, underlying Mr. Rhodes' business objectives is a

1 commitment to quality in the design, materials and craftsmanship of the homes he
2 builds. (Tr. Vol. V at 878). However, when specifically asked by a Commissioner about
3 his concerns regarding current construction defect lawsuits pending against his
4 companies—given his stated interest in building quality homes—Mr. Rhodes provided
5 the following relevant perspective:

6 No. It's kind of a cottage industry that the construction defect lawyers go
7 through. I don't know if – I got a little kind of disconcerted or kind of
8 curious about the whole thing one time in the early lawsuits when I was
9 more involved. I build this whole tract of all single stories. Every single
10 one of them was a single story, and part of the claim, they sued me for
11 squeaky staircases. So part of this cottage construction defect industry
seems to me is kind of a scam on the plaintiffs lawyers to take advantage of
a situation. We do have insurance, and I think that you won't find any of
my peers that have not had similar type of stuff. And it's quite common
unfortunately. But I am proud to try and do my best to build a high quality
home and will continue to keep that.

12 (Tr. Vol. V at 933-934).

13 Following a question by a Commissioner regarding the evolution of construction
14 defect cases, Mr. Rhodes was asked the following question by the ALJ:

15 Q. So it's your testimony that none of the lawsuits had any legitimate
16 basis? Than they were all just part of this conspiracy or hoax that
was rained down upon by California attorneys?

17 A. No. I'm sure that some cases have some merit. But I also think that
18 there might be a little bit – they might be playing a little fast and
loose in making allegations that are not substantiated. And I'm also
sure that sometimes they're right also.

19 (Tr. Vol. V at 934).

20 To that point, Mr. Rhodes discussed his involvement in a class action case arising
21 from the Casa Linda development. He recalled that the settlement in that case was
22 approximately \$16.2 million, which was the largest construction defect settlement in
23 Nevada. Mr. Rhodes explained that the case stemmed from shifts in the soil that caused
24 cracks in homes. Mr. Rhodes was one of many parties named in the lawsuit. His
25 company built only 10 to 15 percent of the homes in the subdivision and was not
26 involved in the soil work. Hence, notwithstanding what may have been reported in the
27 newspapers, Rhodes entities were only held responsible for approximately \$200,000 of
28

1 the total settlement. (Tr. Vol. V at 882-884).

2 Much of the litigation involving Mr. Rhodes and his affiliated companies
3 involved routine litigation that occurs in the ordinary course of business. For example,
4 when asked by a Commissioner about *Zion Credit Corporation vs. Rhodes Design and*
5 *Development Corporation*, Mr. Rhodes described the case as a dispute involving
6 equipment leasing which was ultimately settled. (Tr. Vol. V at 935). Other matters
7 involved disputes with developers relating to such things as drainage easements.
8 Moreover, others included disputes such as a commission being owed, payment for
9 leased copying machines, property tax appeals and breach of contract allegations. In
10 some instances, Rhodes entities were the plaintiff and in others, were the defendant. (Tr.
11 Vol. V at 936-47). In some instances where the matters did not settle, Rhodes entities
12 prevailed and in others, they did not.⁷ Mr. Rhodes could not discuss some matters
13 because the cases either settled and were subject to confidentiality agreements or are
14 currently pending.

15 Finally, with respect to alleged construction defect lawsuits, given all of the utility
16 infrastructure that the affiliated Rhodes companies have constructed for water, sewer and
17 power for Mr. Rhodes' developments, he testified that he has never had any construction
18 defect lawsuits relating to such infrastructure. (Tr. Vol. V at 1068). There was also
19 information filed in the docket indicating that other large builders in Arizona are
20 involved in litigation in the ordinary course of their businesses. (Letter from Robert L.
21 Greer dated March 1, 2007, attached to letter from Snell & Wilmer to Commissioner
22 Mundell dated March 1, 2007).

23 Finally, to the extent that the Commission has any lingering concerns regarding
24 the above, as more fully discussed herein, Staff has proposed, and the Applicants have
25 agreed to, the posting of performance bonds totaling \$5,000,000 to ensure that the
26 utilities and their customers are adequately protected regardless of the outcome of any

27 _____
28 ⁷ Indeed, the ability to settle many of the litigation matters is indicative of Mr. Rhodes' willingness to
compromise.

1 current or future litigation involving affiliated Rhodes entities.

2 **b. Federal Election Commission ("FEC") Matter.**

3 On June 6, 2005, Mr. Rhodes signed a Conciliation Agreement with the FEC and
4 paid a civil penalty of \$148,000. The Conciliation Agreement related to contributions
5 made in 2002 to the Dario Herrera and Harry Reid campaigns in violation of FEC laws.
6 This was a civil (as opposed to criminal) matter.⁸ When asked at the hearing by a
7 Commissioner about this matter, Mr. Rhodes testified:

8 A. We made a mistake. I'm not a campaign expert. We paid a fine.
9 And we paid the fine in order to get it behind us and have closure to
it.

10 Q. Well what was the mistake specifically that you made?

11 A. I guess not knowing election law well enough.

12 (Tr. Vol. V at 923-24).

13 Mr. Rhodes went on to testify as follows:

14 Q. And do you understand why members of the Corporation
15 Commission would be concerned about the Federal Election
16 Commission fine against you and what that may mean to the issue of
whether you're a fit and proper entity? Do you understand why that
would be concerning to us?

17 A. Yes.

18 Q. And why do you think – can you elaborate?

19 A. It kind of speaks for itself. Obviously it doesn't look very good.

20 Q. And it is your intention to never engage in that kind of activity
21 again?

22 A. That's correct.

23 Q. In the State of Arizona or any other state?

24 A. Yes ma'am.

25 (Tr. Vol. V at 925).

26 Upon further questioning from a Commissioner relating to this topic, Mr. Rhodes
27 responded as follows:

28 ⁸ In response to a question by Chairman Gleason, Mr. Rhodes testified that he has never been convicted
of a felony. (Tr. Vol. V at 1065).

1 Q. Could I ask the question, are Nevada laws as far as what they can
2 donate, what you can donate in Nevada to a candidate in Nevada,
3 whether it's a legislative or statewide office, different than the
4 federal election laws?

5 A. Yeah. I found that out. Yes much different.
6 (Tr. Vol. V at 951).

7 Finally, when Commissioner Pierce asked about his motivation for settling, Mr.
8 Rhodes responded, "I didn't really want to throw any of my people under the bus. We
9 made a mistake. As the owner, I accepted the responsibility for it and paid the fine to
10 have it behind us." (Tr. Vol. V at 930).

11 What is important for the Commission to note in its assessment of this matter
12 when evaluating whether the Applicants are fit and proper entities to receive a CC&N
13 because of Mr. Rhodes' ownership, is that Mr. Rhodes admits that he made a mistake.
14 He "stepped up," took responsibility for it, paid the fine, learned from this mistake and
15 moved forward.

16 **c. Corporate Structure.**

17 One of the issues raised in this proceeding related to the Commission's
18 understanding of the corporate structure of the Rhodes entities. It was explained that Mr.
19 Rhodes owns 100 percent of Sagebrush Enterprises, Inc. that controls Rhodes
20 Companies, LLC that controls Rhodes Homes Arizona, LLC that owns the share of the
21 Applicants. One of the benefits of this ownership structure is that it permits the
22 Applicants the ability to have capital infused to the extent necessary by one of the parent
23 companies. The Applicants can rely on the financial strength of the parent companies
24 and the integrated nature of the development activities with the utility operations to
25 ensure that infrastructure be built and that customers receive reliable service. It also
26 permits the Applicants to have the benefit of the management and other synergies of a
27 vertically integrated family of companies.

28 Another issue raised at the hearing related to why Mr. Rhodes purchased land
under different entities. Mr. Rhodes explained the business rationale for this when he

1 testified that “[L]ike when Walt Disney went down and bought Disney World in
2 Orlando, he had all of his different corporations so he wouldn’t raise all of the prices, so
3 he wouldn’t have to bid against himself and bid up the price of the land.” (Tr. Vol. V at
4 920).

5 **d. Mr. Rhodes’ Availability to Testify.**

6 There was some confusion at the beginning of the hearing regarding Mr. Rhodes
7 availability to testify in person; the implication being that because of Mr. Rhodes
8 ownership of the Applicants, this could impact a determination as to whether the
9 Applicants were fit and proper to receive a CC&N. (Tr. Vol. I at 61-2). At the hearing,
10 Mr. Rhodes testified that he “was always willing and able to testify” and that he had “a
11 child that had medical conditions that I was working very closely and still working with.
12 So we’re trying to schedule my stuff with my child’s medical conditions. I always made
13 myself available telephonically, and I’m here today in person, and thank you for letting
14 me be here.” (Tr. Vol. V at 1004-5). Upon further inquiry by the ALJ relating to Mr.
15 Rhodes’ willingness to appear at the Commission in the future, the following testimony
16 was given:

17 Q. On an ongoing basis, if – and lets take a hypothetical example. If
18 there was to be some significant event involving the water
19 Applicants where there was an issue that the Commission was
20 concerned with, would you agree on an ongoing basis to come back
21 to the Commission at the Commission’s request and to testify or
22 appear before the Commission in order to avoid the legal issue of
23 whether the Commission subpoena power reaches beyond or would
24 not reach beyond the boundaries of Arizona given that you’re a Las
25 Vegas resident?

22 A. So your question is would I show up here if you asked me to?

23 Q. Right.

24 A. Absolutely. You bet.

25 Q. You would not attempt to invoke the subpoena power or the lack of
26 the Commission’s subpoena power into the future if there was a need
27 as determined by the Commission for you to appear and talk to the
28 Commission or offer testimony?

A. If you want me here, you let me know. I’ll be here.

1 (Tr. Vol. V at 1005-6).

2 **4. Proposed Conditions.**

3 For the two Applications combined, Staff has recommended in the Staff Report
4 Addendum a total of 49 conditions.⁹ Additionally, there are recommendations that to the
5 extent certain conditions are not complied with, that the order granting the CC&Ns be
6 considered null and void after due process. These conditions are designed to ensure that
7 the Applicants are fit and proper to receive CC&Ns. The Applicants have agreed to
8 comply with all of the conditions as applied to the respective Applications.

9 **5. Conclusion Related to Fit and Proper.**

10 Mr. Rhodes will not be involved in the day-to-day operations of the Applicants as
11 they will be run by Mr. Ray Jones and Mr. Kirk Brynjulson. (Tr. Vol. V at 863-64).
12 Moreover, Staff has imposed a myriad of conditions to ensure that the entities are fit and
13 proper, including the posting of \$5 million in performance bonds or letters of credit.
14 When asked about Staff's recommendation regarding whether the Applicants are fit and
15 proper, Staff witness Chukwu testified as follows:

16 Q. Is Staff's recommendation that the utilities are fit and proper a stand-
17 alone recommendation or is it part of the entire package of
18 conditions that Staff recommends?

19 A. It is part of the entire packet of recommendations that Staff did make
20 in this case.

21 Q. Are there particular recommendations that provide protection to
22 future ratepayers especially related to financial soundness and water
23 adequacy?

24 A. Oh, yes.

25 (Tr. Vol. VII at 1333).

26 Based upon the above, the Applicants, as well as Staff, believe that in conjunction
27 with recommendations made by Staff and agreed to by the Applicants, the Applicants are
28 fit and proper entities to receive CC&Ns to provide water and wastewater services.

⁹ Although a number of the conditions are duplicative because there are two Applications.

1 **IV. WATER ADEQUACY.**

2 The evidence presented in this case regarding adequate water supply for the
3 proposed Golden Valley South CC&N area is substantial and irrefutable. Pursuant to
4 A.R.S. § 45-108 (B), ADWR has the authority and duty to evaluate the proposed source
5 of water for a planned subdivision outside of an active management area and to
6 determine its ability to meet proposed uses for a period of years. Mr. Doug Dunham,
7 Manager of ADWR's Office of Assured and Adequate Water Supply, testified that
8 ADWR made such a determination for Golden Valley South in this case. ADWR found
9 that there is 9,000 acre-feet of groundwater per annum and 2,895.69 acre-feet of treated
10 effluent per annum, for a total of 11,895.69 acre-feet per annum of physically available
11 water to meet the estimated water demand in Golden Valley South.

12 The analysis for a 100-year adequate water supply requires an applicant to prove
13 only one of five elements: (i) physical availability, (ii) legal availability, (iii) continuous
14 availability, (iv) adequate water quality, or (v) financial capability to obtain a final
15 adequacy determination. (Tr. Vol. II at 216-17). These are the same five elements that
16 must be proven within an Active Management Area ("AMA") under the assured water
17 supply program. In addition to these five elements, the assured 100-year water supply
18 must be consistent with the goal of the AMA in which the project is located, as well as
19 the management plan for that AMA. (Tr. Vol. II at 256). The main difference between
20 the assured water supply analysis and the adequate water supply analysis is that the
21 physical availability test limits the total depth to groundwater within the AMAs to 1,000
22 feet while the total depth to groundwater for the adequate water supply analysis at the
23 end of the 100-year period is 1,200 feet. (Tr. Vol. II at 222).

24 As in most cases, American Land Management ("ALM"), the landowner of the
25 property, chose to demonstrate the physical supply, which required a hydrologic study in
26 support of its application to ADWR. The hydrologic study is the science that determines
27 how much water is in the ground. (Tr. Vol. II at 217). According to Mr. Dunham, the
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1 level of scrutiny given to applications for an analysis of adequate water supply is
2 rigorous. (Tr. Vol. II at 222). The Hydrology Section of ADWR reviews the hydrology
3 studies to determine if they are valid and accurate. (Tr. Vol. II at 217). ADWR's
4 hydrologists crosscheck with records on file at ADWR to corroborate the application
5 with its own records and with other previous reports on file with ADWR. (Tr. Vol. II at
6 247). ADWR's hydrology staff and the applicant's hydrologist meet to determine the
7 best approach to answer questions or differences of opinion regarding specific
8 hydrologic issues. (Tr. Vol. II at 220). ADWR takes a conservative approach in
9 evaluating calculations and estimates provided in hydrologic studies. Again, according
10 to Mr. Dunham, if ADWR is going to make a mistake, it will be on the side of being
11 cautious in evaluating the aquifer. (Tr. Vol. II at 218). Before ADWR signs off on an
12 analysis of adequate water supply, it is confident that the science and the application
13 provide the necessary support. (Tr. Vol. II at 217-18).

14 It is also important to keep in mind that when performing its analysis, ADWR
15 looks at the current committed demands on the aquifer. The normal review process is a
16 cumulative view, which means that as each application is submitted to ADWR, the
17 existing demands of previously issued analyses and water reports are taken into account.
18 (Tr. Vol. II at 255). In other words, each application must take into account all demands
19 that exist in the aquifer today, including any wildcat subdivisions. These demands
20 include: (i) all existing current uses; (ii) all of the existing recorded lots in the area that
21 are unoccupied and may not as yet be built out; (iii) committed demand such as other
22 decisions made by ADWR as far as water adequacy reports or other adequacy
23 determinations not yet recorded; and (iv) the demand for the applicant's proposed
24 development. (Tr. Vol. II at 257-258). The applicant for an analysis must take into
25 account these demands when it submits an application so that ADWR can examine what
26 the total depth to groundwater will be at the end of the 100-year period. (Tr. Vol. II at
27 234-235). Based upon the scientific data known about what the aquifer looks like, those
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1 demands are projected for 100 years to determine what the total depth to groundwater
2 would be at the end of the 100-year period. If the depth to groundwater does not exceed
3 1,200 feet below land surface, then ADWR will conclude that there is a adequate 100-
4 year water supply for the proposed subdivision or development. Mr. Dunham is
5 confident that this process is complete and effective in making such a determination. (Tr.
6 Vol. II at 258).

7 With respect to the Golden Valley South property, ADWR determined in a letter
8 dated October 19, 2005, that there is 9,000 acre-feet per year of ground water physically
9 available, which is less than the initial projected build out demand initially calculated by
10 ALM's hydrologist of 15,910.9 acre-feet.¹⁰ (Analysis of Adequate Water Supply,
11 October 19, 2005, Exhibit A-15). It is not at all unusual for a determination of
12 physically available water by ADWR to be less than the initial projected demand. In
13 fact, one of the key elements in developing the analysis review process is to allow
14 developers of master planned communities to come to ADWR fairly early in the
15 planning process and provide a very generic land use plan. This allows the developer the
16 flexibility to modify that plan as it moves forward. Often times there are changes to the
17 plan that are dictated by local planning and zoning or other local agencies, as well as
18 market driven changes. (Tr. Vol. II at 267).

19 ADWR also determined that an additional 2,895.69 acre-feet per year of treated
20 effluent will be physically available at build-out, which, when added to the initial 9,000
21 acre-feet per year, is slightly less than the 12,196.11 acre-feet of the modified estimated
22 build out demand at the time of the second application. (Analysis of Adequate Water
23 Supply, August 14, 2006, Exhibit A-16). The combination of the two ADWR analyses

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25 ¹⁰ Staff witness Scott acknowledged the importance of the October 19, 2005 letter of water adequacy as
evidenced by this exchange with Applicants' legal counsel:

26 Q. And do you recall, when you received the October 19, 2005 analysis of adequate
27 water supply from ADWR, did you view that as a positive step in the process of
demonstrating water adequacy for Golden Valley South?

28 A. Yes. I took it as a first big step. (Tr. Vol. VI at 1251).

1 result in a total of 11,895.69 acre-feet of physically available water for Golden Valley
2 South. However, subsequent to the issuance of the second analysis, the master plan was
3 modified once again to reduce high water use landscaping in open spaces, further
4 reducing estimated demand to 11,566 acre-feet. This most recent estimate of the
5 demand for Golden Valley South is 329.69 acre-feet less than what is physically
6 available for Golden Valley South. Using ADWR's standard demand methodology, Mr.
7 Dunham agreed with the calculation of the new lower estimated demand. (Tr. Vol. II at
8 328). This reduced estimated demand will be confirmed by ADWR as the developer
9 requests water reports for the project. (Tr. Vol. II at 329).

10 There is nothing in the record that suggests that ADWR failed in any way to
11 exactly follow its policies, practices and procedures in evaluating the applications for
12 analyses of adequate water supply for Golden Valley South. The landowner and
13 developer applied for the analyses in accordance with ADWR's rules, policies and
14 procedures. ADWR made its determination that there is 11,895.69 acre-feet of physically
15 available water supply. The developer is proceeding with the next steps to obtain the
16 first water reports for Golden Valley South. And, ADWR agrees that the landowner and
17 developer have done everything they can do to comply with state law regarding the
18 demonstration of a physical water supply for the proposed Golden Valley South CC&N
19 area. (Tr. Vol. II at 233). Accordingly, the evidence presented in this case regarding the
20 demonstrated adequacy of the water supply for Golden Valley South is incontrovertible.

21 **V. CONSERVATION MEASURES.**

22 The Applicants are committed to the sensible use of groundwater and beneficial
23 reuse of effluent within their proposed certificated areas. More than just words, this
24 commitment was made tangible through specific conservation measures articulated by
25 the Applicants in the Applications, their respective master planning documents,
26 responses to data requests and testimony. Representatives of Rhodes Homes Arizona
27 also outlined other conservation measures that the developer intends to implement at
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1 Golden Valley South and the Villages at White Hills. These measures are discussed in
2 the following paragraphs.

3 **A. Direct Reuse of Effluent.**

4 PMUC's master wastewater plan calls for the direct use of treated effluent at
5 Golden Valley South and the Villages at White Hills. (Tr. Vol. III at 461). The direct
6 use of effluent means that effluent will be delivered directly to customers for use on the
7 golf course in Golden Valley South, landscaped rights-of-ways and common areas, and
8 other turfed areas within the developments, as opposed to just recharge of the effluent or
9 disposal by some other means. Moreover, PMUC's plans call for the construction of an
10 effluent reuse system (the so-called purple pipes) which is sized to deliver 100% of the
11 build-out capacity of the wastewater treatment plants that will serve the two
12 developments. (Tr. Vol. III at 535-36). This is uncommon in Arizona for at least two
13 reasons. First, Mr. Jones testified that "many wastewater systems have no reuse at all."
14 (Tr. Vol. III at 594-95). While Mr. Jones noted that newer wastewater systems are
15 including reuse, he testified that "the predominance of wastewater systems still today
16 have no reuse." *Id.* Second, of those wastewater systems which can deliver effluent for
17 direct use, Mr. Jones testified that "most would be sized for the identified major turf
18 facility uses and any effluent generated above that would ... either have to be recharged
19 or otherwise disposed of." (Tr. Vol. III at 595). The effluent reuse systems that will
20 serve Golden Valley South and the Villages at White Hills maximize groundwater
21 conservation because they will be constructed to deliver the entire output of the
22 wastewater treatment plants for the developments.

23 In addition, the wastewater treatment plants will be designed to deliver "A+"
24 effluent, the highest grade of effluent identified by the Arizona Department of
25 Environmental Quality ("ADEQ"). (Tr. Vol. III at 464-65). Lesser grades of effluent
26 have associated restrictions on usage. Thus, the treatment of effluent to the "A+"
27 standard makes possible the fullest reuse of the effluent. (Tr. Vol. III at 463-64).

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B. Recharge of Excess Effluent.

The output of effluent from the two wastewater treatment plants and the demand for effluent within the developments will not match exactly. In the hottest summer months, the demand for effluent will exceed the output from the wastewater treatment plants. In some winter months, the output from the plants may exceed the demand for effluent, especially during periods of rain. (Tr. Vol. III at 462). In order to accommodate these inevitable imbalances, PMUC plans to construct recharge facilities so that excess effluent can be recharged to the aquifer during winter months and recovered during summer months. (Tr. Vol. III at 462). Mr. Jones testified that these recharge facilities must be permitted by ADWR and ADEQ. (Tr. Vol. III at 462-63).

C. Tiered Rate Design.

PMWC proposed a three-tiered rate design in its Application, which has become the standard conservation-oriented rate design requested and approved by the Commission. (Tr. Vol. III at 465). Mr. Jones testified that the rate design he developed was structured to “match the Staff model rate design for a utility.” (Tr. Vol. III at 465). Mr. Jones further testified, on behalf of PMWC, that “tiered rate designs are an important part of the conservation equation and that they are effective.” (Tr. Vol. III at 465).

D. Best Management Practices.

Mr. Jones testified that ADWR is considering adoption of a best management practices program to address shortcomings in its Total Gallons Per Capita Per Day (“GPCD”) Program which applies inside Arizona’s AMAs. (Tr. Vol. III at 467-468). PMWC has indicated its willingness to consider voluntarily implementing certain best management practices for water conservation in its proposed certificated areas if the CC&N is approved, notwithstanding the fact that the certificated areas lie outside of the AMAs. Mr. Jones explained as follows:

1 I have had discussions with Mr. Brynjulson about adopting a similar
2 program for Perkins Mountain, even though it would not be regulatorily
required at the location of these utilities.

3 [W]e have started with building into the plan the things that make sense for
4 a start-up utility, the things that a start-up utility is capable and can do, but
5 we made provisions to transition to more aggressive measures in the future
if they become warranted and make financial sense for the company and
the customers.

6 (Tr. Vol. III at 466).

7 Rhodes Homes Arizona has outlined a number of measures that will further the
8 objective of conservation of groundwater in the Golden Valley South and the Villages at
9 White Hills developments. Specifically, the developer has stated that it intends to install
10 low flow toilets, shower heads and faucets, and hot water recirculation systems. (Tr.
11 Vol. IV at 675-676). In addition, the developer has stated that it will require xeriscape
12 landscaping in front yards and will limit turf in back yards. These restrictions on
13 landscaping will be controlled by the homeowners association. (Tr. Vol. IV at 671-2).
14 The developer intends to use effluent, once available, on the golf course at Golden
15 Valley South, and on the landscaped rights-of-ways, common areas, and turfed areas.
16 (Tr. Vol. III at 594). Irrigation systems for common area landscaping, rights-of-ways,
17 turfed areas and the golf course will incorporate wind sensing and slope sensing
18 technology to maximize the efficiency of the application of effluent. (Tr. Vol. IV at
19 677).

20 **E. Miscellaneous Policy Issues.**

21 **1. Imposition of Additional Conditions on the CC&N.**

22 At the hearing, there was discussion regarding whether the Commission could
23 impose additional conditions on the Applicants to further promote policy initiatives
24 relating to conservation of groundwater. Such potential conditions included a
25 prohibition relating to the use of groundwater on the golf course, requiring purple piping
26 for direct delivery of effluent to homes, requiring xeriscape landscaping, prohibitions
27 against grass in front and back yards, and other conditions. As discussed above, the
28 legal standard for the granting of a CC&N rest on (i) a demonstrated need and necessity

1 for the utility service; and (ii) a demonstration that the applicant is fit and proper.
2 Conditions that the Commission may impose on a new CC&N should reasonably relate
3 to one of these two standards.

4 In Docket No. SW-0345A-00-1043, the Commission considered a case involving
5 the former Citizens Water Services Company (now Arizona-American Water Company)
6 for an extension of its CC&N to serve the new Verrado master planned community west
7 of Phoenix. In that case, the parties were asked to brief whether the Commission may
8 consider the issue of "urban sprawl" when evaluating the appropriateness of a request for
9 extension of a CC&N. In its brief,¹¹ Staff addressed the question "*How should the*
10 *Commission consider the issue of 'urban sprawl' when evaluating the appropriateness*
11 *of a request for extension of a CC&N?'*" The following is an excerpt of Staff's analysis:

12 In general, when the Commission evaluates an application for a CC&N, it
13 should focus its analysis upon the public service corporation, not upon the
14 developer. Some parties may argue that an issue such as "urban sprawl" is
15 entirely outside the Commission's jurisdiction, because it relates to the
16 nature of the development, not to the nature of utility service. By contrast
17 Staff believes that the relevance of any particular issue, including "urban
18 sprawl," will depend on the facts of the case.

19 For example, if the Commission's consideration of "urban sprawl" focuses
20 solely upon the merits of "urban sprawl" in and of itself, i.e., whether we
21 want our cities to be compact rather than sprawling, then the Commission
22 may be overstepping its authority. But if the evidence presented to the
23 Commission demonstrates that the characteristics of "urban sprawl" are
24 potentially detrimental to the utility, either financially or operationally, or
25 to its ratepayers, then the Commission has the authority to craft an
26 appropriate remedy.

27 Certainly, there are instances in which the Commission may assert a kind
28 of ancillary jurisdiction over entities that are not public service
corporations. See, *Arizona Corp. Comm'n v. State ex rel Woods*, 171 Ariz.
286, 297 P.2d 807, 818 (1992) (holding that the Commission may regulate
the formation of utility affiliates); A.A.C. R142-206.C (requiring
customers to grant easements to utilities to ensure proper service
connections).¹² These examples illustrate that the Commission's authority
is necessarily quite broad, at times extending even to entities that are not
public service corporations. Nonetheless, these examples also illustrate
that this sort of extended jurisdiction is most sustainable when it is directly

¹¹ Commission Staff's Supplemental Brief dated October 19, 2001 at page 3 (Docket No. SW-0345A-00-1043).

¹² Footnote omitted.

1 related to the goals and policies of utility regulation.

2 In summary, the degree to which the Commission may consider “urban
3 sprawl” is case-specific. In instances where the issue is related to the
4 utility’s operations or finances, the Commission may fashion appropriate
5 conditions and/or orders to address it. If, by contrast, the Commission
6 were to debate the merits of “urban sprawl” in an isolated way, *separate
7 and apart from its effects upon the utility or its service*, the resulting order
8 may be vulnerable on appeal. (emphasis added).

9 Similarly, the Applicants in this case submit that the potential imposition of
10 additional conditions beyond what has been proposed by Staff and/or agreed to by the
11 utility (such as restrictions on the use of groundwater on golf courses or purple piping to
12 the homes) that do not go to whether there is a need for service or whether the utility is
13 fit and proper would be “separate and apart from its effects upon the utility or its
14 service.” Adopting such conditions may result in unintended consequences, as discussed
15 herein. The Applicants will be in the business of providing water and wastewater
16 service to customers. They should not be put in a position of “policing” their customers
17 with respect to how customers use their service. Take, for example, a hypothetical
18 condition on a CC&N prohibiting the sale of water to customers for watering grass in the
19 front or back yard. Would the water company be required to monitor customer
20 landscaping and then terminate service to a customer who is watering grass or risk
21 violating its CC&N?

22 Although the Applicants can appreciate the Commission’s desire to promote
23 conservation, the Applicants respectfully submit that these types of conditions raise
24 public policy considerations which do not reasonably relate to whether the applicant for
25 a CC&N has demonstrated a “need and necessity” for the requested utility service or that
26 the applicant is “fit and proper.”

27 **2. Regional Water Planning for Mohave County.**

28 At the hearing, there was extensive discussion regarding the need and desire for
more conservation measures to be imposed. Specifically, Commissioner Hatch-Miller
spoke of the need for water providers and water users to work together with developers

1 who would be tapping water resources on a regional basis to ensure that such new
2 development does not negatively impact existing water users. (Tr. Vol. V at 1024). For
3 the reasons discussed above, the Applicants believe it is appropriate for these issues to
4 be addressed in a generic docket where all interested utilities and stakeholders would be
5 able to participate. Rhodes Homes Arizona, as well as the Applicants, would certainly
6 participate in such a docket to consider public policy issues such as the initial use of
7 groundwater to construct and water golf courses, piping of effluent to homes, installation
8 of rain catchment equipment, importing renewable supplies of Colorado River water,
9 disclosure requirements to home buyers regarding the long-term adequacy of the water
10 supply, implementing well-spacing rules akin to the rules which apply within AMAs,
11 and other issues. Additionally, in order to address Commissioner Pierce's concern
12 regarding the enforceability of conservation-related conditions against non-jurisdictional
13 entities such as developers, other agencies including ADWR, the Arizona Department of
14 Real Estate and the Mohave County Water Authority (discussed below) should be asked
15 to participate to identify what additional companion regulations could be adopted to
16 augment the Commission's efforts to promote conservation. (Tr. Vol. V at 1007-1008).
17 Finally, to the extent that additional legislation may be needed in order to implement
18 such initiatives on a state-wide or region-wide basis through this generic docket, a study
19 could be initiated to identify and draft any necessary legislative changes.

20 By way of information to the Commission, in 1994 Mohave County worked with
21 Arizona's legislature to pass legislation to enable the formation of a county water
22 authority. That legislation is codified at A.R.S. §§ 45-2201, *et seq.* In accordance with
23 the provisions of that statute, Mohave County has formed the Mohave County Water
24 Authority ("Authority"). The Authority was formed to protect Mohave County's right to
25 18,500 acre-feet per year of Colorado River water. The Authority has broad powers
26 relating to the augmentation and conservation of water supplies, and for the acquisition,
27 construction and operation of projects for the diversion, withdrawal, transportation,
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1 delivery, treatment, storage and recharge of water. See generally, A.R.S. § 45-2241.
2 Under A.R.S. § 45-2243, the powers of the Authority are subject to some limitations,
3 including a limitation on the Authority's power to acquire additional Colorado River
4 water. PMWC recognizes the need for a regional approach to long-term water planning,
5 but no single water user can undertake such regional planning alone.

6 **VI. AMA WELL IMPACT RULES.**

7 The Applicants were asked during the hearing to discuss ADWR's rules
8 pertaining to well spacing and impact which apply within the AMAs. Pursuant to A.R.S
9 §§ 45-597.A. and 45-598.A., the Director of ADWR is required to adopt rules governing
10 the locations of new wells and replacement wells within AMAs. In October of 1983, the
11 Director drafted an interim policy that governed the construction of new wells and
12 replacement wells. On June 6, 2006, the Governor's Regulatory Review Council
13 approved finalized rules that define the terms "replacement well" and an existing "well
14 of record," and also establish well spacing criteria for new wells. These new rules are
15 set forth in the Arizona Administrative Code as Rules R12-15-1301, *et seq.*¹³ Thus, the
16 well impact program has been in place within the AMAs for over 20 years.

17 Under Arizona Administrative Code ("A.A.C.") R12-15-1308, a "replacement
18 well" can be constructed at a location that is no greater than 660 feet from the original
19 well, and once completed, the owner of a replacement well cannot withdraw an amount
20 of water in excess of the maximum annual capacity of the original well. On the other
21 hand, a new well, or replacement well that is drilled at a new location (*i.e.*, at a distance
22 greater than 660 feet away from the original well), triggers certain requirements under
23 A.A.C. R12-15-1302. Under these requirements, the Director cannot approve an
24 application for a permit to construct a new well or replacement well if that well will
25 unreasonably increase damage to surrounding land or other water users because of the
26 concentration of wells within the vicinity of the proposed new well.

27 _____
28 ¹³ These rules have yet to be linked to the Arizona Secretary of State's website, but they are available on
ADWR's website, www.azwater.gov/dwr/content/find_by_program/wells/default.htm.

1 In order to determine whether the new well will unreasonably increase damage to
2 surrounding land or other water users, the Director applies standards set forth in A.A.C.
3 R12-15-1302.B. If the Director determines that groundwater withdrawals from the
4 proposed well will cause a drawdown in an existing well of record that exceeds ten (10)
5 feet or more in the first five (5) years of operation of the proposed well, then the Director
6 cannot approve the application to construct the new well or replacement well at a new
7 location. In order to facilitate the Director's determination, the applicant for a permit to
8 drill the proposed well may submit a hydrological study delineating areas that surround
9 the proposed well where the projected impact will exceed ten (10) feet of additional
10 drawdown.¹⁴ Such studies are commonly prepared by many hydrologic consulting firms
11 and a map depicting such impacts was submitted by PMWC as PMWC Exhibit A-41.¹⁵

12 If the Director determines that the proposed well will cause ten (10) feet or more
13 of additional drawdown in an existing well of record, then the Director notifies the
14 applicant for the permit who may then obtain consents from the owners of the wells of
15 record. The applicant may also amend his application by changing the location of the
16 proposed well, or alternatively agreeing to reduce the volume of groundwater withdrawn
17 therefrom.

18 As set forth above, the Director of ADWR is the one who applies the standards
19 under the well spacing requirements set forth in A.A.C. R12-15-1301, *et seq.* Under
20 both the applicable statutes and rules, the Director generally has no authority to extend
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22 ¹⁴ The Director also may deny a well drilling permit if the proposed well is in an area of known land
23 subsidence or if it might cause migration of contaminated groundwater from a remedial action site to a
24 well of record. *See* A.A.C. R12-15-302.B.3. Land subsidence is a geologic phenomenon caused by the
25 compaction of alluvial material in a groundwater basin as the groundwater basin is dewatered over long
26 periods of time. Schumann, H.H. (1974). *Land Subsidence and Earth Fissures in Alluvial Deposits in*
27 *the Phoenix Area, Arizona*, United States Geological Survey Miscellaneous Investigations Series-MAP I-
28 845-H.

¹⁵ Under Arizona law, a person who owns property but who has not constructed a well has no right to be
protected from the adverse groundwater level declines caused by the pumping of existing wells. *See, In*
the Matter of the Rights to the Use of the Gila River, 171 Ariz. 230, at 239-240 (1992) (holding that under
Arizona's system of water laws, future groundwater users have no legally recognized property right in
potential, future groundwater use).

1 these well spacing requirements to areas outside of the AMAs.¹⁶

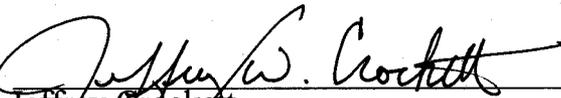
2 Because Mohave County is outside of any AMA, the well spacing requirements
3 do not apply. The resolution of any Commission concerns regarding the lack of well
4 spacing and well impact rules outside of AMAs should be addressed in the generic
5 docket discussed above.

6 **VI. CONCLUSION.**

7 Applicants submit that the evidentiary record in this docket fully supports the
8 issuance of CC&Ns to the Applicants. To the extent that the Commission has any
9 lingering concern regarding the issuance of CC&Ns to the Applicants, the requirement
10 for performance bonds or letters of credit totaling \$5 million will ensure that ratepayers
11 are adequately protected and that the public interest is served. For the reasons set forth
12 herein, Applicants respectfully request that the Applications be approved.

13 RESPECTFULLY SUBMITTED this 30th day of March, 2007.

14 SNELL & WILMER L.L.P.

15
16 By: 

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23 Company and Perkins Mountain Utility
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21 ORIGINAL and 15 copies filed this
22 30th day of March, 2007, with:

23 Docket Control
24 Arizona Corporation Commission
25 1200 West Washington
26 Phoenix, Arizona 85007

27 ¹⁶ Under A.A.C. R12-15-1305, however, there are several exceptions that allow the Director to evaluate
28 the impact of proposed wells located outside of the AMAs. These exceptions are for recovery wells
(used to recover water stored in an aquifer under A.R.S. § 45-544.B.1) and wells used to withdraw
groundwater for transportation into an AMA.

1 COPY of the foregoing hand-delivered
2 this 30th day of March, 2007, to:

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